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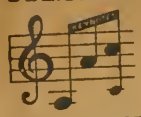
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Act Abolishing Writs of Error in Federal Courts Amended by Congress

President Signs Measure Designed to Clear Up Confusion as Result of the Enactment of Act of January 31, 1928.

By PAUL P. O'BRIEN, Clerk U. S. Circuit Court of Appeals.

H. R. Bill 12441, amending Section 2 of an Act entitled "An Act in reference to Writs of Error," approved January 31, 1928, passed the House on April 2d, the Senate on April 20, 1928, and was approved by the President on April 26th. It is effective forthwith.

The measure is designed to clear up any confusion that has arisen as a result of the enactment of the Act of January 31, 1928.

The Act, as amended, follows:

Be it enacted, etc., That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal.

Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error.

The procedure of giving notice of appeal and having bond approved does not meet statute requirements for it will be seen that, as now amended, the Act requires all of the old steps, the only effect being to call the review an appeal rather than a writ of error.

The old practice of petitioning for an appeal, obtaining an order allowing appeal and fixing amount of bond, cost and/or supersedeas, approval of the bond by the judge who allowed the appeal, issuance of citation on appeal and filing of assignment of errors must be followed.

The necessity for the preservation of the record in the trial court by noting specific objections and exceptions, request for findings of fact and conclusions of law, preparation and settlement of bill of exceptions and statement of evidence is not changed by the recent enactment.

Outline of the Time Limits and Steps to Be Taken in Connection With Obtaining the Allowance of an Appeal to the United States Circuit Court of Appeals.

1. Time.

(a) In all cases, other than those hereinafter specified, three months from entry of judgment or decree.

(b) Appeal from an interlocutory order or decree, granting, continuing, modifying, refusing or granting an injunction, or an interlocutory order or decree appointing a receiver, or refusing an order to wind up a pending receivership or to take appropriate steps to accomplish the purpose thereof, such as the directing a sale or other disposal of property thereunder—thirty days from the entry of such order or decree. (Sec. 129, Judicial Code.)

(c) An interlocutory decree in admiralty—within fifteen days after entry of decree, provided that within twenty days after such entry the appellant shall give notice of the appeal to the appellee; the taking of such an appeal does not stay proceedings under the interlocutory decree unless otherwise ordered by the District Court upon such terms as it shall deem just. (Sec. 129, Judicial Code 41 Stat. L. 233.)

(d) In bankruptcy cases under Sec. 24a and b of the Bankruptcy Act of May 28, 1926—within thirty days after the judgment or order or other matter complained of has been rendered or entered such appeal to be allowed in the discretion of the appellate court.

(e) In bankruptcy cases under Sec. 25a of said Bankruptcy Act—within thirty days after the judgment appealed from has been rendered.

(f) Appeal from decision of District Court sustaining or overruling exceptions to awards in arbitration under Act providing for mediation, conciliation and arbitration in controversies between certain employers and their

(Continued on Page Five.)

Act Abolishing Writs of Error in Federal Courts Amended by Congress.

(Continued from Page One)

employees, approved July 15, 1913 (38 Stats. 107)—within 10 days after judgment entered.

(g) Review of decisions of Board of Tax Appeals—within six months after decision rendered.

2. Steps.

(a) File petition for appeal with clerk of trial court.

(b) File assignments of error with clerk of trial court.

(c) Withdraw said papers temporarily from clerk's office and present same with order allowing appeal and fixing amount of bond, costs and/or supersedeas to judge of trial court.

(d) Have judge of trial court sign order allowing appeal and fixing amount of bond, as required. Secs. 1000, 1007 and 1012, Revised Statutes and Rule 13, C. C. A. In criminal cases, in addition to executing cost bond, usually fixed at $250, bail bond may be obtained in amount to be fixed by trial judge.

(e) Citation on appeal should be signed by judge allowing appeal. (Citation should be tested in the name of judge signing same.)

(f) Return petition for appeal and assignments of error to the clerk's office of trial court.

(g) File with clerk of trial court the order allowing appeal and fixing amount of bond.

(h) Bond duly executed should be presented to judge who allowed appeal for his approval.

(i) File with clerk of trial court bond bearing approval of judge.

(j) After serving citation on appeal on adverse party, or counsel, file with the clerk of the trial court. (It is advisable for counsel for the appellant to serve a copy of the assignment of errors on the adverse party or the attorney of record with the citation.)

(k) Praecipe for transcript of record should be entitled in the District Court, addressed to the clerk of said court, served upon opposing counsel, and filed with the clerk of said court.

(l) If the clerk of the trial court is unable to prepare and file the transcript of record with the clerk of the appellate court within the time fixed by the citation, an order should be obtained from the judge who signed the citation, or a judge of the appellate court, agreeably to the provisions of subdivision 1 of Rule 16 of the Rules of Practice of the appellate court and filed with the clerk of the appellate court. The clerk of the district court should be advised of the period of extension granted.

In actions at common law in which bill of exceptions must be settled and allowed, careful attention should be given to rules of local district court governing preparation and settlement thereof.

In suits in equity, observance of

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A TREATISE

ON

FEDERAL PRACTICE

CIVIL AND CRIMINAL

INCLUDING

PRACTICE IN BANKRUPTCY, ADMIRALTY, PATENT CASES, FORECLOSURE OF RAILWAY MORTGAGES, SUITS UPON CLAIMS AGAINST THE UNITED STATES,

EQUITY PLEADING AND PRACTICE, RECEIVERS AND INJUNCTIONS

IN THE STATE COURTS

BY

ROGER FOSTER

OF THE NEW YORK BAR,

AUTHOR OF COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES TREATISES ON THE FEDERAL JUDICIARY ACTS OF 1875 AND 1887, THE FEDERAL INCOME TAX OF 1894, LIBERTY OF CONTRACT, ATTACHMENT, &C., AND LECTURER ON FEDERAL JURISPRUDENCE AT THE LAW SCHOOL OF YALE UNIVERSITY.

FIFTH EDITION

REVISED AND ENLARGED

IN THREE VOLUMES

VOL. I.

CHICAGO

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1913

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PREFACE.

When this work was begun, thirty years ago, its design was a treatise upon Federal Equity Practice alone. The subject was chosen because this was then territory unknown to most members of the bar, including the author. During the seven years that passed before the completion of the first edition in one volume, he was convinced of the necessity of including chapters upon practice at common law and error and appeal. The kind reception given to the book by the bench and bar induced him, in the succeeding three editions, to add chapters upon the jurisdiction and practice of the Courts of the United States in other branches of the law. These and the later statutes and decisions enlarged the book into three volumes, leaving the old section numbers undisturbed, with those that were new designated by letters of the alphabet. This made their citation awkward, and the result was an arrangement that was neither symmetrical nor logical. Now that the Judicial Code and the new Equity Rules have revolutionized the jurisdiction and practice of the Federal courts, it seemed to him that a rearrangement of the topics would make the book more useful to most; although he regrets to cause some inconvenience to old friends accustomed to use the book in its original shape and he dislikes to depart from the traditions of the legal classics, which preserve the original numbers of their pages or sections.

The whole book has been rewritten and much new matter has been added, especially in the chapters on Criminal Practice, Admiralty and Bankruptcy, besides a description of several topics, for example, the Consular Courts and Extradition, that had been previously omitted. By the elimination of a number of quotations and the transfer of many instances from the text

to the notes, he found room for this without adding a fourth volume.

He has spared no pains in making the work complete. Notwithstanding the demands of an exacting profession he has worked upon the book every week that he was at his office for the last twenty-three years, and he believes that he has examined every reported case that has been decided by a court of the United States. He will, however, welcome any suggestions as to errors or omissions by correcting which he can make it more useful to the bar. Although he has added references to a few of the later cases, such as those relating to The Titanic, that have appeared while the book was passing through the press, all reported since the two hundred and twenty-eighth volume of the reports of the Supreme Court of the United States and the two hundredth volume of the Federal Reporter are not included.

The description of the practice in equity as it existed before the promulgation of the new rules has been retained, because these cannot be adequately understood without a knowledge of what preceded them and also in order to make the book useful to practitioners in the States that still retain the distinction between the practice at common law and that in equity. He hopes that the book now contains everything except the local rules and statutes that is needed by a practitioner in the courts of equity of New Jersey, Massachusetts, Delaware, Tennessee, Kentucky, Mississippi, and Alabama, as well as in all the courts of the United States and the Supreme Court of the District of Columbia; besides the treatment of a number of topics, such as Parties, Service of Process by Publication, Multifariousness, Injunctions, Receivers and others equally important under Code practice.

When he has completed his Commentaries upon the Constitution of the United States, of which one volume has been already published, the author hopes to be able to furnish the practitioner with a complete guide to the whole field of Federal Jurisprudence.

Liberty Tower, New York, June 3rd, 1913.

TO

The Memory of my Father,

DWIGHT FOSTER,

FORMERLY JUSTICE OF THE SUPREME JUDICIAL COURT
OF MASSACHUSSETTS,

I DEDICATE THIS BOOK,

BEGUN AT HIS SUGGESTION,
ALTHOUGH HE DID NOT LIVE TO CORRECT ITS FAULTS.

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FEDERAL PRACTICE

VOLUME I.

CHAPTER I.

ORIGINAL JURISDICTION.

§ 1. Constitutional provisions concerning the courts of the United States. Sec. 1. The Constitution of the United States ordains: "Article III, Section 1. The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in

the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The jurisidction of the Courts of the United States is restricted by the Eleventh Amendment, which ordains: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Sixth Amendment ordains: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." The Seventh Amendment: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

§ 2. Enumeration of the courts of the United States. The Courts of the United States are, the Supreme Court, the Circuit Courts of Appeals, the Court of Customs Appeals, the District Courts, the Court of Claims and the Commerce Court.[1]

§ 2. [1] The Circuit Courts of the United States have been abolished and their powers transferred to the District Courts. *Ex parte* U. S., 226 U. S. 420, by the Judicial Code, enacted March 3, 1911, §§ 289, 291,

The statutes of the United States have also created certain courts which are usually considered not to be courts of the United States.[2] These are, the District Court of Alaska, the District Court of the United States for Porto Rico, the District Court of Hawaii, the Supreme Court of the Philippines, the United States Court for China, the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia. The Board of General Appraisers and the United States Commissioners have also certain judicial powers, both civil and criminal which are hereinafter considered.

§ 3. Original Jurisdiction and Terms of the Supreme Court. The jurisdiction of the Supreme Court of the United States is original and appellate. Its appellate jurisdiction is hereinafter considered.[1]

The Supreme Court has original jurisdiction both at law and equity in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party,[2] except where a citizen of the same State is a party, when it has no jurisdiction.[3] The jurisdiction of the Supreme Court over controversies to which a State is a party is exclusive, except as regards controversies between a State and its citizens, or between a State and citizens of other States.[4] The Supreme Court has exclusively all such jurisdiction of suit sagainst amabssadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul is a party.[5] A State can sue the United States with

36 St. at L. 1087. It is probable that the Commerce Court will be destroyed before this work is through the press.

[2] American Insurance Co. v. Canter, 1 Peters, 511, 7 L. ed. 242; Benner v. Porter, 9 How. 235, 13 L. ed. 119; Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659; McAllister v. U. S. 141 U. S. 174, 35 L. ed. 693; Romeu v. Todd, 206 U. S. 358, 368, 51 L. ed. 1093, 1097 (United States Court for Porto Rico). But it has been held that the Supreme Court of the District of Columbia is a court of the United States within the meaning of U. S. R. S. § 714. James v. U. S. 202 U. S. 401, 50 L. ed. 1079.

§ 3. [1] See Chapter on "Writs of Error and Appeals."

[2] Constitution, art. III.

[3] California v. Southern Pac. Co., 157 U. S. 229, 39 L. ed. 683.

[4] Jud. Code, § 233, 36 St. at L. 1087.

[5] Ibid. 36 St. at L. 1087; Bors v. Preston, 111 U. S. 252, 28 L. ed.

its consent to establish or to protect a right of property owned by the State,[6] but not one in which the State has no interest although a part of its citizens are interested therein.[7] A State cannot sue the United States without the latter's consent.[8] A State cannot sue to enforce or protect a right which is purely political.[9] A State cannot obtain an order or judgment compelling a governor of another State to return a fugitive from labor or justice.[10] A State may file a bill against another State to settle and establish a disputed boundary.[11] In such a suit the United States has an interest in the controversy, and the attorney-general on his application may intervene, appear on behalf of the United States, adduce proofs and be heard in argument without making the United States a party in the technical sense of the term; but he has no right to interfere in the pleading or evidence or admissions of either of the States; and in such a suit the judgment cannot be either for or against the United States.[12] A State may sue another State for an injunction against the diversion of the waters of a stream flowing through both which unreasonably interferes with their use for irrigation,[13] and at least when the stream is not navigable, the United States cannot intervene.[14] A State may sue another

419; U. S. v. Ravara, 2 Dall. 297, 1 L. ed. 388; Gittings v. Crawford, Taney, 1; St. Luke's Hospital v. Barclay, 3 Blatchf. 259; Graham v. Stucken, 4 Blatchf. 50.

6 Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954.

7 Kansas v. U. S., 204 U. S. 331, 51 L. ed. 510.

8 Mississippi v. Johnson, 4 Wall. 475, 478, 18 L. ed. 437.

9 Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; § 79, *infra*.

10 Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

11 New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741; s. c., 5 Pet. 284, 8 L. ed. 127; s. c., 6 Pet. 323, 8 L. ed. 414; Massachusetts v. Rhode Island, 12 Pet. 755, 9 L. ed. 1272; Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41; Rhode Island v. Massachusetts, 15 Pet. 233, 10 L. ed. 721; s. c., 4 How. 591, 11 L. ed. 1116; Missouri v. Iowa, 7 How. 660, 12 L. ed. 861; Florida v. Georgia, 17 How. 478, 15 L. ed. 181; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67; Missouri v. Iowa, 10 How. 1, 13 L. ed. 303; Alabama v. Georgia, 23 How. 505, 16 L. ed. 556; Missouri v. Kentucky, 11 Wall. 395, 20 L. ed. 116.

12 Florida v. Georgia, 17 How. 478, 15 L. ed. 181.

13 Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

14 Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

State[15] and a public[16] or private[17] corporation of the latter to enjoin a public nuisance affecting a large number of the complainant's citizens; such as the pollution of water[18] or the discharge of noxious gases over its territory.[19] Otherwise, it seems that a State cannot maintain a suit to redress the wrongs of a part of its own citizens,[20] for example, to enjoin a railway company from charging unreasonable rates within its jurisdiction;[21] nor, it has been held, to enjoin the governor and health officer of another State from enforcing unreasonable quarantine regulations, which interfere with commerce between these States.[22] A State cannot file a bill in the Supreme Court of the United States to enforce a penal statute, such as a bill to prevent a railway company from violating its prohibition law;[23] nor to enforce a judgment for penalties rendered in its courts against a foreign corporation.[24] A State cannot sue another State to collect bonds and coupons of the defendant which have been assigned to the plaintiff by its own citizens in order that it may collect them and pay the proceeds to the assignors.[25] But a State may sue another State to collect bonds that have been given to the plaintiff absolutely.[26] A State may sue for an injunction against the collection by citizens of other States of certain bonds of the United States which are the property of such State, and for the delivery to it of such bonds, and for a declaration that the contract under which the defendants claim a title

[15] Missouri v. Illinois, 180 U. S. 208; s. c., 200 U. S. 496.

[16] Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572.

[17] Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 L. ed. 1038.

[18] Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572.

[19] Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 L. ed. 1038.

[20] Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347; Oklahoma v. Atchison, T. & S. F. Ry. Co., 220 U. S. 277, 55 L. ed. 465; Oklahoma v. Gulf, C. & S. F. Ry. Co., 220 U. S. 290, 55 L. ed. 469.

[21] Oklahoma v. Atchison, T. & S. F. Ry. Co., 220 U. S. 277, 55 L. ed. 465.

[22] Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347.

[23] Oklahoma v. Gulf, C. & S. F. Ry. Co., 220 U. S. 290, 55 L. ed. 469.

[24] Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 L. ed. 239.

[25] New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656.

[26] South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448; *infra*, § 104.

to such bonds is void.[27] A State may maintain a bill against citizens of other States to enforce its title to a railroad.[28] The Supreme Court has no jurisdiction of a suit by a State against a citizen of the District of Columbia;[29] nor of a suit by a State against one of its own citizens,[30] or to which one of its citizens is an indispensable party.[31] The allegation that a defendant corporation is a "body politic in the law of and doing business in the State of California" is insufficient to establish that the defendant is a California corporation, and is insufficient to show that the defendant is not a Pennsylvania corporation.[32] The United States may sue a State in the Supreme Court.[33] The fact that a State is a stockholder in a corporation by or against which a suit is brought does not make the State a party to such suit.[34]

The Supreme Court of the United States considers the former practice of the courts of Chancery and of King's Bench, in England, as affording outlines for its practice in the exercise of its original jurisdiction.[35] It has made a few rules regulating the same.[36] In suits to which a State is a party, the practice in equity is followed.[37] It is the regular practice to obtain from the court, upon a motion, leave to file the bill. The motion is usually heard *ex parte*,[38] and where the State is a party, leave is ordinarily granted as of course;[39] but

27 Texas v. White, 7 Wall. 700, 741–743, 19 L. ed. 227, 242, 243.

28 Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290.

29 *Re* Massachusetts, 197 U. S. 482, 49 L. ed. 845.

30 Pennsylvania v. Quicksilver Co., 10 Wall. 553, 19 L. ed. 998; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

31 Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

32 Pennsylvania v. Quicksilver Co., 10 Wall. 553, 19 L. ed. 998.

33 U. S. v. Texas, 143 U. S. 621, 36 L. ed. 285.

34 Bank of U. S. v. Planters' Bank of Ga., 9 Wheat. 904, 6 L. ed. 244.

35 Supreme Court Rule 3.

36 Supreme Court Rules 3, 5.

37 Georgia v. Brailsford, 2 Dall. 402, 1 L. ed. 433; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

38 Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

39 Mississippi v. Johnson, 4 Wall. 475, 478, 18 L. ed. 437; Washington v. Northern Securities Co., 185 U. S. 254, 255, 46 L. ed. 897; Kansas v. U. S., 204 U. S. 331, 337, 51 L. ed. 510, 511.

under special circumstances, the court will require notice to be served upon the proposed defendant:[40] and leave to file a bill has been denied.[41] Written authority from the governor of a State is sufficient to authorize a suit on behalf of the State.[42] All process of the court is in the name of the President of the United States.[43] In a suit by a State against another State the service of a subpoena sixty days before the return day is sufficient.[44] Service should be made on both the governor and the attorney-general.[45] In one case a subpoena served upon the governor by leaving a copy at his house and there showing the original to the secretary of state was held sufficient.[46] The filing of a pleading by the attorney-general of a State who has been admitted to practice in the Supreme Court of the United States is an appearance on behalf of such State.[47] The rules concerning the time for pleading in suits between individuals do not apply to suits between the different States.[48] The State of Massachusetts was allowed to answer an amended bill of the State of Rhode Island one year after the filing of such amended bill.[49] If the State fail to appear, or if the State withdraw its appearance, no coercive measures will be taken to compel its appearance, but the complainant may be allowed to proceed *ex parte*.[50] In a suit to settle a disputed boundary, the most appropriate mode of proceeding is by bill and cross-bill.[51] In suits

[40] Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347; Minnesota v. Northern securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

[41] Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499.

[42] Texas v. White, 7 Wall. 700, 719, 19 L. ed. 227, 235.

[43] Supreme Court Rule 5; New Jersey v. New York, 6 Pet. 323, 8 L. ed. 414.

[44] Supreme Court Rule 5; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; Grayson v. Virginia, 3 Dall. 320, 1 L. ed. 619; New Jersey v. New York, 3 Pet. 461, 7 L. ed. 741; s. c., 5 Pet. 284, 8 L. ed. 127; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717.

[45] Supreme Court Rule 5.

[46] Huger v. South Carolina, 3 Dall. 339, 1 L. ed. 627.

[47] New Jersey v. New York, 6 Pet. 323, 8 L. ed. 414.

[48] Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

[49] Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

[50] Massachusetts v. Rhode Island, 12 Pet. 755, 9 L. ed. 1272; Oswald v. New York, 2 Dall. 415, 1 L. ed. 438; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440.

[51] Missouri v. Iowa, 7 How. 660, 12 L. ed. 861.

against a State the practice is very liberal, and the utmost liberality is exercised by the court in the correction of slips of practice or errors.[52] The appellate jurisdiction of the Supreme Court is explained in the final chapter of this work. Incidental to such appellate jurisdiction, the Supreme Court has power in certain limited cases to issue writs of prohibition,[53] mandamus,[54] *habeas corpus*,[55] *scire facias*,[56] and other writs.[57]

The Supreme Court holds one term annually, at Washington, beginning on the second Monday in October, and such adjourned or special terms as it finds necessary for the dispatch of business.[58] In case of a contagious or epidemic disease, a term may be held at another place.[59]

§ 4. The jurisdiction and terms of the circuit courts of appeals and the judicial circuits. There are nine Circuit Courts of Appeal, one in each circuit.[1] Their jurisdiction is exclusively appellate, and will be explained in the concluding chapter of this work. Incidental to such appellate jurisdiction, they have the power to issue all writs not specifically provided for by statute, which are necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law.[2]

The territorial jurisdiction of the Circuit Courts of Appeals is as follows: The First Circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine. The Second Circuit includes the districts of Vermont, Connecticut and New York. The Third Circuit includes the districts of Penn-

52 Iowa v. Illinois, 151 U. S. 238, 38 L. ed. 145; Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

It has been said that, even in a case which should be disposed of without undue delay, "a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed." Virginia v. West Virginia, 222 U. S. 17, 56 L. ed. 71.

53 Jud. Code, § 234, 36 St. at L. 1087. See *infra*, § 456.

54 *Infra*, § 457.

55 U. S. R. S., § 751. See *infra*, § 461.

56 Jud. Code, § 262, 36 St. at L. 1087. See *infra*, § 461.

57 Ibid. See *infra*, §§ 455, 459.

58 Jud. Code, § 230, 36 St. at L. 1087.

59 U. S. R. S., § 4799.

§ 4. 1 Jud. Code, § 116, 36 St. at L. 1087.

2 Ibid. § 262. See *infra*, § 455.

sylvania, New Jersey, and Delaware. The Fourth Circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina and South Carolina. The Fifth Circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas. The Sixth Circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee. The Seventh Circuit includes the districts of Indiana, Illinois, and Wisconsin. The Eighth Circuit includes the districts of Colorado, Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. The Ninth Circuit includes the districts of Arizona, California, Hawaii,[3] Idaho, Montana, Nevada, Oregon, and Washington.[4] Final decisions of the District Court for Alaska[5] and the United States Court for China,[6] are heard by the Circuit Court of Appeals for the Ninth Circuit.

The term of the Circuit Court of Appeals for the First Circuit is held in the City of Boston, Massachusetts on the first Tuesday of October at 10 A. M. Stated sessions thereof are held at the same hour on the first Tuesday of every month. The clerk's office is in the City of Boston. The term of the Circuit Court of Appeals for the Second Circuit is held in the City of New York on the third Tuesday of October. The clerk's office is in the City of New York. The terms of the Circuit Court of Appeals for the Third Circuit are held in the City of Philadelphia on the first Tuesday of March and the first Tuesday of October. The clerk's office is in Philadelphia. The terms of the Circuit Courts of Appeals for the Fourth Circuit are held in the City of Richmond, Virginia, on the first Tuesday of February, the first Tuesday of May and the first Tuesday of November. Special sessions of the court are held at Richmond, Virginia, on the second Tuesday of every month of the year, except in those months in which regular terms are held. The clerk's office is in Richmond. The terms of the Circuit Court of Appeals for the Fifth Circuit are held: at Atlanta, Georgia, on the first Monday in October; at Montgomery, Alabama, on the third Monday in October; at Ft. Worth, Texas, on the first Monday in November; at New Orleans, Louisiana, on the third

[3] Ibid. §§ 116, 133. Wilder's S. S. Co. v. Low, C. C. A., 112 Fed. 161.

[4] Ibid. § 116.

[5] Ibid. § 135.

[6] Act of June 30, 1906, 34 St. at L. 814.

Monday in November. The clerk's office is in New Orleans. All appeals, writs of error and other appellate proceedings, taken or prosecuted from the District Courts, in the State of Georgia, are heard and disposed of at the term of the Circuit Court of Appeals held in Atlanta, and all such, taken or prosecuted from the District Courts of Texas, held at Beaumont in the Eastern District of Texas, are heard at the term of the Court of Appeals held at New Orleans; with the exception in both districts of appeals from orders of injunctions and other cases, which, under the statutes and rules, or in the opinion of the court are entitled to be brought to a speedy hearing. The term of the Circuit Court of Appeals for the Sixth Circuit is held in the City of Cincinnati, Ohio, on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year, except August and September. At the July sessions, no cases are heard except upon special order of the court. The clerk's office is at Cincinnati. The term of the Circuit Court of Appeals for the Seventh Circuit is held at Chicago, Illinois, on the first Tuesday in October and continues until the first Tuesday of October of the succeeding year. Unless otherwise specially ordered, the court holds at Chicago three sessions for the hearing of causes during each term, beginning of the first Tuesdays in October, January and May. The clerk's office is in Chicago. The terms of the Circuit Court of Appeals for the Eighth Circuit are held: at St. Paul, Minnesota, on the first Monday of May; at Denver, Colorado, on the first Monday of September; and at St. Louis, on the first Monday of December. The clerk's office is at the City of St. Louis. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, are heard at the succeeding May term of the court in St. Paul. Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts are filed on or before the 1st day of July, and cases from the remainder of the circuit in which transcripts and stipulations of the parties

for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, are heard at the succeeding September term in Denver. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma and the Indian Territory in which transcripts are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only are heard at the succeeding December term in St. Louis. The term of the Circuit Court of Appeals for the Ninth Circuit is held at San Francisco, California, on the first Monday of October. The clerk's office is at San Francisco, California.[7]

It seems that the term of a Circuit Court of Appeals may be extended.[8]

§ 5. Jurisdiction of the District Courts in general. The unit of Federal territorial jurisdiction is in the judicial district. There is at least one district in each state of the Union. Some of the States are divided into several districts. And some districts are divided into two or more divisions.[1] The jurisdiction of the District Courts is thus defined by statute:

"The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, brought by the United States,[2] or by any officer thereof author-

[7] Jud. Code, § 126, 36 St. at L. 1087; U. S. R. S., § 604; 25 St. at L. 676; 26 St. at L. 830; 139 U. S. 707; 26 St. at L. 217; 33 St. at L. 59, 249, 548; 31 St. at L. 414. Original Rules of C. C. A., 150 Fed. XXV. Amended Rules of C. C. A., 150 Fed. XXXVII.

[8] Guaranty Tr. Co. v. Metropolitan Ry. Co., C. C. A., 177 Fed. 925.

§ 5. [1] Jud. Code, §§ 69–115, *infra*, § 64.

[2] Such is a suit by the United States for the use of anyone of the five civilized tribes of Indians, including the Creek Nation, under Acts of March 1, 1901, Ch. 676, § 10, 31 St. at L. 864, and April 26, 1906, Ch. 1876, § 18, 34 St. at L. 144, to cancel patents or deeds to town lots obtained by fraud for less than the statutory price, or otherwise, "for the collection of any moneys or recovery of any land claimed by any of said tribes." U. S. v. Rea-Read Mill & Elevator Co., 171 Fed. 501. It has been held that a suit by an individual upon a marshal's bond cannot be maintained in a Federal court unless the matter in dispute exceeds the jurisdictional amount, Pierson v. Phillips, 36 Fed. 837; and that such a suit upon a bond given by a contractor for the

ized by law to sue,[3] or between citizens of the same State claiming lands under grants from different states;[4] or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars,[5] and (a) arises under the Constitution or laws of the United States,[6] or treaties made, or which shall be made, under their authority,[7] or (b) is between citizens of different States,[8] or (c) is between citizens of a State and foreign States, citizens, or subjects.[9] No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if

construction of a public work to secure payment to laborers and material man may be, irrespective of the amount involved, U. S. Fidelity & G'y. Co. v. U. S. for the benefit of Kenyon, 204 U. S. 349, 51 L. ed. 516. When suits of the latter class are brought by the Government for its own benefit, it is not required to serve or publish notice to claimants, nor, it has been held, to bring the suit in the district where the contract was to be performed, as is required in suits brought by a claimant to enforce the same by Act of February 24, 1905, Ch. 778, 33 St. at L. 811, Comp. St. Supp. 1911, p. 1071; U. S. v. McGee, 171 Fed. 209. It is not a condition precedent to such a suit by a claimant, that he should have filed affidavits with the Quartermaster's Department and obtained a certified copy of the bond with leave to sue. U. S. v. Massachusetts Bonding & Ins. Co., 198 Fed. 923.

[3] This includes actions by the receiver of a national bank appointed by the comptroller, Johnson v. Rankin (Texas) 95 S. W. 665; *infra*, § 35. It seems that a suit by an agent of the stockholders of a national bank, appointed in pursuance with the Revised Statutes, falls within this clause. Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518; Guarantee Co. v. Hanway, C. C. A., 104 Fed. 369; Weeks v. International Trust Co., C. C. A., 125 Fed. 370, 373. Where the plaintiff, who was receiver of a national bank, assigned his cause of action to one of the defendants after the commencement of the suit, the suit was dismissed, Weaver v. Kelly, C. C. A., 92 Fed. 417, 34 C. C. A. 423. For cases brought by receivers appointed by the Federal courts, see *infra*, § 37.

[4] *Infra*, § 50.

[5] This increases the jurisdictional amount, which formerly was $2,000, exclusive of interest and costs, 24 St. at L. 552. For the construction of the clause, see *infra*, §§ 6–23. It has been held, that where the cause of action arose prior to January 1st, 1912, the amount necessary for the jurisdiction is not enlarged, although the action is subsequently commenced, Taylor v. Midland Valley R. Co., 197 Fed. 323; construing Jud. Code, § 299.

[6] *Infra*, §§ 24–39.

[7] *Infra*, § 26.

[8] *Infra*, §§ 40–49.

[9] *Infra*, § 45.

such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made:[10] *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Second. Of all crimes and offenses cognizable under the authority of the United States.[11] Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.[12] Fourth. Of all suits arising under any law relating to the slave trade. Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the court of Customs Appeals. Sixth. Of all cases arising under the postal laws. Seventh. Of all suits at law or in equity arising under the patent,[13] the copy-

10 *Infra*, § 53.

11 See *infra*, Chapter on Practice in Criminal Cases.

12 See *infra*, Chapter on Admiralty.

13 *Infra*, §§ 29, 146, 147, 188. U. S. R. S., § 4919: "Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs." U. S. R. S., § 4921: "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase the

right,[14] and the trade mark laws.[15] Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.[16] Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.[17] Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against and indorser thereof, to recover the amount of such debenture. Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States

damages found by verdicts in actions in the nature of actions of trespass upon the case." For a case where an injunction and an accounting were denied when brought by the buyer against the seller of a patent, because of the sale of the patented machinery by the vendor in violation of the contract, see United Cigarette Mach. Co. v. Winston Cigarette Mach. Co., C. C. A., 194 Fed. 947. Where a bill charged that, after the termination of a license, the licensees obtained large numbers of the patented devices from sources to complainants unknown and sold the same within the district without right or authority, was held to arise under the patent laws and that the Federal court might take jurisdiction of the same regardless of the amount involved. N. J. Patent Co. v. Martin, 172 Fed. 760. U. S. R. S., § 4918: "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent: and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment." See *infra*, § 147. A suit to enjoin a tax on a patent does not arise under the patent laws, Holt v. Indiana Mfg. Co., 176 U. S. 68, 44 L. ed. 374.

[14] *Infra*, §§ 29, 150.

[15] *Infra*, §§ 30, 148, 149.

[17] *Infra*, §§ 75, 151.

[17] See U. S. v. Mexican Nat. Ry. Co., 40 Fed. 769.

to vote in the several States. Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes. Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided,* That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States. Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the

purposes of all other actions by or against them, real, personal, or mixed and all suits in equity, be deemed citizens of the States in which they are respectively located.[18] Seventeenth. Of all suits brought by any alien for a tort only in violation of the laws of nations or of a treaty of the United States. Eighteenth. Of all suits against consuls and vice consuls.[19] Nineteenth. Of all matters and proceedings in bankruptcy.[20] Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and com-

[18] See *infra,* § 28. The former statute contained the following additional clause: "And in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State," 25 St. at L. 433. There is room consequently for argument in support of the contention that the District Courts have jurisdiction of all actions by or against them, which involve more than the jurisdictional amount, as arising under the Constitution and laws of the United States.

[19] This jurisdiction is not exclusive. The Supreme Court of the United States has original jurisdiction in cases affecting consuls; Constitution, Art. III; U. S. R. S., § 687; *supra,* § 3. The State courts formerly had jurisdiction of actions against consuls in civil cases; Hall v. Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180; Sartori v. Hamilton, 13 N. J. L. 107; Com. v. Kosloff, 5 Serg. & R. (Pa.) 545; Kidderlin v. Meyer, 2 Miles (Pa.) 242; Durand v. Halbach, 1 Miles (Pa.) 46; State v. De la Foret, 2 Nott & M. (S. C.) 217; Wilcox v. Luco, 118 Cal. 639, 62 Am. St. Rep. 305, 50 Pac. 758. But see Jud. Code, § 256, 36 St. at L. 1087, quoted *infra.*

[20] See *infra,* Chapter on Bankruptcy.

monly known as 'war claims' or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability his ceased; but no other disability than these enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.[21] Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosore of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.[22] Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.[23] Twenty-fourth. Of all actions, suits, or

21 See *infra*, §§ 96, 97, and Chapter on Court of Claims.

22 See *infra*, § 463, and Chapter on Writs of Error and Appeals.

23 26 St. at L. 209; U. S. v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325; U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 290, 41 L. ed. 1007;

proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases. Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of land in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situated."[24] They have also jurisdiction of proceedings to condemn for national public uses land within their respective districts;[25] concurrently with the State courts, of proceedings for the naturalization of aliens,[25] and of suits by beneficial purchasers of land

U. S. v. Joint Traffic Ass'n., 171 U. S. 505, 43 L. ed. 259; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. ed. 136; Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608; Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed. 679; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870; Swift & Co. v. U. S., 196 U. S. 375, 49 L. ed. 518; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486; U. S. v. Lehigh Valley R. R. Co. 220 U. S. 257, 55 L. ed. 458; Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834; U. S. v. Am. Tobacco Co., 221 U. S., 106, 55 L. ed. 663; U. S. v. Union Pac. R. R. Co., 226 U. S. 61, 57 L. ed. 53; s. c., 226 U. S. 470, 57 L. ed. 90; U. S. v. Patten, 226 U. S. 525, 57 L. ed. —; U. S. v. Reading Co., 226 U. S. 324, 57 L. ed. 90; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. 898; s. c., 12 L.R.A. 753, 46 Fed. 432; Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869. See American Biscuit & Mfg. Co. v. Klitz, 44 Fed. 721, 725, 726.

[24] Jud. Code, § 24, 36 St. at L. 1087, as amended by 37 St. at L. part 2, p. 46.

[25] 25 St. at L. Ch. 728, p. 357. See *infra,* § 486.

[26] 34 St. at L. 596, Comp. St. Supp. 1909, p. 477. See U. S. v. Ojala, C. C. A., 182 Fed. 51. It has been held: that a suit to cancel a certificate of naturalization is a special proceeding and that the pleadings and procedure may be moulded in any way which seems best calculated to meet the needs of justice, but that the proof must be of the

erroneously patented under railroad or wagon land grants to establish their rights to such land.[27]

"The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and

kind and force required to set aside a judgment, U. S. v. Mansour, 170 Fed. 676. That the subpœna which, under § 5 of the act, the clerk is authorized to issue, is the ordinary subpœna ad testificandum and that where one of the witnesses specified in the published notice cannot be produced the petitioner can substitute another whose name has not been posted, and that no postponement of the hearing is then required, *Re* Neugebauer, 172 Fed. 943. That the declaration of an intention to become a citizen of the United States is not a part of a judicial proceeding and that a defect in the same cannot be subsequently cured by an amendment *nunc pro tunc*. *Re* Stack, 200 Fed. 330.

27 Act of March 2, 1896, 29 St. at L. Ch. 39, p. 42; Oregon & C. R. Co. v. U. S., C. C. A. 144 Fed. 832.

do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners."[28] The District Courts have also jurisdiction, by removal from the State courts, of all cases in which they have original jurisdiction and of which the State courts have concurrent jurisdiction, with the exception of those arising under the Employers' Liability Act of April 22nd, 1908.[29] Such suits of the latter class when brought in a State court, cannot be removed to any court of the United States.[30] The District Courts have also other jurisdiction, by removal, of certain civil and criminal cases.[31] This will be described in the subsequent chapter on the removal of causes. It has been held that such a court has inherent jurisdiction to punish as a contempt the unlawful ouster of the court, its officers and records, from the rooms of a public building, where they are located, and as an incidental to the contempt proceedings it may issue a stay order against such a removal.[32] Such courts have also jurisdiction to compel the attendance of witnesses and the production of books or papers, before the Interstate Commerce Commission[33] or the Commissioner of Corporations,[34] and investigations under the Anti-Monopoly Law,[35] and in aid of the assessment of the Corporation Income Tax.[36] The District Courts have also certain ancillary jurisdiction which is hereinafter considered.[36a] "The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws."[37] "The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled 'An Act

[28] Jud. Code, § 271, 36 St. at L. 1087.

[29] Jud. Code, § 28, 36 St. at L. 1087.

[30] Ibid.

[31] Ibid. §§ 30–34.

[32] Re Lyman, 55 Fed. 29, 43.

[33] 32 St. at L. 847, § 3, 10 Fed. St. Ann. 170, Comp. St. Supp. 1911, pp. 1309, 1312, Pierce Fed. Code, § 6453; *infra*, § 339.

[34] 32 St. at L. 825, 828; *infra*, § 339.

[35] 26 St. at L. 209, Comp. St. 1901, p. 3200; 34 St. at L. 798, Comp. St. Supp. 1911, pp. 1319, 1320; *infra*, § 339.

[36] Act of August 5, 1909, 36 St. at L. 11, 117.

[36a] § 51, *infra*.

[37] Jud. Code, § 25, 36 St. at L. 1087. See *infra*, Chapter on Writs of Errors and Appeals.

to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes,' approved May seventh, eighteen hundred and ninety-four." [38] "The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota." [39]

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right, or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls." [40]

The Bankruptcy Act provides: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant,

[38] Ibid. § 26.

[39] Ibid. § 27.

[40] Jud. Code. § 256, 36 St. at L. 1087.

except suits for the recovery of property under section sixty, subdivision b, section sixty-seven, subdivision e, and section seventy, subdivision e."[41]

The jurisdiction of the District Courts is restricted in most instances by the residence of the parties or of their assignors. These restrictions are hereinafter considered.[42]

§ 6. Value of the matter in dispute. In General. The value of the matter in dispute in suits brought in the District Courts of the United States or removed thereto, when the jurisdiction depends upon difference of citizenship, or because the case arises under the Constitution or laws of the United States or treaties made under their authority, must ordinarily exceed, "exclusive of interest and costs, the sum or value of three thousand dollars."[1] The exceptions are stated in the preceding section.[2] This enlarges the former jurisdiction from two thousand to three thousand dollars, and the statute does not apply to cases pending when it was passed, nor to causes of action that arose prior to February 1st, 1912.[3] The matter in dispute must be of such a nature as to be capable of being reduced to a pecuniary standard of value.[4] Such is not the right to personal liberty. Consequently, an application for the writ of *habeas corpus* cannot be removed;[5] and the writ of *habeas corpus* cannot issue originally from a District Court of the United States, to determine the right to the custody of a child, or in any other case, when it is not authorized by statute.[6] Nor the right to a

41 Act of July 1, 1898, 30 St. at L. 544. § 23b as amended by Act of February 5, 1903, 32 St. at L. 797, and Act of June 25, 1910, 36 St. at L. 838. See Chapter on Bankruptcy, *infra*.

42 See *infra*. §§ 62, 63.

§ 6. 1 Jud. Code, § 24, 36 St. at L. 1087.

2 *Supra*, § 5.

3 Jud. Code, § 299, 36 St. at L. 1087; Taylor v. Midland Valley R. Co., 197 Fed. 323.

4 Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458. See also Snow v. U. S., 118 U. S. 346, 354, 30 L. ed. 207, 209; In re Burrus, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; Perrine v. Slack, 164 U. S. 452, 454, 41 L. ed. 510, 511; Whitney v. Dick, 202 U. S. 132, 50 L. ed. 963; Ex parte Evert, 1 Bond. 197; In re Barry, 42 Fed. 113; Clifford v. Williams, 131 Fed. 100. Such is not the right to compel the Secretary of State to assert a claim by the petitioner against a foreign government. U. S. ex rel. Holzendorf v. Hay, 194 U. S. 373, 48 L. ed. 1025 (appellate jurisdiction).

5 Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458.

6 Clifford v. Williams, 131 Fed.

divorce.[7] It has been said: that in a suit for a divorce, where the plaintiff prays alimony charging, that the defendant is the owner of valuable real estate and property interests, and also receives a yearly income of not less than $10,000; it does not appear that the value of the matter in dispute exceeds the sum of $2,000, since it is uncertain what amount of alimony the court may allow, and the alimony is only an incident to the right to a divorce.[8] The same rule has been applied, by a State court, upon an application to remove a suit to set aside a decree of divorce.[9] It has been held that, for a similar reason, a suit by a stockholder to compel the corporation to permit him to inspect its books and records is not removable,[10] but that the value of the right to appeal from the probate of a will is at least equal to the share of the appellant in case the decedent had died intestate.[11]

The value of the matter in dispute is not the amount of any contingent loss or damage which one of the parties may sustain by a decision against him; but the amount in dispute between the parties to the pending suit.[12] Thus, the reason that, on account of its probative force, the judgment may operate as an estoppel in a subsequent proceeding;[13] or affect his rights against a stranger to the suit;[14] does not increase the value of the matter in dispute. In a suit by a State treasurer, to recover a balance of unpaid taxes, less than the jurisdictional amount, where the defense was, that the defendant had tendered, in pay-

100. See In re Burrus, 136 U. S. 586, 593, 597, 34 L. ed. 500, 503, 514; Perrine v. Slack, 164 U. S. 452, 454, 41 L. ed. 510, 511; Ex parte Evert, 1 Bond, 197; In re Barry, 42 Fed. 113; also reported 136 U. S. 597, 34 L. ed. 514.

7 Johnson v. Johnson, 13 Fed. 193. The court might, however, take jurisdiction of a suit to enforce a decree awarding alimony. Barber v. Barber, 21 How. 582, 16 L. ed. 226.

8 Bowman v. Bowman, 30 Fed. 849.

9 Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342.

10 Whitney v. Am. Shipbuilding Co., 197 Fed. 777.

11 Erwin v. Walsh, 27 Fed. 579.

12 Ross v. Prentiss, 3 How. 771, 772, 11 L. ed. 824; Elgin v. Marshall, 106 U. S. 579, 27 L. ed. 249; Bruce v. M. & K. R. Co., 117 U. S. 514.

13 Elgin v. Marshall, 106 U. S. 579, 27 L. ed. 249; Bruce v. M. & K. R. Co., 117 U. S. 514, 29 L. ed. 990; New England Mtg. Co. v. Gay, 145 U. S. 123, 36 L. ed. 646. (All these were cases of appellate jurisdiction.) Mayor, etc., of Baltimore v. Postal Tel. Cable Co., 62 Fed. 500.

14 Smith v. Adams, 130 U. S. 167, 32 L. ed. 895 (appellate jurisdiction).

ment of all the taxes assessed against him, coupons for more than the jurisdictional amount; it was held, that the matter in dispute was the right to tender all those coupons; and that the case might be removed.[15] Prospective damages, which can be recovered in the action, or which the bill is filed to prevent, should be considered in the estimate,[16] when they are alleged with sufficient certainty.[17] Where relief is prayed in the alternative, it seems that that which involves the larger amount is the test of the jurisdiction.[18] In a suit for an accounting, the jurisdictional amount is the value of the fund of which an account is sought.[19]

Where the complaint or declaration contains several counts, or causes of action, in determining the value of the matter in dispute their aggragate amount is to be considered,[20] unless it appears that each is founded upon the same state of facts,[21] or that the plaintiff is not in fact the owner of all the claims upon which he sues.[22] Thus, where the complaint, in form, stated two causes of action, each for the failure to deliver a telegram, and each alleging damages in the sum of $1,900; the only difference being that in one it was alleged that the telegram was addressed to a woman, and in the other that it was addressed to her husband, it

15 Green v. Brooks, 28 Fed. 215.

16 Draper v. Skerrett, 116 Fed. 206; Southern Cash Register Co. v. Montgomery, 143 Fed. 700; *infra*, § 13.

17 Oregon R. & Nav. Co. v. Shell, 125 Fed. 979.

18 Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419 (appellate jurisdiction); Hayward v. Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; Greenfield v. U. S. Mtg. Co., 133 Fed. 784.

19 Rogers v. Lawton, 162 Fed. 203.

20 Judson v. Macon County, Fed. Cas. No. 7,568 (2 Dill. 213); Stanley v. Albany County Sup'rs, 15 Fed. 483; Hammond v. Cleaveland, 23 Fed. 1; Bernheim v. Birnbaum, 30 Fed. 885; Armstrong v. Ettlesohn, 36 Fed. 209; Chase v. Sheldon Roller-Mills Co., 56 Fed. 625; Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; Weaver v. Norway Tack Co., 80 Fed. 700; Bergman v. Inman, Poulsen & Co., 91 Fed. 293; Davis v. Mills, 99 Fed. 39; Southern Cash Register Co. v. Montgomery, 143 Fed. 700.

Heffner v. Gwynne-Treadwell Cotton Co., C. C. A., 160 Fed. 635; Spokane Valley Land & Water Co. v. Kootenai County, Idaho, 199 Fed. 481.

Kaus v. Am. Surety Co., 199 Fed. 972, where the jurisdiction was sustained because of the joinder of two causes of action against the same surety, upon bonds given by separate saloon-keepers, under the Iowa Civil Damage Act.

21 Pooser v. Western Union Tel. Co., 137 Fed. 1001; Baltimore & O. R. Co. v. Ryan, 31 Ind. (App.) 597, 68 N. E. 923.

22 Woodside v. Beckham, 216 U. S. 117, 54 L. ed. 408.

appearing that the telegram was the same, and that the plaintiff's counsel could not determine from the manuscript as to which of the two was the person to whom the telegram was addressed; it was held, that the cause could not be removed.[23] Where the declaration contained three counts aggregating in excess of the jurisdictional amount; the first upon a contract for services at an agreed price, less than this; the second upon a *quantum meruit* for the same services, alleging their value at a sum in excess thereof; the third for goods sold, money lent "and a like sum of money due on a contract," such as that specified in the first, "and a like sum for commissions" in effecting the sales therein specified; it was held, that the court had jurisdiction.[24] Under the former statute where the declaration contained a special count, on a fire insurance policy for $2,250, alleging a total loss, and concluding, to plaintiff's damage for $2,000, "for the recovery of which, with just costs, plaintiff brings suit," and common counts *in assumpsit* for $2,000, each concluding as in the first; it was held, that the action could be removed.[25] Where a complaint in each of three counts claimed for personal injuries "the sum of $1,900 damages," and in two other counts "the further sum of $1,900;" it was held, that the case could be removed, although the court felt morally certain that it was intended to claim damages for but one cause of action.[26] It has been held: that, where it clearly appears that the different causes of action alleged, consist merely of the common counts, the value of the matter in dispute should be determined by the amounts named in the bill of particulars.[27] It makes no difference if the claims have been assigned and no one of them is equal to the jurisdictional amount.[28] "Upon a bill for an injunction, where the amount involved cannot be deduced

[23] Pooser v. Western Union Tel. Co., 137 Fed. 1001.

[24] Hayward v. Nordberg Mfg. Co., C. C. A., 85 Fed. 4.

[25] Platt v. Phoenix Assur. Co., 37 Fed. 730.

[26] Thompson v. Southern Ry. Co., 116 Fed. 890.

[27] Healy v. Prevost, Fed. Cas. No. 6,297.

[28] Hammond v. Cleaveland, 23 Fed. 1; Bernheim v. Birnbaum, 30 Fed. 885, 887; Chase v. Sheldon Roller-Mills Co., 56 Fed. 625; Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; Bergman v. Inman, Poulsen & Co., 91 Fed. 293; Davis v. Mills, 99 Fed. 39; Brigham-Hopkins Co. v. Gross, 107 Fed. 769. But see Waite v. Santa Cruz, 184 U. S. 302, 46 L. ed. 552.

from the facts alleged, a simple allegation that the right sought to be protected is of the value of more than $3,000, exclusive of interest and costs, will usually be held to be sufficient."[29] The pleadings or the petition for removal must show that the value of the matter in dispute exceeded the jurisdictional amount,[30] at the time the suit was brought.[31] Where the complaint was silent, the allegation in the answer was held to be conclusive.[32] An allegation, that the "amount in dispute" exceeds the jurisdictional amount, is not insufficient because it uses the word "amount" instead of "matter" in dispute.[33] It has been held: that the court may, where the bill or declaration is defective in that respect, retain jurisdiction and permit an amendment, which shows the jurisdictional value of the matter in dispute.[34] Where the plaintiff exaggerates the amount in dispute, the court may, on exception properly taken, try the question of jurisdiction separately, without a jury; and if the damages appear to have been purposely and fraudulently magnified, it may dismiss the case; but its decision is reviewable by the supreme court.[35] The mere fact that the plaintiff recovers less than the

29 Texas & P. Ry. Co. v. Kuteman. C. C. A., 54 Fed. 547. See Hyde v. Victoria Land Co., 125 Fed. 970; Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1, 5; Southern Cash Register Co. v. National Cash Register Co., 143 Fed. 659; Spaulding v. Evenson, 149 Fed. 913.

30 Strasburger v. Beecher, 44 Fed. 209; Back v. Sierra N. C. M. Co., 46 Fed. 673; Harvey v. Raleigh & G. R. Co., 89 Fed. 115; Yellow A. M. & M. Co. v. Winchell, 95 Fed. 213.

31 Strasburger v. Beecher, 44 Fed. 209.

32 W. U. Tel. Co. v. White, 102 Fed. 705.

33 Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. ed. 276.

34 Davis v. Kansas City, S. & M. R. Co., 32 Fed. 863; Johnston v. Trippe, 33 Fed. 530; Whalen v. Gordon, C. C. A., 95 Fed. 305. See Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451.

35 Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. ed. 1171. See Chicago Cheese Co. v. Fogg, 53 Fed. 72; Simon v. House, 46 Fed. 317; Holden v. Utah & M. Mach. Co., 82 Fed. 209; Horst v. Merkley, 59 Fed. 502; Maxwell v. A. T. & S. F. R. Co., 34 Fed. 286; Bedford Quarries Co. v. Welch, 100 Fed. 513; Bank of Arapahoe v. David Bradley Co., C. C. A., 72 Fed. 867.

In Hayne v. Woolley, 180 Fed. 573, which was an action for damages by trespass in allowing cattle to run at large upon the plaintiff's land during the fall and winter season, the court *held* that the damages could not amount to more than $200 or $300, saying: "The damage in

jurisdictional amount does not justify a dismissal or a remand.[36] A Texas case suppests that a distinction should be drawn between cases where the full amount claimed in the complaint is not recovered because of the plaintiff's failure to prove his allegations of fact and those where he fails because his claim is unfounded in law. It was held that where a demurrer was sustained to one of several claims for damages joined in one complaint and the aggregate amount thereof was thus reduced below the jurisdictional amount, the case must be dismissed;[37] but it has been said that the reasonable view would indicate that, when such claim was inserted in the original petition in good faith, the amount involved was in controversy, and the court having taken jurisdiction should render judgment for the remainder of the claims.[38] Where the plaintiff sued in good faith for a principal sum, in excess of the jurisdictional amount and the defendant proved a set-off, the exact amount of which plaintiff did not know when he began the suit; it was held, that the court might retain jurisdiction.[39] An amendment reducing the plaintiff's claim below $3,000 will not divest the jurisdiction of the court over what remains; nor will the voluntary dismissal of the plaintiff's bill divest the jurisdiction of the court over a crossbill previously filed, to recover less.[40] "It has been held, that the burden of proof, that the matter in dis-

this respect, if any, would be very slight. It is a matter of common knowledge that, in many instances, land is improved, rather than damaged, by permitting cattle to run upon it."

36 Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App. 40; Washington County v. Williams, 111 Fed. 801, 49 C. C. A. 621.

Put-in-Bay Waterworks &c. Co. v. Ryan, 181 U. S. 409, 45 L. ed. 927; *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

37 Western Union Tel. Co. v. Arnold, (Texas 1903) 77 S. W. 249; affirmed, 79 S. W. 8.

38 Columbia Law Review, March 1904; citing Martin v. Goode, 111 N. C. 288, 32 Am. St. Rep. 799; Bank of Arapahoe v. David Bradley & Co., C. C. A., 72 Fed. 867.

39 Pickham v. Wheeler B. Mfg. Co., C. C. A., 77 Fed. 663; s. c., 69 Fed. 419; Stillwell B. & S. V. Co. v. Williamston O. & F. Co., 80 Fed. 68. See also Schunk v. Moline M. & S. Co., 147 U. S. 500, 37 L. ed. 255; Kunkel v. Brown, C. C. A., 99 Fed. 593; Jones v. McCormick H. M. Co., C. C. A., 82 Fed. 295; Hayward v. Nordberg Mfg. Co., C. C. A., 85 Fed. 4; Ung Lung Chung v. Holmes, 98 Fed. 323; Tennent-Stribling Shoe Co. v. Roper, 94 Fed. 739; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632; Von Schroeder v. Brittan, 93 Fed. 9; *infra*, §§ 7, 23.

40 Kirby v. Am. Soda & Foun-

pute is less than the jurisdictional amount, when the plaintiff's pleading alleges that fact, rests upon the defendant.[41] Under the former practice it was said, that such an obection should be set up by a plea in abatement and is waived by an answer to the merits.[42] But it has been held: that the objection may be raised by a general, or a specific, denial;[43] and, if it appears on the trial, by the testimony of the plaintiff and his witnesses, that the amount as alleged in the complaint exceeded his reasonable expectation of recovery; the action should be dismissed.[44] It has been held that the statutes and rulings of the courts of the State are not conclusive upon the question whether a suit involves the jurisdictional amount.[45]

§ 7. Value of the matter in dispute in action for damages. Where the suit is brought upon a contract in which the law liquidates the damages for a default, the amount of the damages as liquidated by the law, not the amount named in the plaintiff's pleading, is the value of the matter in dispute;[1] but where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which the plaintiff demands judgment is alone to be considered;[2] unless it clearly appears that the amount named is merely colorable and

tain Co., 194 U. S. 141, 48 L. ed. 911.

41 Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co., C. C. A., 67 Fed. 35; Butters v. Carney, 127 Fed. 622. But see Greene v. Tacoma, 53 Fed. 562.

42 Butchers' & D. S. Y. Co. v. Louisville & N. R. Co., C. C. A., 67 Fed. 35. See Pine v. New York, 103 Fed. 337; §§ 125, 293. But see Greene v. Tacoma, 53 Fed. 562.

43 Greene v. Tacoma, 53 Fed. 562.

44 Holden v. Utah & M. Machinery Co., 82 Fed. 209.

45 Heffner v. Gwynne-Treadwell Cotton Co., C. C. A., 160 Fed. 635.

§ 7. 1 Wilson v. Daniel, 3 Dallas 401, 407, 1 L. ed. 655, 657; Barry v. Edmonds, 116 U. S. 550, 560, 29 L. ed. 729, 732; Vance v. W. A. Vandercook Co., 170 U. S. 468, 42 L. ed. 1111; North Am. T. & T. Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061; Battle v. Atkinson, 191 U. S. 559, 48 L. ed. 302, 24 S. Ct. 845, affirming 115 Fed. 384; Cabot v. McMaster, 61 Fed. 129.

See Remsen v. C. F. Blanke Tea & Coffee Co., 189 Fed. 418. Where the contract provided for liquidated damages it was *held* that the jurisdictional amount was limited to that sum. Phillips v. Troutman, 197 Fed. 325.

2 Wilson v. Daniel, 3 Dall. 401, 401, 1 L. ed. 655, 657; Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080; Barry v. Edmonds, 116 U. S. 550, 560, 29 L. ed. 729, 732; Gorman v. Havird, 141 U. S. 206, 35 L. ed. 717; Judson v. Macon County, Fed. Cas. No. 7,568 (2 Dill. 213); Stanley v. Albany County Sup'rs.

beyond a reasonable expectation of recovery.[3] It has been said that where th ecomplaint contains the requisite allegation, the jurisdiction is not defeated because other matters therein stated have a tendency to show that such allegation is not well founded, unless they are such as to create a legal certainty of that conclusion.[4] Should the latter fact appear, for the first time, upon the trial, it seems that the court would then be justified in dismissing the case at the end of the plaintiff's evidence.[5] In an action for debt upon a bond, the principal and interest alone are in dispute; and no more can be recovered, except costs, although the plaintiff lays his damages at a much larger amount. The value of the matter in dispute cannot, therefore, exceed the principal, with interest and costs.[6] In an action for railroad extortion, under a statute providing that the injured party might recover the amount of damages sustained by the overcharge or discrimination, where the declaration specified the overcharges claimed, alleged that the amount of the recovery on that count should be a sum less than the jurisdictional amount, and further averred that the plaintiff had been damaged in a sum in excess of the jurisdictional amount by reason of the railway company's refusal to pay the damages first alleged; it was held, that the Federal Court could not have jurisdiction.[7] In a suit for damages for a breach of a contract to transport a passenger, it was held, that damages claimed for loss of business and employment, which, it was alleged that the plaintiff could have obtained if the contract had been per-

15 Fed. 483; Eisele v. Oddie, 128 Fed. 941; Southern Cash Reg. Co. v. National Cash Reg. Co., 143 Fed. 659; s. c., 143 Fed. 700. O. J. Lewis Mercantile Co. v. Klepner, C. C. A., 176 Fed. 343.

3 Lee v. Watson, 1 Wall. 337; 17 L. ed. 557; Bowman v. Chicago & N. W. Ry. Co., 115 U. S. 611, 616, 29 L. ed. 502, 504; Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080; Mayor, etc., of Baltimore v. Postal Tel. C. Co., 62 Fed. 500; Bank of Arapahoe v. David Bradley & Co., 72 Fed. 867; Shields v. McCandlish, 73 Fed. 318; Hampton Stave Co. v. Gardner, C. C. A., 154 Fed. 805.

4 Henry & Sons & Co. v. Colorado Farm & Live Stock Co., C. C. A., 164 Fed. 986.

5 Maxwell v. A. T. & S. F. Ry. Co., 34 Fed. 286, 290; Cabot v. McMaster, 61 Fed. 129; Holden v. Utah S. & M. M. Co., 82 Fed. 209. For what is sufficient evidence of good faith, see Peeler v. Lathrop, 84 Fed. 780; *infra*, § 363.

6 Wilson v. Daniel, 3 Dallas 401, 407, 1 L. ed. 655, 657.

7 Barataria Canning Co. v. Louisville & N. R. Co., 143 Fed. 113.

formed, were too remote and must be excluded from consideration in the estimate of the jurisdictional amount.[8] Upon a complaint alleging that plaintiff employed defendant to locate him on a half section of government land, which he entered under the homestead and timber acts, for which service he paid defendant $200, and seeking to recover damages for false and fraudulent representations as to the quantity and quality of timber on such land; it was held, that it did not state a cause of action for the recovery of damages, beyond the amount paid defendant, if there could be any recovery, and that the action was not within the jurisdiction of a federal court, although the damages were laid in a sum exceeding the jurisdictional amount.[9] An action was brought by a city in a State court, to recover a tax of $2 for each of 509 telegraph poles maintained in the streets; but the declaration concluded: "And plaintiff claims $10,000." It was held, that the actual amount in dispute was but the amount of the tax, $1,018, and that the Federal Court could not take jurisdiction by removal.[10] The law of Arkansas having limited plaintiff's recovery, in an action of unlawful detainer, to the rent due at the commencement of the suit and up to the time of rendering judgment, or the value of the occupation during the time of the unlawful detention of the premises, with damages for withholding the same; it was held, that a Federal court, in that State, does not have jurisdiction of such an action, when the complaint alleges that the amount due is the rent for nine months at $25 per month,[11] although damages are also claimed in a sum exceeding the jurisdictional amount, without showing that plaintiff is entitled to anything but actual damages.[12] A cause is not removable, when the prayer for relief asks for "$3,000 and all other proper relief;" if, under the pleadings, no other relief can be granted.[13] Where the State practice allows no greater damage than that prayed, the value of the matter in dispute will be considered to be no more than the amount stated in the plaintiff's prayer for

[8] North American Transportation & Trading Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061.

[9] Wines v. Cobb Real Estate Co., 128 Fed. 198.

[10] Baltimore v. Postal Tel. Cable Co., 62 Fed. 500.

[11] Sand. & H. Digest, 670, § 3458.

[12] Battle v. Atkinson, 115 Fed. 384; aff'd. 191 U. S. 559, 48 L. ed. 302.

[13] Baltimore & O. R. Co. v. Worman, 12 Ind. (App.), 494, 40 N. E. 751.

relief, although the body of the complaint contains allegations showing greater damages.[14] In a suit for the conversion of property, upon which plaintiff claimed liens, where the several liens were specifically set forth, and aggregated less than the jurisdictional amount; it was held that a Circuit Court of the United States was without jurisdiction, although the damages claimed were the amount of a previous judgment establishing the liens against the original debtor for a sum, including interest and other expenses, exceeding the same to which judgment the defendants, who had subsequently acquired the property, were not parties.[15] In an action for the denial of the right to vote;[16] or for false imprisonment;[17] or for assault and battery; or in any other case in which exemplary damages may properly be awarded, the law prescribes no limitation to the amount that can be recovered, and the amount claimed by the plaintiff is the sole criterion to which resort can be had in settling the question of jurisdiction.[18] In an action for damages resulting from the death of plaintiff's husband and father, the sum named and prayed for was "——— thousand dollars;" it was held, that it did not appear that the case involved the jurisdictional amount.[19] Where the plaintiff brought his action in the Circuit Court of the United States claiming that it sounded in tort, in which exemplary damages might be allowed and that consequently, the matter in dispute exceeded the jurisdictional amount, which otherwise would not have been the case; it was held, that he was estopped from contending, after the defendant's death, that it was not in tort, but in contract; and that, therefore, it might be revived.[20]

[14] Simmons v. Mutual Reserve Fund Life Ass'n, 114 Fed. 785; Swann v. Mutual Reserve Fund Life Ass'n, 116 Fed. 232; Barber v. Boston & M. R. Co., 145 Fed. 52.

[15] Bergman v. Inman, Poulsen & Co., 91 Fed. 293.

[16] Wiley v. Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84.

[17] Hynes v. Briggs, 41 Fed. 468.

[18] Wilson v. Daniel, 3 Dallas 401, 407, 1 L. ed. 655, 657; Barry v. Edmunds, 116 U. S. 550, 560, 29 L. ed. 729, 732. In an action for damages because of the circulation of a mutilated map with plaintiff's name, where the complaint did not show special damage, it was *held* that no more than nominal damages could be recovered and that the jurisdictional amount was not involved. Ohman v. City of New York, 168 Fed. 953.

[19] Yarde v. Baltimore & O. R. Co., 57 Fed. 913.

[20] Iron Gate Bank v. Brady, 184 U. S. 665, 46 L. ed. 739.

§ 8. Value of the matter in dispute in ejectment, and other suits to obtain the possession of land. It has been held: that, in ejectment, the value of the matter in dispute is that of the interest in the land, to recover which the suit is brought; although the defendant claims a less interest,[1] or only an easement[2] in the same; together with any special damages that are alleged, and can be recovered in the suit.[3] It has been held: that where a bill to recover an interest in lands alleged, "that complainants are informed and believe that the whole of said lands are worth $12,000, and the amount demanded by them herein is more than $2,000" was argumentative; since it left the court to make a calculation, and was insufficient to show the jurisdiction.[4] Under the former statute where in an action involving the title to land, the plaintiff claimed the right thereto without making a payment of $2,200, demanded by one of the defendants, it was held, that the action was one involving more than $2,000 and was removable.[5] Where no special acts of damage are pleaded, only nominal damages can be recovered; and the amount of damages alleged in general language cannot affect the value of the matter in dispute.[6] Where the manner in which the land is used enhances its value to the defendant, that fact must be taken into consideration in the estimate.[7] It has been held: that in an action of unlawful detainer in Arkansas, in the absence of an allegation of special damages, the value of the matter in dispute is no more than the amount of two years' rents, or the rental value for two years of the property in question, irrespective of its fee value.[8]

§ 8. [1] Way v. Clay, 140 Fed. 352. See Vicksburg, S. & P. R. Co. v. Smith, 135 U. S. 195, 34 L. ed. 95; Dupree v. Leggette, 140 Fed. 776. *Contra*, Thompson v. Kendrick's Lessee, 6 Tenn. (5 Hawy.) 113. See Jones v. Rowley, 73 Fed. 286.

[2] Greene v. Tacoma, 53 Fed. 562; Butters v. Carney, 127 Fed. 622. See Vicksburg, S. & P. R. Co. v. Smith, 135 U. S. 195, 34 L. ed. 95.

[3] See Way v. Clay, 140 Fed. 352.

[4] Dupree v. Leggette, 140 Fed. 776.

[5] Withers v. Johns Hopkins Place Sav. Bank, 30 S. W. 766.

[6] Way v. Clay, 140 Fed. 352; Elk Garden Co. v. T. W. Thayer Co., 179 Fed. 556, under Virginia Code 1904, §§ 2750, 2751.

[7] Greene v. Tacoma, 53 Fed. 562; King v. Southern Ry. Co., 119 Fed. 1016.

[8] Battle v. Atkinson, 115 Fed. 384; affirmed 191 U. S. 559, 48 L. ed. 302.

§ 9. Value of the matter in dispute in action to recover possession of personal property. In an action or proceeding to recover the possession of personal property, it seems, that the value of the property sought by the plaintiff, or by the claimant, is that of the matter in dispute.[1] It is not enlarged by a claim of special damages for injury to plaintiff's business, when the State practice would not allow the recovery thereof.[2] In replevin to collect rent by distress, the sum claimed as rent, if less than the value of the property replevied, but where replevin is brought as a means of trying the title to property, then the value of the whole; is the pecuniary test of jurisdiction.[3] In a suit to compel the issue to complainant of a certificate for corporate stock, and the cancellation of a certificate previously issued to another, the par value of the stock was held to be the value of the matter in dispute.[4] In a suit to compel inspectors to allow complainant an examination for a pilot's license, which they had refused to do, where the complaint alleged that the complainant was thereby deprived of a right given him by the laws of the United States, to his damage in "over one thousand dollars," and no objection was made in the court of first instance because of the inadequacy of the matter in dispute; it was held upon appeal that it might be inferred that the damages would exceed the jurisdictional amount.[5] In an action to recover a claim of less than $2,000, begun by an attachment of property worth more, claimed by a receiver who removed the cause, it was held, that the value of the whole property was that of the matter in dispute.[6]

§ 10. Value of the matter in dispute in suits of foreclosure. In a suit to foreclose a mortgage or other lien, the amount in dispute, for the purpose of determining the jurisdic-

§ 9. [1] Peyton v. Robertson, 9 Wheaton, 527, 6 L. ed. 151; Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084; Hoover & Allen Co. v. Columbia Straw-Paper Co., 68 Fed. 945; Ryan v. Seaboard R. R. Co., 89 Fed. 397.

[2] Vance v. W. A. Vandercook Co., 170 U. S. 468, 42 L. ed. 1111, 18 S. Ct. 645; reversing 80 Fed. 786.

[3] Peyton v. Robertson, 9 Wheaton, 527, 6 L. ed. 151; approved Gibson v. Shufeldt, 122 U. S. 27, 29, 30 L. ed. 1083, 1084.

[4] Ryan v. Seaboard & R. R. Co. 89 Fed. 397.

[5] Williams v. Molther, C. C. A., 198 Fed. 460.

[6] Hoover & Allen Co. v. Columbia Straw-Paper Co., 68 Fed. 945.

tion, is the sum sought to be recovered through the lien;[1] together with any damages not covered by the lien, for which judgment is prayed.[2] But it was held that a suit by the vendor upon a contract to pay for land in installments, where the complaint prayed the court to ascertain the amount due and to become due and to fix a time for its payment, in default of which defendant "be foreclosed of all right or title to interest in or lien upon said land;" was brought not for foreclosure, but to determine the rights of the parties in the land, and that the value of the real estate, not the amount due, was the matter in dispute.[3] In a suit to foreclose a mortgage securing the sum of $2,000, the bill alleged that plaintiff advanced an additional $2.25 to pay the fee for recording the mortgage, "for which defendant is liable to him." It was held: that the averment of liability was a mere conclusion of law; and that the bill, therefore, failed to show that more than $2,000 was involved.[4] The value of the matter in dispute is not limited by the value of the property subject to the lien or mortgage.[5]

§ 11. Value of the matter in dispute in suits to redeem. In a suit to redeem land, the value of the equity of redemption is the value of the matter in dispute.[1] Where the bill prayed, that a trust deed purporting to be security for a loan and a subsequent deed executed upon a foreclosure thereof be set aside, or in the alternative, that complainants be permitted to redeem on payment of the mortgage deed, interest and costs; it was held, that the value of the matter in dispute was that of the land, not the amount required to redeem.[2]

§ 12. Value of the matter in dispute in suits to quiet title. In a suit to quiet title or to remove a cloud therefrom, the value of the matter in controversy is that of so much of plaintiff's property as is affected by the adverse claim.[1] Where

§ 10. [1] Gibson v. Shufeldt, 122 U. S. 27, 30, 30 L. ed. 1083, 1084; Stillwell, B. & S. V. Co. v. Williamston, O. & F. Co., 80 Fed. 68; Wakeman v. Throckmorton, 124 Fed. 1010.

[2] Lilienthal v. McCormick, 117 Fed. 89, 54 C. C. A., 475.

[3] Squire v. Robertson, 191 Fed. 733.

[4] Less v. English, 85 Fed. 471, 29 C. C. A. 275.

[5] Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co., 80 Fed. 68.

§ 11. [1] Carne v. Russ, 152 U. S. 250, 38 L. ed. 428.

[2] Greenfield v. U. S. Mtg. Co., 133 Fed. 784.

§ 12. [1] Parker v. Morrill, 106

the land was part of a railroad's right of way, one hundred feet distant from its tracks, which had never been used in the operation of the railroad; it was held that the value of that part of the land, not the value of the company's right to operate the railroad, was that of the matter in dispute.[2] In a suit to cancel a paper purporting to be a marriage contract, which, if valid, gave the alleged wife an interest in the property of the plaintiff, it was held, that the amount of the provision, which the woman would be entitled to receive were the contract held binding, was the value of the matter in dispute.[3] Where plaintiff sued to quiet title and to set aside a deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest and costs; it was held, that the amount involved was the value of the land, and not the amount required to redeem.[4] Allegations in a complaint for the cancellation of a lease, and to enjoin the lessees from using the premises: that the value of the leased premises was $10,000; and that the rental value of the property was $2,400 a year; it was held, were sufficient to give jurisdiction to the Federal court.[5] It was held: that the Circuit Court has no jurisdiction of a suit to correct an ambiguity in the deed of a railroad right of way, and to restrain the removal of gates at a crossing in the enclosure thereof, where the value of the realty and the damage accruing to adjacent property from the road's construction were not shown to exceed the jurisdictional amount; and the fact that animals might stray on the track through the threatened openings in the enclosure, and cause wrecks occasioning great damage, did not help the case; since, when jurisdiction

U. S. 1, 27 L. ed. 72; Lehigh, Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545; Simon v. House, 46 Fed. 317; Riggs v. Clark, 71 Fed. 560, 18 C. C. A. 242, 37 U. S. App. 626; Felch v. Travis, 92 Fed. 210; Woodside v. Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Cowell v. City Water-Supply Co., 96 Fed. 769; Cowell v. City Water-Supply Co., 121 Fed. 53, 57 C. C. A. 393; Hyde v. Victoria Land Co., 125 Fed. 970; Building & Loan Ass'n of Dakota v. Cunningham (Texas 1898), 47 S. W. 714.

[2] Union Pac. R. Co. v. Cunningham, 173 Fed. 90.

[3] Sharon v. Terry, 36 Fed. 337. See Fidelity & Deposit Co. v. Moshier, 151 Fed. 806.

[4] Greenfield v. U. S. Mtg. Co., 133 Fed. 784.

[5] Reese v. Zinn, 103 Fed. 97.

depends on a particular sum, suits where the right involved cannot be calculated in money are not within it.[6] In suits to set aside, as clouds upon the title to lands; a tax;[7] an assessment for a street improvement;[8] and to cancel certain street improvement certificates;[9] it was held, that the amount of the tax, assessment and certificates, respectively, was the value of the matter in dispute; not the value of the lands affected.[10]

§ 13. Value of the matter in dispute in suits for injunctions. In a suit for an injunction, the value of the matter in dispute is that of the object of the bill,[1] namely, the value, to the plaintiff, of the right for which he prays protection;[2] or the value, to the defendant, of the acts of which the plaintiff prays prevention;[3] together with the amount of the damages which

6 Oregon R. & Nav. Co. v. Shell, 125 Fed. 979.

7 Douglas Company v. Stone, 191 U. S. 557; s. c., 110 Fed. 812; Purnell v. Page, 128 Fed. 496; Turner v. Jackson Lumber Co., C. C. A., 159 Fed. 923.

8 Eachus v. Hartwell, 112 Fed. 564.

9 Shewalter v. Lexington, 143 Fed. 161.

10 See *infra*, §§ 13–16.

§ 13. 1 Western Union Tel. Co. v. City Council, 56 Fed. 419, 420; citing with approval Foster's Fed. Pr., (2nd ed.) § 16.

2 Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 52 L. ed. 171; Oleson v. Northern Pac R. Co., 44 Fed. 1; Herbert v. Rainey, 54 Fed. 248; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; Von Schroeder v. Brittan, 93 Fed. 9; Humes v. City of Fort Smith, Ark., 93 Fed. 857; Maffet v. Quine, 95 Fed. 199; denying rehearing, 93 Fed. 347; State of Arkansas v. Kansas & T. Coal Co., 96 Fed. 353; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; Riverside & A. Ry. Co. v. City of Riverside, 118 Fed. 736; American Fisheries Co. v. Lennen, 118 Fed. 869; Cowell v. City Water-Supply Co., 121 Fed. 53, 57 C. C. A. 393; reversing decree 96 Fed. 769; McKee v. Chautauqua Assembly, 124 Fed. 808; State v. Frost, 89 N. W. 915, 113 Wis. 623; Morris v. Bean, 146 Fed. 423; Spaulding v. Evenson, 149 Fed. 913; Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 Fed. 809; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n., C. C. A., 165 Fed. 1, 11, the right to maintain a schedule of charges for transportation.

3 Cowell v. City Water-Supply Co. C. C. A., 121 Fed. 53, 57 C. C. A. 393; reversing decree 96 Fed. 769; Am. Smelting & Refining Co. v. Godfrey C. C. A., 158 Fed. 225, 14 Ann. Cas. 8; Mississippi & Mo. R. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Whitman v. Hubbell, 30 Fed. 81; Oleson v. Northern Pac. R. Co., 44 Fed. 1; Rainey v. Herbert, C. C. A., 55 Fed. 443; American Fisheries Co. v. Lennen, 118 Fed. 869; Amelia Milling Co. v. Tennessee Coal, Iron & R. Co., 123 Fed. 811; Memphis v. Postal Tel. Cable Co., C. C. A., 145 Fed. 602.

the plaintiff claims that he has already sustained and prays to have awarded to him.[4] It is not limited by the amount of damages claimed by the plaintiff to have already accrued[5]. When the value of the right sought to be protected is uncertain, the averment in the bill upon that subject will usually govern,[6] provided it can be reasonably inferred to have some pecuniary value; but where a right, such as that to inspect the books or records of a corporation, is ordinarily not one of pecuniary value, the rule is otherwise.[7] In a bill by the owner, to enjoin a trespass, which it was alleged would entirely destroy the use of certain land; it was held, that the value of the land was the test.[8] Where a mortgagor sued to enjoin the sale of land under a mortgage, which it was claimed was void; it was held, that the value of the matter in dispute was that of the mortgage, although the suit also prayed judgment against the defendant for money usuriously charged and received by it, which was less than the jurisdictional amount.[9] In a suit by a mortgagee, to enjoin an act which he claimed would impair the value of his security, it was held: that the amount of the damage, which would result from the threatened act, was the test.[10] In a suit to enjoin the illegal seizure of imported liquors; the value to the plaintiff of the right to make such importations, and of the articles, which he intended to import and which defendants threatened to seize.[11] When a railroad company sued to enjoin the collection of penalties of $500 each by a commission and a

[4] Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654.

[5] Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654; Whitman v. Hubbell, 30 Fed. 81; Rainey v. Herbert, 55 Fed. 443; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; American Fisheries Co. v. Lennen, 118 Fed. 869; Rocky Mountain Bell. Tel. Co. v. Montana Federation of Labor, 156 Fed. 809.

[6] Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547; Studebaker v. Salina Waterworks Co., 195 Fed. 164; Martin v. City Water Co., 197 Fed. 462; both of which involved the right to measure its charges by meters; Enders v. Supreme Lodge Knights and Ladies of Honor, 176 Fed. 832, the right of an insurance association to levy an assessment.

[7] Whitney v. Am. Shipbuilding Co., 197 Fed. 777.

[8] Smith v. Bivens, 56 Fed. 352; Northern Pac. Ry. Co. v. Cunningham, 103 Fed. 708; Sheriff v. Turner, 119 Fed. 231. But see Hagge v. Kansas City S. Ry. Co., 104 Fed. 391.

[9] Dickinson v. Union Mtg. & Tr. Co., 64 Fed. 895.

[10] Clapp v. Spokane, 53 Fed. 515.

[11] Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654.

shipper, alleging that the penalties, for which it would be sued in the future, would exceed the jurisdictional amount; and that the right sought to be protected was more than that amount; it was held, that the jurisdiction sufficiently appeared, although the dispute arose concerning demurrage to the amount of $146.[12] It was so held of a similar suit against a commissioner alone.[13] In a suit by a railroad company, to enjoin a shipper from a multiplicity of suits to recover overcharges; it was held, that the value of the matter in dispute was the value to the plaintiff of the right to maintain its schedule rates.[14] In a suit by the receiver of a water company to restrain a multiplicity of suits by customers to compel him to reduce the water rates; it was held, that the value of the right to maintain his schedule rates was the test of jurisidction.[15] In suits by a railway company, to enjoin the scalping or resale of non-transferrable tickets; the value of the business sought to be protected was held to be the test.[16] In a suit to restrain the infringement of a trade-mark, the value of the trademark, and to compel an account of the profits; the value of the matter in dispute is the value of the trade-mark, not the amount of the profits which the defendant has derived from its use.[17] In a suit to enjoin the unlawful use of a trade name; the damages already incurred, plus those which the bill alleged would be suffered in the future, unless the relief prayed was granted.[18] But in a suit to enjoin an unlawful use of complainant's trade name, where it was not alleged that the acts complained of would destroy the value of said name; the value thereof was held not to be that of the

[12] McNeill v. Southern Ry. Co., 202 U. S. 543, 548, 50 L. ed. 1142, 1145.

[13] Railroad Commission v. Texas & P. Ry. Co., C. C. A., 144 Fed. 68.

[14] Texas & P. Ry. Co. v. Kuteman, C. C. A., 54 Fed. 547.

[15] Lanning v. Osborne, 79 Fed. 657.

[16] Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 52 L. ed. 171; affirming Louisville & N. R. Co. v. Bitterman, C. C. A., 144 Fed. 34; Del., L. & W. R. Co. v. Frank, 110 Fed. 689. In a suit for specific performance of a contract to carry the complainants free during their lives, the value of the right to the same was held to be that of the matter in dispute. Mottley v. Louisville & N. R. Co., 150 Fed. 406.

[17] Symonds v. Greene, 28 Fed. 834; Hennessy v. Herrmann, 89 Fed. 669; Draper v. Skerrett, 116 Fed. 206.

[18] Draper v. Skerrett, 116 Fed. 206.

matter in dispute.[19] In a suit to enjoin the unlawful use of market quotations posted in the plaintiff's exchange; the value of the exclusive right to the same is the test.[20] In a suit to enjoin the cancellation of a contract, it was held, that the matter in dispute was the right to maintain the contract; which was to be measured by the profits, not by the gross receipts, from the defendant thereunder, nor by the cost to the plaintiff of preparation to perform its part of the same.[21] But in another case, it was held: that the value of the matter in dispute was the amount, which the plaintiff had contracted to pay in cash upon an exchange of property.[22] In suit to enjoin the use, as a railroad, of a highway, it was held: that the value of the matter in dispute was that of the use of the highway for the railway company.[23] Where a suit was brought by a city against a telegraph company, to recover $1,772 for street rentals for the maintenance of defendant's poles and wires, and the bill prayed for the payment of the rentals or forfeiture of defendant's right in the streets, and that its occupation thereof should cease; it was held, that the matter in controversy was not necessarily limited to the amount of the money sought to be recovered; and hence that a certified petition of removal, stating that the value of the matter in controversy was more than the statutory amount, showed that the amount in controversy was sufficient to confer Federal jurisdiction.[24] In an action to abate a nuisance, it has been held: that the value of the article sought to be abated, or of the acts sought to be enjoined, is the test of the jurisdiction.[25] It has been said: that the amount involved, for jurisdictional purposes, in a suit to enjoin the maintenance of

[19] Winchester Repeating Arms Co. v. Butler, 128 Fed. 976.

[20] Board of Trade v. Cella Commission Co., C. C. A., 145 Fed. 28, where an allegation that complainant realizes $30,000 a year from the right it sued to protect was held to be sufficient.

[21] Riverside & A. Ry. Co. v. Riverside, 118 Fed. 736, 737, 738, 743.

[22] Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 48 L. ed. 911.

[23] Oleson v. Northern Pac. R. Co., 44 Fed. 1.

[24] Memphis v. Postal Tel. Cable Co., C. C. A., 145 Fed. 602.

[25] Mississippi & Mo. R. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311 (a railroad bridge); Whitman v. Hubbell, 30 Fed. 81 (an awning; where the value of the right to use the awning was held to be the test); Rainey v. Herbert, C. C. A., 55 Fed. 443 (coke ovens); Am. Smelting & Refining Co. v. Godfrey, C. C. A., 158 Fed. 225, 14 Ann. Cas. 8.

a nuisance, cannot be measured solely by the damage suffered by complainant; nor by the actual outlay of money, which defendant would be required to make if the relief should be granted; but the value of the right, of which he is sought to be deprived, is to be taken into consideration.[26] Where there was no allegation of the value of the structures sought to be abated, which were obstructions to navigation; and the damages alleged to have been suffered because of the same, prior to the beginning of the suit, were less than the jurisdictional sum; it was held: that the jurisdiction did not appear.[27] In a suit to enjoin the defendant from continuing a business, in violation of a contract with complainant, it was held: that the court had jurisdiction, where the value of the plant owned and operated by them, and the amount of their annual business, exceeded such amount.[28] In a suit in the nature of an interpleader, the pecuniary test of the jurisdiction is the amount claimed by the defendants, whom the complainant seeks to enjoin, not the amount which complaint admits to be due and seeks to deposit in court.[29]

§ 14. Value of the matter in dispute upon taxpayers' bills. In a suit to enjoin the collection of a tax, the amount of the tax, not the value of the property which the defendant threatens to seize,[1] nor of that, the title to which is clouded,[2] is the test of jurisdiction. But, it has been held: that, where an injunction is sought against the collection of an annual tax or license fee, imposed upon a franchise or upon the right to exercise a certain occupation, resistance to the payment of which would result in the destruction of the plaintiff's business; the

[26] Amelia Milling Co. v. Tennessee Coal, Iron & R. Co., 123 Fed. 811.

[27] Kenyon v. Knipe, 46 Fed. 309.

[28] American Fisheries Co. v. Lennen, 118 Fed. 869.

[29] Hayward & Clark v. McDonald, C. C. A., 192 Fed. 890.

§ 14. [1] Washington & G. R. Co. v. District of Columbia, 146 U. S. 227, 232, 36 L. ed. 951, 953; King v. Wilson, Fed. Cas. No. 7,810 (1 Dill. 555); Linehan Railway Transfer Co. v. Pendergrass, 70 Fed. 1, 16 C. C. A. 585, 36 U. S. App. 48; Eachus v. Hartwell, 112 Fed. 564; Field v. Barber Asphalt Pav. Co., 117 Fed. 925; Turner v. Jackson Lumber Co., C. C. A., 159 Fed. 926; Risley v. City of Utica, 168 Fed. 737.

[2] Douglas Company v. Stone, 191 U. S. 557, 24 S. Ct. 843, 48 L. ed. 801; s. c., affirming 110 Fed. 812; Eachus v. Hartwell, 112 Fed. 564; Purnell v. Page, 128 Fed. 496; Turner v. Jackson Lumber Co., C. C. A., 159 Fed. 923.

value of the right to exemption, including the threatened damage to that business, not the amount of the tax or license fee which has accrued, is to be considered.[3] Upon a bill to enjoin an income tax upon a salary annexed to an office, claimed to be exempt; the specific tax sought to be enforced, not the right to exemption, was held to be the test.[4] It has been held, upon a bill to enjoin the collection of a land tax, filed by a corporation claiming an exemption; that the amount of the tax claimed to be already due was the sole test, since it could not be assumed that the assessment for subsequent years would be for a like amount.[5] The cases conflict as to whether, in a suit to enjoin a municipality from issuing bonds or otherwise incurring indebtedness, the pecuniary test of the jurisdiction is the amount of the tax, to which the complainant would be thereby subjected, or the whole debt, the creation of which complainant seeks to prevent.[6] In a suit to enjoin a municipality from issuing bonds, to an amount charged to be in excess of the constitutional limit of its indebtedness; the value of the power of the city to issue such bonds, not the tax to which the complainant would be thereby subject, was held to be the value of the matter in dispute.[7] It has been held: that upon a taxpayer's bill, to enjoin the execution of a contract for a public work; the value of the

3 American Fertilizing Co. v. Board of Agriculture, 43 Fed. 609, 11 L.R.A. 179; Western Union Tel. Co. v. City Council, 56 Fed. 419; Humes v. City of Fort Smith, Ark., 93 Fed. 857; Southern Exp. Co. v. City of Ensley, 116 Fed. 756; Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333; Berryman v. Board of Trustees of Whitman College, 222 U. S. 334; Postal Telegraph-Cable Co. v. City of Mobile, 179 Fed. 955; Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532.

4 Purnell v. Page, 128 Fed 496.

5 Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 41 L. ed 451. *Contra*, Board of Trustees of Whitman College v. Berryman, 156 Fed. 112.

6 In the following cases, the amount of the plaintiff's tax was held to be the test: El Paso Water Co. v. El Paso, 152 U. S. 157, 159, 38 L. ed. 396, 397; Colvin v. Jacksonville, 158 U. S. 456, 460; Adams v. Douglas County, Fed. Cas. No. 52; McCahon, 235, 1 Kan. 627; Murphy v. East Portland, 42 Fed. 308.

7 Ottumwa v. City Water-Supply Co., C. C. A., 59 L.R.A. 604, 119 Fed. 315; City of Helena v. Helena Waterworks Co., C. C. A., 173 Fed. 18; Larabee v. Dolley, 175 Fed. 365.

See Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987. But see Risley v. City of Utica, 168 Fed. 737.

contract, and not the amount of the tax complainant might be required to pay in consequence, was the amount in dispute.[8]

§ 15. Value of the matter in dispute upon creditor's bills. It has been held: that, upon a creditor's bill, the value of the complainant's claim, not the value of the property sought to be reached,[1] nor the value of the claim, payment of which he seeks to enjoin,[2] is that of the matter in dispute, when the creditor sues in his own right alone; but that when the creditor sues on behalf of himself and the other creditors, for the administration of a trust fund,[3] or to collect money or other property applicable to the payment of its debts,[4] the amount of such fund or property determines the question of jurisdiction. In one case the value of immature claims was added to that of those already matured, when determining the jurisdictional amount.[5]

§ 16. Value of the matter in dispute upon stockholders' bills. It has been held: that upon stockholders' bills, to enforce causes of action belonging to corporations;[1] or to enjoin actions, which are *ultra vires*;[2] or to protect the assets of the company from waste,[3] or for the appointment of a receiver of

[8] Johnston v. City of Pittsburg, 106 Fed. 753.

§ 15. [1] Werner v. Murphy, 60 Fed. 769; Alkire Gr. Co. v. Richesin, 91 Fed. 79; Cowell v. City Water-Supply Co., 121 Fed. 53; reversing s. c., 96 Fed. 769. See Bruce v. Manchester & K. R. R. Co., 117 U. S. 514, 29 L. ed. 990; Estes v. Gunter, 121 U. S. 183, 30 L. ed. 884; Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706; Put-in-Bay Waterworks &c. Co. v. Ryan, 181 U. S. 409. *Cf.* Huff v. Bidwell, C. C. A., 151 Fed. 563.

[2] Smithson v. Hubbell, 81 Fed. 593. But see Taxpayers' Bills, *supra*, § 14.

[3] Putnam v. Timothy, D. G. & C. Co., 79 Fed. 454; Jones v. Mutual Fidelity Co., 123 Fed. 506. See Alsop v. Conway, C. C. A., 188 Fed. 568. But see Bruce v. Manchester & K. R. R. Co., 117 U. S. 514, 29 L. ed. 990.

[4] Conway v. Owensboro Sav. Bank & Tr. Co., 165 Fed. 822, to enforce the liability of stockholders.

[5] Johnston v. Straus, 26 Fed. 57.

§ 16. [1] Hill v. Glasgow R. Co., 41 Fed. 610. See § 145, *infra*. Contra, Massa v. Cutting, 30 Fed. 1; Harvey v. Raleigh & G. R. Co., 89 Fed. 115.

[2] McKee v. Chautauqua Assembly, 124 Fed. 808; Larabee v. Dolley, 175 Fed. 365; Howard v. Nat. Telephone Co., 182 Fed. 215, where a preferred stockholder sued to compel the rescission of a transfer of a majority of the common stock, alleging that his stock was of the par value of $3,100 and that this and the other preferred stock was threatened with destruction in value by the illegal control of the assets obtained by the transferee of the common stock.

[3] Carpenter v. Knollwood Cemetery, 198 Fed. 297.

the corporate assets.[4] or for the distribution of the same,[5] the value of the matter in dispute is that of the corporate right sought to be enforced, or of the amount of loss which the corporation would suffer from the threatened unlawful action, or the value of the assets of the corporation, as the case may be; not the value of the plaintiff's stock. In a suit to compel the issue to complainant of a certificate of corporate stock, and the cancellation of one issued to another; it was held, that the value of the matter in dispute was at least the par value of the stock, where there were circumstances tending to show that the defendants had valued it at a higher sum.[6] But in a suit to compel a transfer of stock and payment of the depreciation in its market value on the day of the demand for transfer and the highest market value between that day and judgment, it appearing that the reason for the refusal was to protect the corporation from liability for an inheritance tax; it was held that the amount of such tax was the pecuniary test of the jurisdiction,[7] and that there could be no pecuniary valuation of the matter in dispute in a suit by a stockholder to compel the corporation to allow him to inspect its books and records.[8]

§ 17. Value of the matter in dispute when there are joint plaintiffs. Where a number of plaintiffs, claiming under the same title, and having a joint or a common and undivided interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them; the value of their united interests is that of the matter in dispute; at least when they are all indispensable parties.[1] It was so held, of a suit by

[4] Towle v. Am. Bldg., L. & Inv. Soc., 60 Fed. 131; Robinson v. W. Va. Loan Co., 90 Fed. 770; Taylor v. Decatur M. & L. Co., 112 Fed. 449; Jacobs v. Mexican Sugar Co., 130 Fed. 589; *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

[5] Kent v. Honsinger, 167 Fed. 619.

[6] Ryan v. Seaboard & R. R. Co., 89 Fed. 397, 404.

[7] Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931.

[8] Whitney v. Am. Shipbuilding Co., 197 Fed. 777.

§ 17. [1] So held when the holders of several notes sued jointly to enforce a vendor's lien, in which they were all entitled to share. Troy Bank v. Whitehead & Co., 222 U. S. 39, 56 L. ed. 81. Where several of the next of kin sued to recover assets, converted by the husband of an administratrix; held, that their joint interest was the test of the jurisdiction. Shields v. Thomas, 17 How. 3, 15 L. ed. 93.

several of the next of kin for an accounting by an administrator.[2] Where life tenants and remaindermen join as plaintiffs in a bill seeking an injunction against threatened injury to the corpus of the estate; the amount of their joint interest is the test of jurisdiction.[3] Where a number of shippers united in a suit to enjoin a railway company from enforcing a proposed schedule of charges for transportation, jurisdiction was maintained, although the interest of no single one of them was equal to the jurisdictional amount.[4] In proceedings for a *mandamus* to compel the collection of a single tax, levied for the joint benefit of all the relators, in which they had a common and undivided interest of different amounts; it was held, that the value of the matter in dispute, upon a writ of error, was measured by the whole amount of the tax, and not by the separate parts of the same which each of the relators would receive after its collection.[5] In a suit by the owners of separate lots, who derived title from a common grantor, to quiet their title as against a defendant who claimed to own all the land; it was held, that the amount in controversy was the value of the whole tract of land owned by the complainants, and not the value of the lots owned severally by each.[6] Where all the insurers of property damaged by fire, united in a submission to arbitration, and afterwards joined in a bill to set aside the award, it was held: the controversy was single, and the amount in controversy was the amount of the award.[7] Where several creditors joined in a suit for the appointment of a receiver of the assets of a corporation; it was held, that there was jurisdiction, when their joint claims exceeded the jurisdictional sum, exclusive of interest and costs; although each of their individual

[2] Prince v. Towns, 33 Fed. 161; Thornton v. Tison, 95 Ala. 589, 10 South. 639.

[3] Herbert v. Rainey, 54 Fed. 248; aff'd, C. C. A., 55 Fed. 443.

[4] Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs. Ass'n., C. C. A. 165 Fed. 1, 11. There the right of the railway company to maintain the schedule seems to have been the test. See. also, Market Co. v. Hoffman, 101 U. S. 112, 118, 25 L. ed. 782.

[5] Crawford v. Haller, 111 U. S. 796, 28 L. ed. 602; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627.

[6] Lovett v. Prentice, 44 Fed. 459.

[7] Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed 378, 5 C. C. A. 524; 15 U. S. App. 134; reversing s. c., 44 Fed. 151, 11 L.R.A. 623.

claims was less.[8] A finding that the plaintiffs below were *bona fides* holders of bonds and entitled to sue in the Circuit Court, was held to imply that they were joint owners and was sufficient to support the jurisdiction.[9]

Where two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained as to those whose claims exceed the jurisdictional amount.[10] A creditor's bill cannot be maintained by several complainants, holding independent demands againts the debtor, for less than the jurisdictional amount, although the aggregate of all the demands exceeds the same, when they do not sue on behalf of others, not parties.[11] The same ruling was made when several tax-payers joined in a suit to recover back taxes that they had paid.[12] In a suit by heirs for an accounting by the defendant of property of the intestate, which he had received, and for a distribution of the same, since any heir might have maintained the suit for his respective share without joining the others, it was held, that there was no jurisdiction, because the interest of none of the plaintiff's exceeded $2,000.[13] It was similarly held, when determining the jurisdiction upon appeal in a suit by a legatee, to compel other legatees to pay over to the executors assets which they had received.[14] A bill by several land owners to enjoin the collection or assessment of assessments or taxes against their respective property, cannot be maintained, except as to those whose tax or assessment would exceed the jurisdictional amount, although each relies upon the same ground of objection.[15] It was so held, also, as to the

[8] Jones v. Mutual Fidelity Co., 123 Fed. 506.

[9] Green County, Kentucky v. Thomas' Executor, 211 U. S. 598, 53 L. ed. 343; Troy Bank v. Whitehead & Co., 222 U. S. 39, 56 L. ed. 81.

[10] Separate claims, by different persons, for work, labor and services, cannot be joined, in order, by their aggregate amount, to confer jurisdiction, though a joinder be authorized by State statute. Holt v. Bergevin, 60 Fed. 1.

[11] Putney v. Whitmire, 66 Fed. 385. See Gibson v. Shufeldt, 122 U. S. 27, 30 L. ed. 1083.

[12] Risley v. City of Utica, 179 Fed. 875.

[13] Rich v. Bray, 37 Fed. 273, 2 L.R.A. 225.

[14] Miller v. Clark, 138 U. S. 223, 225, 34 L. ed. 966.

[15] Wheless v. City of St. Louis, 180 U. S. 379, 45 L. ed. 583; affirming decree, 96 Fed. 865; King v. Wilson, Fed. Cas. No. 7,810 (1 Dill. 555); Schulenberg-Boeckeler Lumber Co. v. Town of Hayward, 20 Fed. 422.

jurisdiction upon appeal.[16] It has been said that a suit by several land owners, who are injured by a common nuisance, can only be maintained as to those who show that the injury, past and prospective, of each exceeds the jurisdictional amount.[17] In a suit by the several owners of water rights in a stream, joining as complainants for convenience only, to enjoin the obstruction or the diversion of water therefrom, by defendants, it was held, that the matter in dispute with each complainant, must exceed the jurisdictional amount in order to give a Federal court jurisdiction.[18] A suit under a Colorado statute, imposing a certain individual responsibility upon shareholders in banks, it was held, could not be be maintained, except by those creditors whose individual claims exceeded the jurisdictional amount.[19] Where it appeared, from a bill brought by a number of insurance companies to set aside an award as to the amount of a loss, that the amount of insurance given by each of the plaintiffs exceeded the jurisdictional sum, and there was nothing to show that the loss was to be apportioned *pro rata* to the amount of each policy; it was held, that the court could not presume that such was the case and that there was jurisdiction, although the total insurance exceeded the loss fixed by the award, since the insured might select certain of the policies and sue upon them for their full value.[20] The consolidation after answer of two actions upon different contracts, brought by the same plaintiff against the same defendant, which aggregate more than the jurisdictional amount, but neither of which is separately equal thereto; does not render the consolidated cause removable as a single action, although the defense to each is the same.[21]

Where a suit is brought by one or more, for themselves, and all others of class jointly interested, for the relief of the whole class; the aggregate interest of the whole class constitutes the

16 Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 S. Ct. 98; affirming judgment 12 Utah, 476, 43 P. 119.

17 Hagge v. Kansas City S. Ry. Co., 104 Fed. 391, 393.

18 Eaton v. Hoge, C. C. A., 141 Fed. 64.

19 Auer v. Lombard, 72 Fed. 209, 19 C. C. A. 72, 33 U. S. App. 438.

20 Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L.R.A. 623.

21 E. A. Holmes & Co. v. U. S. Fire Ins. Co., 142 Fed. 863.

matter in dispute.[22] Where a bill by several taxpayers, in behalf of all, attacked the validity of certain county bonds issued to aid in constructing a railway, prayed an injunction restraining the sheriff from collecting a tax levied for the payment of interest, and the county judge from making any further levies, and also a decree that the bonds were invalid, and that all the holders be brought in by publication and perpetually enjoined from collecting principal or interest; it was held, that the main controversy was as to the validity of the bonds; and therefore was not separable, when determining the jurisdictional amount, into controversies affecting the amount due from the separate taxpayers.[23] The bill or petition must show the pecuniary interest of the parties on whose behalf the suit is brought.[24] But, such a suit, where the class is similarly situated, but not jointly interested, can only be maintained by a plaintiff whose individual interest exceeds the jurisdictional amount.[25] Upon a bill by a bank, on behalf of itself and its stockholders, to enjoin taxes assessed against the bank and them, which did not aver that the plaintiff had in his hands, or under its control, any dividends belonging to the stockholders that could be applied to pay the taxes; it was held, that the claim was in separate and distinct rights, and that the jurisdictional amount must be determined by the amount of the tax, against the complainant.[26]

§ 18. Value of the matter in dispute when there are joint defendants. Where two or more defendants are joined by the same plaintiff in one suit, the pecuniary test of jurisdic-

22 Hill v. Glasgow R. Co., 41 Fed. 610; Towle v. Am. Bldg., L. & Inv. Soc., 60 Fed. 131; Putnam v. Timothy, D. G. & C. Co., 79 Fed. 454; Johnston v. Pittsburg, 106 Fed. 753; Taylor v. Decatur, M. & L. Co., 112 Fed. 449; Ottumwa v. City Water-Supply Co., C. C. A., 119 Fed. 315, 59 L.R.A. 604; Jones v. Mutual Fidelity Co., 123 Fed. 506; McKee v. Chautauqua Assembly, 124 Fed. 808. See taxpayers' bills, § 14, *supra*; creditors' bills, § 15, *supra*; stockholders' bills, § 16, *supra*; and cases therein cited.

23 Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. ed. 987.

24 Adams v. Douglas County, Fed. Cas. No. 52; McCahon, 235, 1 Kans. 627; Sioux Falls Nat. Bank v. Swenson, 48 Fed. 621.

25 El Paso Water Co. v. El Paso, 152 U. S. 157, 159; Colvin v. Jacksonville, 158 U. S. 456, 460; Adams v. Douglas County, Fed. Cas. No 52; McCahon, 235, 1 Kan. 627.

26 Sioux Falls Nat. Bank v. Swenson, 48 Fed. 621.

tion is ordinarily the joint or several character of their liability. If their liability is joint, the value of the matters in controversy between the plaintiff and them all is that of the matter in dispute.[1] Where a number of claims are so tied together, by combination or conspiracy, as to make the relief single in regard to the same, the aggregate amount thereof is the pecuniary test of jurisdiction.[2] When several actions at law pending in a State court between the same parties, each for less than the jurisdictional amount but aggregating in excess thereof, all depend upon the same state of facts, and by stipulation judgment is entered in all in accordance with the result of the trial of one; a single suit in equity may be maintained to restrain the enforcement of all the judgments, on the ground of fraud in obtaining them, and such a suit may be removed.[3] Where separate actions at law by insured against insurers on policies, to which the same defense was interposed, and under which the liability, if any, was proportional, were removed to the Federal court, with the exception of one in which the amount involved was insufficient; it was held, that prosecution of this action, as well as of the others, might be enjoined by a bill in equity in the Federal court to have the liabilities of insurers there determined and adjusted.[4] A suit by heirs, to set aside judgments, none of which exceeded $2,000, rendered by a probate court against their ancestor's estate, through a fraudulent combination, was held to be within the jurisdiction of the Circuit Court of the United States when the real estate, upon which the judgments were liens, exceeded in value the jurisdictional amount.[5]

If the liability is several, ordinarily, the suit can only be sustained as against those whose respective controversies with the plaintiff involve matters exceeding, as regards each, the jurisdictional amount.[6] Upon a creditors' bill, to enjoin the

§ 18. [1] Western Union Tel. Co. v. Norman, 77 Fed. 13; Pacific Live-Stock Co. v. Hanley, 98 Fed. 327.

[2] McDaniel v. Traylor, 212 U. S. 428, 53 L. ed. 584.

[3] Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. ed. 870; reversing Calhoun v. McKnight, 39 La. Ann. 325, 1 South. 612.

[4] Virginia-Carolina Chemical Co. v. Home Ins. Co., C. C. A., 113 Fed. 1.

[5] McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, reversing 123 Fed. 338.

[6] Where Rev. St. Wis. 1898, S.

enforcement of several attachments against the debtor's property; it was held, that there was no jurisdiction, when the amount of none of the attachments exceeded the jurisdictional amount.[7] Jurisdiction cannot be conferred on a court, to enjoin the collection of taxes assessed in several parishes by joining in one bill against the different collectors, the whole amount of such taxes; the separate assessments not being sufficient to give jurisdiction.[8] In a suit by a railroad company against officers of several counties, to avoid assessments and taxes levied on its lands, the amount involved cannot be brought within the jurisdiction of the District Court by taking the aggregate of the sums involved as to each defendant; but the jurisdiction as to each must be determined by the amount in controversy between him and the railroad company.[9] To give a District court jurisdiction of a suit to quiet title to a tract of land, in which a number of persons are joined as defendants, between whom no privity of title exists, and each of whom claims title to a separate part of the tract; the value of the property in controversy between each defendant and the complaint must exceed the jurisdictional amount.[10] In a suit in a District Court against a number of defendants, to quiet title to a tract of land alleged to be of

2609*a*, authorized the joinder of several causes of action against several insurance companies liable for a single loss under several policies; held, that since, notwithstanding such joinder, the liability of each was separate, and not joint, the Federal court had no jurisdiction of such an action where the alleged liability of each insurance company did not exceed the jurisdictional amount. Wisconsin Cent. Ry. Co. v. Phœnix Ins. Co., 123 Fed. 989. Where Rev. St. Ind. 1881, § 2442 (Rev. St. 1894, § 2597), provided that "the heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid;" held, that the liability of two or more heirs, devisees, or distributees of a decedent is several, and not joint, and, though another statute provides that they may be jointly sued, the Federal court has no jurisdiction of a suit against them unless the liability of each exceeds such amount. Busey v. Smith, 67 Fed. 13.

[7] Chamberlain v. Browning, 177 U. S. 605 (appellate jurisdiction).

[8] Citizens' Bank of Louisiana v. Cannon, 164 U. S. 319, 41 L. ed. 451.

[9] Walter v. Northeastern R. Co., 147 U. S. 370, 37 L. ed. 206; Keels v. Central R. Co., 147 U. S. 374, 37 L. ed. 208; Northern Pac. R. Co. v. Walker, 148 U. S. 391, 37 L. ed. 494; Fishback v. W. U. Tel. Co., 161 U. S. 96, 40 L. ed. 630.

[10] Stemmler v. McNeill, 102 Fed. 660.

sufficient value, to sustain the jurisdiction of the court; it must appear from the bill, that all the defendants have a privity of interest, derived from a common source of title, or that the separate claim of each defendant is of the jurisdictional amount; since, where the defendants claim separately, the suit is separable, and the requisite amount must be involved in each separate controversy.[11] It was held, that two of several tenants in common, who were citizens of another State and had been joined in condemnation proceedings with their co-tenants, and the mortgagees of the interest of one of the others who were citizens of the same State as plaintiff, were not entitled to a removal of the proceedings to the Federal Court, when the aggregate of their claims exceeded the sum of jurisdiction, but the amount of their separate claims was less than that amount.[12]

But in some cases, in the nature of bills of peace, when defendants had committed or threatened separate infringements of the same right of the plaintiff; it was held, that the value of that right was the test.[13] In a suit to quiet the title to several tracts of land, held by different defendants under separate patents, which plaintiff claimed as assignee of several contracts by the same county officer; each providing that on payment of the purchase price, therein specified, a patent should issue for the land, therein described; the bill alleging that the purchase money had been duly tendered to the county officers, who were made parties to the bill, and not accepted by them, and praying that the patentees be decreed to hold the land in trust for the plaintiff; it was held, that, for the purpose of determining the jurisdiction of the Supreme Court upon appeal, the suit was to be considered as in effect for specific performance of the county's contracts, and the matter in dispute was the aggregate amount tendered to the county officers, although each several interest of the patentees was insufficient had its owner been the sole respondent.[14] It was held: that a

11 Stemmler v. McNeill, 102 Fed. 660; distinguishing Bates v. Carpentier, 98 Fed. 452; Cooper v. Preston, 105 Fed. 403.

12 Trotier v. St. Louis, B. & S. Ry. Co., 54 N. E. 487, 180 Ill. 471; Texas & P. Ry. Co. v. Dishman & Tribble (Texas), 85 S. W. 319.

13 Louisville & N. R. Co. v. Bitterman, C. C. A., 144 Fed. 34.

14 Corbin v. County of Black Hawk, 105 U. S. 659, 664, 26 L. ed. 1136.

bill for injunction against taxes, brought by a railroad company against a revenue agent who represented all the parties interested, sufficiently stated the jurisdictional amount, when it alleged that the taxes assessed amounted to a specified sum, much larger than the jurisdictional limit; and that a question not arising on the face of the bill as to how the taxes, when collected, would be disposed of, and in what proportions and amounts they would be parcelled out to interested municipalities, was immaterial.[15] In a suit by a railroad company against a number of landowners, to enjoin threatened interference with its use of its right of way through their lands; it was held, that the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constituted the jurisdictional test.[16] It was held: that a bill, to enjoin defendants from diverting the waters of a stream, in violation of complainant's prior right thereto, which was alleged to be of the value of $2,000, and also to recover damages in the sum of $2,500, sustained by complainant by reason of the joint action of defendants in diverting such waters, showed the amount in controversy to be sufficient.[17] In suits by railway carriers, to restrain different scalpers from buying and selling tickets, which were not transferable; it was held, that the value of the matter in dispute was that of the right to the injunction; and the jurisdiction was sustained, although none of the defendants had dealt in, or threatened to deal in, tickets of the jurisdictional amount.[18] It was held that where the plaintiff failed to prove combination between the defendants, the bill was properly dismissed.[19] Where a bill had been dismissed, which had been filed by a creditor preferred under an assignment, praying for a declaration that the assignment, with its preferences, was valid and that different attaching creditors, each of whose claim was less than the jurisdictional

15 Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. ed. 410. Similar is Western Union Tel. Co. v. Norman, 77 Fed. 13.

61 Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1, 63 C. C. A. 1.

17 Morris v. Bean, 123 Fed. 618. A similar ruling was made in Pacific Live Stock Co. v. Hanley, 98 Fed. 327.

18 Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; Louisville & N. R. Co. v. Bitterman, C. C. A., 144 Fed. 34; s. c., 207 U. S. 205, 52 L. ed. 171.

19 McDaniel v. Traylor, 212 U. S. 428, 53 L. ed. 584.

amount, be enjoined from enforcing attachments levied by them separately; it was held, that the amount of the complainant's preferred claim, which exceeded that sum, was the test of the jurisdiction of the appellate court.[20].

§ 19. Consideration of interest in estimating the value of the matter in dispute. The interest excluded from the computation includes interest accrued on the demand, before the suit was brought, and which is collected only as an incident of the principal;[1] but not interest, which is the subject of a separate contract as a coupon, and which might be the subject of a separate suit.[2] The face value of coupons due before the suit, may be added to the principal named in the bond when the jurisdictional amount is determined;[3] except, as has been held in a single case, where the day of payment, named in the bond, had not yet arrived, but by its terms it became due on the non-payment of a coupon for interest; it being said by the court, that "the coupons cannot be considered as interest, for the purpose of maturing the debt, and as separate distinct obligations for the purpose of giving this court jurisdiction."[4] Interest, which has accrued upon bonds and coupons after their maturity, cannot be considered.[5] Where the relief sought did not include interest as such, together with a principal to which it was incidental; but a calculation of interest was used as an instrumentality in determining the amount of damages caused by a breach of warranty;[6] and where interest was claimed as damages, although not provided for in the contract;[7] it was held, that such interest was a part of the jurisdictional amount. Where the bill claimed payment of a sum as the amount of a debt for an advance by a building and loan association; it was held, that the court could not arbitrarily assume that it was

20 Estes v. Gunter, 121 U. S. 183, 30 L. ed. 884.

§ 19. 1 Moore v. Edgefield, 32 Fed. 493; Simmons v. Mutual Reserve Fund Life Ass'n, 114 Fed. 785; Gilson v. Mutual Reserve Fund Life Ass'n, 129 Fed. 1003.

2 Edwards v. Bates County, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. ed. 155; overruling Howard v. Bates County, 43 Fed. 276.

3 Edwards v. Bates County, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. ed. 155.

4 Home and Foreign Inv. & Agency Co. v. Ray, 69 Fed. 657.

5 Greene County v. Kortrecht, C. C. A., 81 Fed. 241.

6 Brown v. Webster, 156 U. S. 328, 39 L. ed. 440.

7 Continental Casualty Co. v. Spradlin, C. C. A., 170 Fed. 322.

usurious interest cloaked with that name.[8] In a suit to foreclose a mortgage, insurance premiums paid by the mortgagee, when claimed in the bill, are considered to be a part of the jurisdictional amount.[9]

§ 20. Consideration of costs in estimating the value of the matter in dispute. Notarial fees for the presentment and protest of a note in suit, although paid before the action was brought, were considered to be costs, not damages, and excluded from the computation of the jurisdictional amount.[1] It has been held that where a statute authorizes the inclusion of an attorney's fee in the judgment, the same is part of the costs and is not included in the jurisdictional amount;[2] but that the case is otherwise where the fee is awarded by stipulation and not by statute.[3]

§ 21. Consideration of counterclaims in estimating the value of the matter in dispute.— Whether the amount of a counterclaim, pleaded by the defendant, should be added to that of the plaintiff's claim, to determine the jurisdictional amount, has been the subject of conflicting adjudications.[1] It has been held that the question is so doubtful that a motion to

[8] Bldg. & L. Ass'n v. Price, 169 U. S. 45, 42 L. ed. 655, 18 S. Ct. 251; Turner v. Southern H. Bldg. & L. Ass'n, C. C. A., 101 Fed. 308; Building & Loan Ass'n of Dakota v. Cunningham (Texas), 47 S. W. 714.

[9] Coolidge v. Ray, 75 Fed. 39.

§ 20. [1] Baker v. Howell, 44 Fed. 113.

[2] Peters v. Queen Ins. Co. of America, 182 Fed. 113.

[3] Rogers v. Riley, 85 Fed. 471.

§ 21. [1] Held, that it should be in: Stinson v. Dousman, 20 How. (U. S.) 461, 464, 467, 15 L. ed. 966, 968, 969 (appellate jurisdiction in equity); Lovell v. Cragin, 136 U. S. 130, 34 L. ed. 372 (appellate jurisdiction in equity); Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. 619 (jurisdiction of Circuit Court where cross-bill was filed); Clarkson v. Manson, 4 Fed. 257 (18 Blatchf. 443); Carson & R. L. Co. v. Holtzclaw, 39 Fed. 578; Wolcott v. Watson, 46 Fed. 529; Wolcott v. Sprague, 55 Fed. 545; Lee v. Continental Ins. Co., 74 Fed. 424; Price & Hart v. T. J. Ellis & Co., 129 Fed. 482; Clarkson v. Manson (N. Y.), 60 How. Pr. 45; reversing 59 How. Pr. 480. See Champion v. Grand Rapids, etc., Ry. Co., 145 Mich. 676, 108 N. W. 1078. *Contra*, Falls W. Mfg. Co. v. Broderick, 6 Fed. 654; La Montagne v. T. W. Harvey Lumber Co., 44 Fed. 645; Bennett v. Devine, 45 Fed. 705; Industrial & Mining Guaranty Co. v. Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471, 16 U. S. App. 196 (cross-bill); McKown v. Kansas & T. Coal Co., 105 Fed. 657. *Cf.* West v. Aurora City, 6 Wall. 139, 18 L. ed. 819; McGinity v. White, 3 Dillon, 350; s. c., Fed.

remand the cause in such a case should be granted.[2] Where the suit was one appealed from a justice to the State Circuit Court, and defendant filed there a plea of set-off, claiming $3,000 against plaintiff, but under the statute of Tennessee he could recover no more than $500 in that court; it was held, that the latter sum was "the matter in dispute," and the Federal court could have no jurisdiction by removal under the act of 1875.[3] Where the counterclaim belongs to a class which, by the State practice is barred unless pleaded in the suit; it must be added to the sum demanded by the plaintiff when determining the jurisdictional amount.[4] It has been said that a defendant who pleads a counter-claim in a court of the United States is stopped to deny jurisdiction because of the insufficiency of the amount in dispute.[5] An adjudication sustaining a set-off, counterclaim, or partial defense, so as to reduce the recovery below the jurisdictional amount, something still being allowed the plaintiff; is no reason for a dismissal or remand; provided that it does not appear that the original claim was exaggerated in bad faith.[6] The filing of a cross-bill, by one defendant against another, does not deprive him of the right of removal.[7] It has been held: that the pleading, by the original defendant, of a counterclaim, or demand in reconvention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant so that he can remove the case.[8]

Cas. No. 8,802; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co., 89 Fed. 113.

2 Crane Co. v. Guanica Centrale (S. D. N. Y.) 132 Fed. 713.

3 New York I. & P. Co. v. Milburn Gin & Machine Co., 35 Fed. 225. *Cf.* Bennett v. Forrest, 69 Fed. 421.

4 Lee v. Continental I. & S. Co., 74 Fed. 424.

5 O. J. Lewis Mercantile Co. v. Klepner, C. C. A., 176 Fed. 343.

6 Lozano v. Wehmer, 22 Fed. 755; Peeler v. Lathrop, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App. 40; Wheeler Bliss Mfg. Co. v. Pickham, 69 Fed. 419; Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co., 80 Fed. 68; Washington County v. Williams, 111 Fed. 801, 49 C. C. A. 621.

7 Jackson & S. Co. v. Pearson, 60 Fed. 113, 123. *Contra*, Bennett v. Devine, 45 Fed. 705 (counterclaim).

8 Waco Hardware Co. v. Michigan Stove Co., C. C. A., 91 Fed 289; McKown v. Kansas & T. Coal Co., 105 Fed. 657; Smithers v Smith (Texas), 80 S. W. 646; rehearing granted 81 S. W. 283. *Contra*, Price & Hart v. T. J. Ellis & Co., 129 Fed. 482.

§ 22. Effect of admissions by the defendant upon the value of the matter in dispute. An admission or disclaimer, in the defendant's answer, which makes the subsequent matter in dispute less than the jurisdictional amount, will not divest the Federal court of jurisdiction of a suit begun there by the plaintiff;[1] but where the plaintiff sued to recover the possession of a large tract of land, and the defendant, in a plea of abatement, denied that he was in possession of more than a small part of the same, and alleged that the value thereof was less than the jurisdictional amount; the court intimated without deciding that the jurisdiction might be thereby defeated.[2] Whether such an admission or disclaimer will defeat the right of removal has not yet been authoritatively decided.[3] Where the defendant, before a removal was attempted, admitted the plaintiff's claim, but disputed the validity of an attachment in the case, and made no formal claim for damages; it was held, that sufficient did not appear to show that the matter in dispute exceeded the jurisdictional amount, although the property attached was more than that sum.[4]

§ 23. Effect of a defense apparent in the plaintiff's pleading upon the value of the matter in dispute. The fact that the plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the jurisdictional amount, does not divest the court of jurisdiction;[1] unless it is apparent that that part of the claim was not made in good faith, but was

§ 22. [1] Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Fuller v. Metropolitan Life Ins. Co., 37 Fed. 163; Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co., 80 Fed. 68.

[2] Jones v. Rowley, 73 Fed. 286.

[3] A decision of a State court seems to hold that it will defeat the right of removal. Thompson v. Kendrick's Lessee, 6 Tenn. (5 Hayw.) 113. But see *supra*, § 6. See Cooper v. Preston, 105 Fed. 403.

[4] Keith v. Levi, 2 Fed. 743 (1 McCrary, 343).

§ 23. [1] Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. Rep. 416, 37 L. ed. 255, following Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Upton v. McLaughlin, 105 U. S. 640, 26 L. ed. 1197, and distinguishing Bowman v. Chicago & N. W. Ry. Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. ed. 502; Johnston v. Straus, 26 Fed. 57; Hardin v. Cass County, 42 Fed. 652 (statute of limitations); Industrial & Min. G'y. Co. v. Electrical Supply Co., C. C. A., 58 Fed. 732; Bank of Arapahoe v. David Bradley & Co., C. C. A., 72 Fed. 867; Interstate Building & Loan

manifestly fictitious;[2] or else that the court has no jurisdiction thereof.[3]

§ 24. Suits arising under the Constitution or laws of the United States. In general. A suit arises under the Constitution or law of the United States whenever its correct decision depends on the construction of either.[1] It has been said: that a suit cannot be removed, from a State court to a Federal court,

Ass'n v. Edgefield Hotel Co., 109 Fed. 692; Waterfield v. Rice, 111 Fed. 625, 49 C. C. A., 504 (statute of limitations); Washington County v. Williams, C. C. A., 111 Fed. 801, 811; Board of Com'rs of Kearny County, Kan. v. Vandriss, C. C. A., 115 Fed. 866 (statute of limitations).

[2] Edwards v. Bates County, 55 Fed. 436; reversed on another point, 163 U. S. 269, 273; Chicago Cheese Co. v. Fogg, 53 Fed. 72.

[3] Coulter v. Fargo, 127 Fed. 912, 62 C. C. A. 144.

§ 24. [1] Cohens v. Virginia, 6 Wheat. 264, 379, 5 L. ed. 257, 285; Feibelman v. Packard, 109 U. S. 421, 27 L. ed. 984; Tennessee v. Davis, 100 U. S. 257, 264, 25 L. ed. 648, 650; Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390; Southern Pac. R. Co. v. California, 118 U. S. 109, 112, 30 L. ed. 103, 104; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84; Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005; New Orleans v. Scixas (Louisiana), 35 La. Ann. 36; McKee v. Brooks (Texas), 64 Tex. 255. Complainant brought suit in a State court to subject a judgment, obtained by the defendant against the United States in the Court of Claims, to the payment of a judgment he had against defendant, and for an injunction to restrain defendant from collecting, transferring, or otherwise disposing of said claim against the government, and for the appointment of a receiver to collect and hold the fund. The suit was removed to the United States court, and, upon motion to remand, held, that it involved the construction of R. S. § 3477, which declares that all "transfers and assignments made of any claim upon the United States . . . shall be absolutely null and void, unless they are freely made, and executed in the presence of at least two attesting witnesses," &c., and the motion was therefore denied. Willard v. Mueller, 23 Fed. 209. A proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street does not raise a Federal question, although such tracks lead to its bridge, built under Acts July 14, 1862, and Feb. 17, 1865, authorizing the construction of a railroad bridge over the Ohio river, and declaring that it "shall be a lawful structure, and shall be recognized and known as a post route," since those acts do not attempt to give the right to the use of the street as an approach. Kentucky v. Louisville Bridge Co., 42 Fed. 241. In an action against a railroad company to enforce a schedule of rates adopted by the railroad commissioners, the State court refused to remove the cause to the Federal court on the ground that under Act of Congress of July 25, 1866,

simply because, in its progress, a construction of the Constitution or a law of the United States may be necessary, unless it, in part at least, arises out of a controversy in regard to the operation and effect of some provision in that Constitution or law upon the facts involved.[2] In order to remove a cause, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision. Where the contest is about the facts only, there can be no removal.[3] A case removed to a Federal court, on the ground that the suit arose under the Constitution or laws of the United States, will be remanded where the record fails to show that there will arise some contested point of law depending upon the Constitution or laws of the United States, what the ques-

its road in the State was made subject to national control only, and therefore was not subject to State legislation; the act referred to giving defendant's lessor aid in the construction of the road, which in all other matters was to be governed by the law of the State. State v. Southern Pac. Co., 23 Or. 424, 31 Pac. 960. No removable question arises from the fact that plaintiff acquired title from the United States to the funds loaned defendant, and to recover which suit is brought. Houston & T. C. R. Co. v. State (Texas), 41 S. W. 157. The State of South Carolina filed a bill in one of its own courts, alleging: that defendant corporation was chartered by the State to build and operate a railroad between the interior and the seaboard; that since it was built the Central Company, a Georgia corporation, and a competitor of defendant, had purchased enough of the stock and bonds of defendant to give it control of the corporation, and had diverted the business of defendant, and crushed competition; that the Central Company had no power to purchase stock in defendant corporation, and that the latter was disabled to fulfill the purposes for which it was chartered. It prayed that such holding by the Central Company be declared *ultra vires*, and that defendant's charter be forfeited. The petition for removal alleged that the Central Company was an instrument of interstate commerce, and that for the purposes of such commerce, and under the interstate commerce clause of the Constitution and the laws passed in pursuance thereof, it had power to purchase defendant's stock, and control its operation. Held, that the determination of the controversy thus developed involved the construction of the Constitution and laws of the United States, and so presented a Federal question. South Carolina v. Port Royal & A. R. Co., 56 Fed. 333.

[2] Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656.

[3] Austin v. Gagan, 39 Fed. 626, 5 L.R.A. 476.

tion is and how it will arise.[4] It has been said: that a cause is not removable simply because an act of Congress must be construed or applied; but that there must be a dispute as to the construction of the act, and facts to show the dispute must appear in the record.[5] It has been held: that a bill by one railroad company against another and its employees, to enforce the interstate commerce act, by enjoining the defendants from refusing to receive plaintiff's cars,[6] and one to enjoin a common carrier from enforcing an unreasonable rate for transportation,[7] in violation of the same statute; arose under the Constitution and laws of the United States. It has been held: that an application for a *mandamus,* to compel a railroad engaged in interstate commerce to run its trains to a certain station, in obedience to a State statute, involves a Federal question, since a judgment therein may impose a burden on interstate commerce.[8] But, it has been said, that a constitutional question is not presented where the court has occasion to apply the rules of the common law regulating transportation charges, whether or not the carriage be interstate.[9] Suits to enjoin combinations [10] and to cancel agreements [11] which are in restraint of commerce between States, arise under the laws of the United States. A suit to determine the validity of the action of State authorities with reference to a tax imposed by the United States involves a Federal question.[12] A cause involving the question whether an express company or its customer must furnish the stamp required by the war revenue act of 1898, to be affixed to a receipt given by the company, is one arising under a law of the United States.[13] So do suits brought by a State attorney

[4] McFadden v. Robinson, 22 Fed. 10, 10 Sawyer, 398.

[5] Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812.

[6] Ex parte Lennon, 166 U. S. 548, 41 L. ed. 1110.

[7] Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, 54 L. ed. 300, affirming Atlantic Coast Line R. Co. v. Macon Grocery Co., C. C. A., 166 Fed. 206; Tift v. Southern Ry. Co., 123 Fed. 789; Kalispell Lumber Co. v. Great Northern Ry. Co., 157 Fed. 845; Sunderland Bros. v. Chicago, R. I. & P. Ry. Co., 158 Fed. 877.

[8] Illinois v. Rock Island & P. R. Co., 71 Fed. 753.

[9] Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868, 35 C. C. A. 62; affirming 62 Fed. 24.

[10] Mannington v. Hocking Valley Ry. Co., 183 Fed. 133.

[11] Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995.

[12] Dinsmore v. Southern Exp. Co., 92 Fed. 714.

[13] Crawford v. Hubbell, 89 Fed.

general, to test the validity of a consolidation of railroad companies, which affect their rights under acts of Congress.[14] It has been said that where the plaintiff pleads a breach of the rules and regulations made by a Department of the United States, the case does not arise under a law of the United States, unless a recovery of damages for a disregard of such regulations is expressly authorized by statute.[15] Suits for malicious prosecution or false imprisonment upon a charge of the violation of a law of the United States,[16] or where the illegality depended upon a right granted by a statute of the United States;[17] an action for damages for preventing plaintiff from voting at a Congressional election,[18] and under ordinary circumstances a controversy as to the right to the custody of an Indian child,[19] do not arise under the laws of the United States. The Federal question in the case must be substantial, and not merely colorable.[20] "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a Federal question."[21] The

1. See, however, Attorney General v. American Express Co. (Michigan), 77 N. W. 317.

14 Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482.

15 Beck v. Johnson, 169 Fed. 154, 163.

16 Ma-ka-ta-wah-qua-twa v. Rebok, 111 Fed. 12.

17 Peters v. Malin, 111 Fed. 244.

18 Knight v. Shelton, 134 Fed. 423.

19 In re Celestine, 114 Fed. 551.

20 Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390; Southern Pac. R. Co. v. California, 118 U. S. 109, 112, 30 L. ed. 103, 104; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936; W. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 44 L. ed. 1052; Swafford v. Templeton, 185 U. S. 487, 494, 46 L. ed. 1005, 1008; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 U. S. 371, 48 L. ed. 484; Underground R. R. Co. v. New York, 193 U. S. 416, 48 L. ed. 733; Barney v. New York, 193 U. S. 430, 48 L. ed. 737; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795; Sloan v. U. S., 193 U. S. 614, 48 L. ed. 814; Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101; Harris v. Rosenberger, C. C. A., 145 Fed. 449; Blue Bird Min. Co. v. Largey, 49 Fed. 289, 291; St. Louis, I. M. & S. Ry. Co. v. Davis, 132 Fed. 629; Montana Catholic Missions v. Missoula County, 200 U. S. 118, 50 L. ed. 398.

21 Brewer, J., in Kansas v. Bradley, 26 Fed. 289, 290. See Western Union Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 44 L. ed. 1052, reversed 90 Fed. 379, 33 C. C. A. 113; Kentucky v. Louisville Bridge Co., 42 Fed. 241; People of State of California v. Brown's Valley Irr. Dist.,

right of removal of a suit involving a Federal question, is not affected by the fact that the Supreme Court has laid down, in previous decisions on different facts, general principles, which will probably control the decision.[22] It was said: that the decisions of the Supreme Court, in cases from the Circuit Courts, and those on writ of error to a State court, were equally instructive in determining when there is a Federal question, such as to support the jurisdiction of the Circuit Court, originally or upon removal.[23] Where the complaint shows upon its face, that the relief sought would be inconsistent with a provision of the Federal Constitution, such as the grant of power to regulate commerce between the States, or the Fourteenth Amendment; that only demonstrates that the suit cannot be maintained at all, not that the cause of action arises under the Constitution or laws of the United States.[24] Where the plaintiff sought to recover damages because the defendant, as Chief Justice of the Supreme Court of the State, had remitted a case to an inferior court; it was held, that there was nothing to show a ground of Federal jurisdiction.[25]

A suit does not arise under the Constitution or laws of the United States, unless the Federal question appears clearly, not merely by inference,[26] upon the face of the plaintiff's initial pleading in his statement of his own case,[27] and in a necessary allega-

119 Fed. 535; Arkansas v. Choctaw & M. R. Co., 134 Fed. 106; Myrtle v. Nevada, C. & O. Ry. Co., 137 Fed. 193; Harris v. Rosenberger, C. C. A., 145 Fed. 449.

[22] Mallon v. Hyde, 76 Fed. 388.

[23] Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. 168.

[24] Arkansas v. Kansas & T. Coal Co., 183 U. S. 185; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727, 731. See Washington v. Island Lime Co., 117 Fed. 777.

[25] Kinney v. Mitchell, 138 Fed. 270.

[26] Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157; W. U. Tel. Co. v. Ann Arbor R. Co., 178 U. S. 239, 44 L. ed. 1052.

[27] Chappell v. Waterworth, 155 U. S. 102, 39 L. ed. 85; Tennessee v. Union and Planters' Bank, 152 U. S. 454, 38 L. ed. 511; Postal Tel. Cable Co. v. Alabama, 155 U. S. 482, 39 L. ed. 231; East Lake Land Co. v. Brown, 155 U. S. 488, 39 L. ed. 233; Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048; Walker v. Collins, 167 U. S. 57, 42 L. ed. 76; Galveston, H. & S. A. Ry. Co. v. State of Texas, 170 U. S. 226, 42 L. ed. 1017; Third St. & S. Ry. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870; reversing 123 Fed. 692; Iowa v. Chicago, M. & St. P. R. Co., 33 Fed. 391; appeal dis-

tion in such pleading.[28] The appearance of a Federal question in the defendant's answer,[29] or petition for removal, [30] or even, it has been held, in his demurrer,[31] or in the plaintiff's pleading in reply or rebuttal,[32] or in a bill of repleader by the plaintiff,[33] is insufficient. A Federal question, first raised by the defendant, must be tried by the State court, subject to review by the Supreme Court of the United States upon writ of error.[34] To give a court of the United States jurisdiction of a cause, on the ground that it presents a Federal question, such question must appear from plaintiff's statement of his own cause of action, and his right to the relief sought must depend directly upon the construction of some provision of the Constitution or laws of the United States.[35] Where the controversy

missed, Chicago, M. & St. P. Ry. Co. v. Iowa, 145 U. S. 632, 36 L. ed. 857; Haggin v. Lewis, 66 Fed. 199; Caples v. Texas & P. R. Co., 67 Fed. 9; Holland v. Texas & P. R. Co., 67 Fed. 9; Cruz v. Texas & P. R. Co., 67 Fed. 9; Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 C. C. A. 42, 36 U. S. App. 530; Florida v. Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 C. C. A. 538, 41 U. S. App. 405; Dewey Min. Co. v. Miller, 96 Fed. 1; South Carolina v. Virginia-Carolina Chemical Co., 117 Fed. 727; Wichita v. Missouri & K. Telephone Co., 122 Fed. 100; Darton v. Sperry (Connecticut), 41 Atl. 1052, 71 Conn. 339; Mills v. Central R. Co. of New Jersey (New Jersey), 7 N. J. Law J. 230; State v. Port Royal & A. Ry. Co. (South Carolina), 45 S. C. 413, 23 S. E. 363; Texas & P. Ry. Co. v. Caples (Texas), 36 S. W. 516.

28 Wise v. Nixon, 78 Fed. 203; California Oil & Gas Co. of Arizona v. Miller, 96 Fed. 12; Henry v. La Compagnie Generale Transatlantique, etc., 96 Fed. 497; Filhiol v. Torney, 119 Fed. 974; McLane v. Leicht (Iowa), 69 Ia. 401, 29 N. W. 327.

29 Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312; Lincoln v. Lincoln St. Ry. Co., 77 Fed. 658; Broadway Ins. Co. v. Chicago G. W. Ry. Co., 101 Fed. 507; Ralya Market Co. v. Armour & Co., 102 Fed. 530; Mayo v. Dockery, 108 Fed. 897; Mitchell Engineering & Machinery Co. v. Worthington, 140 Fed. 947; Cella v. Brown, 144 Fed. 742.

30 Ibid.

31 Indiana v. Alleghany Oil Co., 85 Fed. 870; Shields v. Boardman, 98 Fed. 455.

32 Houston & T. C. R. Co. v. State (Texas), 41 S. W. 157; Houston & T. C. R. Co. v. State of Texas, 177 U. S. 66, 44 L. ed. 673. But see, Smith v. Greenhow, 109 U. S. 669, 27 L. ed. 1080.

33 Cella v. Brown, 144 Fed. 742.

34 Tennessee v. Union & Planters' Bank, 152 U. S. 454, 462, 38 L. ed. 511, 514.

35 Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., C. C. A., 93 Fed. 274, 35 C. C. A. 1; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205; Hare v. Birkenfield, C. C. A., 181 Fed. 825; Boyd v. Great Western Coal &

might have arisen both under the laws in the United States and under the common law or a State statute, the complaint must clearly show that it arises under the former.[36] Jurisdiction cannot be sustained upon allegations that defendant does or may assert some right under such Constitution or laws as a defense.[37] An averment by the plaintiff, that the defendant will set up a defense based upon a Federal statute or the Constitution of the United States,[38] or based upon a State statute repugnant to the Federal Constitution,[39] will not bring the case

Coke Co., 189 Fed. 115; The Dalles & Rockland Ferry Co. v. Hendryx, 189 Fed. 266.

36 Shulthis v. McDougal, 225 U. S. 561; Beek v. Johnson, 169 Fed. 154. But see Nelson v. Southern Ry. Co., 172 Fed. 478; Bottoms v. St. Louis & S. F. R. Co., 179 Fed. 318. It was contended by the defendant that these two cases arose under the Employers' Liability Act (35 St. at L. 65), but the Federal court refused to take jurisdiction because there was no reference to the statute in the plaintiff's pleadings. Miller v. Illinois Cent. R. Co., 168 Fed. 982, where, although the pleading set forth this Federal statute, it did not show that the construction thereof was involved. *Contra*, Smith v. Detroit & T. S. L. R. Co., 175 Fed. 506. See Missouri K. & T. Ry. Co. v. Wulf, 226 U. S. 570, *infra*, § 211. In Clark v. Southern Pac. Co., 175 Fed. 122, it was held that the petition sufficiently showed that the case arose under that Act of Congress.

37 Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., C. C. A., 93 Fed. 274, 35 C. C. A. 1; Hare v. Birkenfield, C. C. A., 181 Fed. 825; Boyd v. Great Western Coal & Coke Co., 189 Fed. 115; The Dalles & Rockland Ferry Co. v. Hendryx, 189 Fed. 266; Kansas City Southern Ry. Co. v. Quigley, 181 Fed. 190, a bill *quia timet*.

38 Florida Cent. & P. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486; City Ry. Co. v. Citizens' St. R. Co., 166 U. S. 557, 41 L. ed. 1114; Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co., 188 U. S. 632, 47 L. ed. 626; Id., 188 U. S. 645, 47 L. ed. 634; affirming, C. C. A., 93 Fed. 274; Filhiol v. Torney, 194 U. S. 356, 48 L. ed. 1014; affirming 119 Fed. 974; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046; Louisville & Nashville R. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126; Kansas v. Atchison, T. & S. F. Ry. Co., 77 Fed. 339; Montana O. P. Co. v. Boston & M. C. C. & S. M. Co., C. C. A., 93 Fed. 274; Peabody Gold Min. Co. v. Gold Hill Min. Co., C. C. A., 111 Fed. 817. But see, Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341; Cox v. Gilmer, 88 Fed. 343; Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 So. 937.

39 Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046; Cox v. Gilmer, 88 Fed. 343. But see South Carolina v. Coosaw Min. Co., 45 Fed. 804; Green v. Oemler, 151 Fed. 936.

within the Federal jurisdiction; even though the plaintiff sues to quiet his own title, which does not depend upon a Federal statute.[40] Where a complaint in the State court alleged that complainants claimed under a designated State statute, not set out in full in the complaint, and that defendant's claim arose under a previous statute, also designated, which was alleged to be contrary to the State Constitution; the Federal court, upon defendant's petition for removal, on the ground that the latter statute was contrary to the United States Constitution as impairing the obligation of their contract under the former statute, took judicial notice of the statutes in determining its jurisdiction.[41] It has been said: that the rule, that a cause is not removable, as one arising under the Constitution or laws of the United States, unless such fact appears from the plaintiff's pleading, applies only to cases in which the Federal question is one inherent in the controversy itself, so that if raised by the defendant, and determined against him by the State court, he may remove it to the Supreme Court for review by appeal or writ of error that such rule cannot be extended as to permit a plaintiff to prevent the removal of a suit against a receiver of a Federal court by omitting to state, in his pleadings, by what court defendant was appointed receiver; and that such an omission, when relied upon to pervent the removal of the cause, may fairly be considered as a fraud upon the jurisdiction of the Federal court, whether so intended or not.[42] The court will take judicial notice of the fact that a defendant corporation was incorporated by an act of Congress, although the plaintiff has averred that it was incorporated under the State laws; and such a case may be removed.[43] Although a complaint

[40] Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U. S. 632, 47 L. ed. 626; affirming, C. C. A., 93 Fed. 274; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046; California Oil & Gas Co. of Arizona v. Miller, 96 Fed. 12.

[41] South Carolina v. Coosaw Min. Co., 45 Fed. 804.

[42] Winters v. Drake, 102 Fed. 545. See Washington v. Island Lime Co., 117 Fed. 777, 778; where it was held, that the pleading did not show fraud in concealing the real controversy by an insufficient statement of the facts constituting plaintiff's cause of action. See also *infra*, § 27.

[43] Texas & P. Ry. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132; Texas & P. Ry. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136; Spokane Falls & N. Ry. Co. v. Ziegler, 167 U. S. 65, 42

by a settler claiming title under the pre-emption laws of the United States against a railroad company stated that defendant claimed under the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way, it disclosed a cause of action arising under the laws of the United States, so as to authorize a removal from a State court to the Federal court, the court having judicial knowledge that the authority of the Territory to legislate as to the matter in question was derived from the act of Congress, granting to railroad companies the right of way through the public lands of the United States.[44] "Resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record."[45] In an action for false imprisonment, averments in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a State law which is repugnant to the Constitution of the United States, are not open to the objection of anticipating the defense for the purpose of showing that a Federal question is involved.[46]

Where the facts stated in the plaintiff's petition set forth a cause of action authorized by both an act of Congress and a State statute, although he did not specifically refer to either, it was held that the case might be removed.[47] It has been held: that an action against an interstate common carrier by rail, for damages caused by unjust discrimination in rates and charges gainst plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action

L. ed. 79; Scott v. Choctaw, O. & G. R. Co., 112 Fed. 180. See, however, Oregon Short Line & U. No. Ry. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048; cited *infra*, § 27. *Contra*, Texas & P. Ry. Co. v. Hightower (Texas), 12 Tex. Civ. App. 41, 33 S. W. 541.

[44] Spokane Falls & N. Ry. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79.

[45] Powell v. Brunswick County, 150 U. S. 433, 440; Fuller, C. J.

[46] Cox v. Gilmer, 88 Fed. 343.

[47] Hall v. Chicago, R. I. & P. Ry. Co., 149 Fed. 654.

arising under the Interstate Commerce law, although not in express terms based on that act, and, although an action would lie for the same cause at common law; and is removable, when the petition for removal sets up a defense under the act of Congress.[48] An action in a State court, to recover for personal injuries alleged to have been received by reason of the failure of defendant railroad company properly to equip its cars with safety appliances, is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the Federal law relating to railroads engaged in such commerce, since the questions of fact whether defendant is engaged in interstate commerce, and, if so, whether it has complied with the law, are not Federal questions.[49]

The mere fact that, in the progress of the trial of a case, it may become necessary to construe the Constitution or laws of the United States, does not give the Federal courts jurisdiction thereof; but the decision must depend on such construction.[50]

The existence in the case, of other questions than that arising under the Constitution or laws of the United States, does not impair the right of removal.[51] It was said: that the clause of the removal act of 1888, authorizing the removal of civil suits arising under the Constitution or laws of the United States, relates only to the entire action and does not permit the removal of a part thereof when the rest is not removable.[52] A bill to enjoin the enforcement of a municipal ordinance authorizing a street-railroad company to condemn for its use certain parts of the track of another corporation was entertained by a Circuit Court of the United States upon the ground, that

[48] Lowry v. Chicago, B. & Q. Ry. Co., 46 Fed. 83.

[49] Myrtle v. Nevada C. & O. Ry. Co., 137 Fed. 193.

[50] Wise v. Nixon, 78 Fed. 203.

[51] Connor v. Scott, Fed. Cas. No. 3,119 (4 Dill. 242); Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); s. c., Fed. Cas. No. 4,828 (8 Blatchf. 243); Illinois v. Illinois Cent. R. Co., 16 Fed. 881; People v. Sanitary Dist. of Chicago, 98 Fed. 150; Manigault v. S. M. Ward & Co., 123 Fed. 707; Mastin v. Chicago, R. I. & P. Ry. Co., 123 Fed. 827; New Orleans M. & T. R. Co. v. State of Mississippi (Ky.), 2 Ky. Law Rep. 137.

[52] Texas v. Day Land & Cattle Co., 49 Fed. 593; Chapter on Removal of causes.

the violation of a previous grant to the latter company, which complainant alleged, impaired the obligation of a contract. It was held: that this did not give that court jurisdiction to decide a question arising on a supplemental bill as to the right of condemnation by the former company under its charter, pursuant to which the city determined, pending the suit, that the streets were not wide enough for two companies to lay tracks side by side; because the matter involved was beyond the scope of the controversy, which gave the court jurisdiction of the case originally.[53]

It has been said: that the nature of the action, and not the character of the defense, constitutes the test of the determination whether it arises under the laws of the United States; and that if the case made by the complaint arises under an act of Congress, the right of removal by the defendant is not lost by insufficient denials in the answer,[54] or by the interposition of a good defense.[55] It has been held: that a Federal court loses jurisdiction of a suit originally brought there, and that the same will be dismissed, upon the defendant's filing a disclaimer of any interest in the matter concerning which the plaintiff claims title under the laws of the United States, and denying that it has made any claim to the same.[56]

In a suit in a Federal court, raising the question whether the State was attempting to impair the obligation of a contract, a decision that this question was *res adjudicata* as against the State does not oust the Federal jurisdiction on the theory that it makes the case turn on a question not Federal.[57] Where the bill brings before the court for determination a Federal question not merely colorable, but raised in good faith not merely for the purpose of giving jurisdiction to the District Court of the United States, the court can take juris-

[53] Mercantile Trust & Deposit Co. v. Collins Park & Belt R. Co., 107 Fed. 762. See August Busch & Co. v. Webb, 122 Fed. 655, 662.

[54] Miller v. Tobin, 18 Fed. 609, 9 Sawyer, 401.

[55] Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312.

[56] Robinson v. Anderson, 121 U. S. 522, 524, 30 L. ed. 1021; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 287, 46 L. ed. 910, 913; Boston & M. Consol. C. & S. Min. Co. v. Montana Ore P. Co., 188 U. S. 632, 47 L. ed. 626; Crystal Springs Land & Water Co. v. Los Angeles, 82 Fed. 114.

[57] Bank of Kentucky v. Stone, 88 Fed. 383.

diction and does not lose the same by deciding the case upon other points and omitting to decide the Federal questions or deciding them adversely to the party claiming their benefit.[58] It was formerly held that, when a case involving several questions has been removed because one of them arises under the Constitution or laws of the United States, after a decision of the court disposing of the Federal question there should be a remand;[59] but that a Federal question, which is not frivolous, cannot be decided upon a motion to remand.[60]

58 Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; Omaha H. Ry. Co. v. Cable Tr. Co., 32 Fed. 727; per Brewer, J.; s. c., 33 Fed. 689; Nashville, C. & St. L. Ry. Co. v. Taylor, 86 Fed. 168, 178, 188; Louisville Tr. Co. v. Stone, C. C. A., 107 Fed. 305, 309, 310; Bernstein v. Danwitz, 190 Fed. 604; Central R. Co. of New Jersey v. Jersey City, 199 Fed. 237, 246; Michigan Railroad Tax Cases, 138 Fed. 223; Oregon R. & Navigation Co. v. Campbell, 173 Fed. 957; Larabee v. Dolley, 175 Fed. 365; Risley v. City of Utica, 179 Fed. 875. But see Underground Railroad v. City of New York, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. 494, affirming, s. c., 116 Fed. 952; Mercantile Tr. & Deposit Co. v. Collins Park & Belt R. Co., 107 Fed. 762, 765; People's Gaslight & Coke Co. v. City of Chicago, 114 Fed. 384, holding that where the bill did not show that an ordinance fixing the rate for the price of gas, impaired the obligation of a contract, or took property without due process of law, the court could not consider the question whether the city had the power, under the laws of the State, to enact such an ordinance. Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870; *Cf.* Penn. Mut. L. I. Co. v. Austin, 168 U. S. 685, 695, 42 L. ed. 626, 630; and *infra*. But it has been held, in New York Mackintosh Co. v. Flam, 198 Fed. 571, that where the plaintiff failed to establish a cause of action under the Federal statute concerning trademarks, he could not obtain an injunction because of unfair competition. Similar rulings were made in copyright cases: Larrowe-Loisette v. O'Loughlin, 88 Fed. 896; Scribner v. Straus, C. C. A., 147 Fed. 28. Similar rulings were made in patent cases: Mecky v. Grabowski, 177 Fed. 591; National Casket Co. v. New York & Brooklyn Casket Co., 185 Fed. 533. Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; Leschen Rope Co. v. Broderick, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. ed. 710; Burt v. Smith, C. C. A., 71 Fed. 161, 17 C. C. A. 573; Hutchinson, Pierce & Co. v. Loewy, C. C. A., 163 Fed. 42, 90 C. C. A. 1. *Contra*, Dicta of Ray, J. in Onondaga Indian Wigwam Co. v. Ka-Noo-No. I. Mfg. Co., 182 Fed. 832.

59 Hamblin v. Chicago, B. & Q. R. Co., 43 Fed. 401.

60 Lowry v. Chicago, B. & Q. R. Co., 46 Fed. 88.

§ 25. Suits arising under the Constitution of the United States. A suit arises under the Constitution of the United States when the plaintiff's cause of action depends upon the violation of a right under the same by an individual who does not act under color of any statutory authority;[1] or where the cause of action depends upon the unconstitutionality of an act of Congress;[2] or the repugnancy of a State statute to the Federal Constitution;[3] or, it has been held, where it depends upon a statute, which the defendant contends in good faith to be in violation of the same, and there is ground for a reasonable doubt as to the soundness of the contention,[4] or the complaint shows that the plaintiff's claim would be defeated by a construction of the Federal Constitution, as to which there is room for a reasonable doubt.[5] The pleadings need not state what particular clause of the Constitution is in question.[6] It has been said: that it is not essential to the jurisdiction of a Federal Court over a suit based on an alleged impairment of a contract by a State, that there should be a valid contract, or that the impairment complained of should in fact be effected; but it is sufficient, for jurisdictional purposes, if the plaintiff claims the existence of such contract and its impairment in good faith.[7] Where a bill is filed to enjoin the enforcement of

§ 25. [1] An action to recover damages for preventing plaintiff from exercising the right to vote for a member of Congress is one arising under the Constitution of the United States. Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84; Knight v. Shelton, 134 Fed. 423.

[2] Patton v. Brady, 184 U. S. 608, 46 L. ed. 713.

[3] Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560; Green v. Oemler, 151 Fed. 936.

[4] Railroad Co. v. Mississippi, 102 U. S. 135, 141, 26 L. ed. 96, 98; Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482; Southern Pac. R. R. Co. v. California, 118 U. S. 109, 30 L. ed. 103; Kansas v. Walruff, 26 Fed. 178; Kessinger v. Hinkhouse, 27 Fed. 883; Mahin v. Pfeiffer, 27 Fed. 892; Minnesota v. Duluth & I. R. R. Co., 87 Fed. 497. *Contra*, Kentucky v. Chicago, I. & L. Ry. Co., 123 Fed. 457. To the same effect are: Lemen v. Wagner (Iowa), 68 Iowa, 660, 27 N. W. 814; Judge v. Arlen (Iowa), 71 Iowa, 186, 32 N. W. 326; Dickinson v. Herb Brewing Co. (Iowa), 73 Iowa, 705, 36 N. W. 651; Shear v. Bolinger (Iowa), 74 Iowa, 757, 37 N. W. 164.

[5] Minnesota v. Duluth & I. R. R. Co., 87 Fed. 497.

[6] Crystal Springs Land & Water Co. v. Los Angeles, 76 Fed. 148.

[7] Pacific Electric Co. v. Los Angeles, 118 Fed. 746. But see Risley v. City of Utica, 179 Fed. 875

a municipal ordinance,[8] or resolution of a city council, which has the effect of an ordinance,[9] or to prevent the passage of one,[10] which will violate an existing contract with the complainant; the case arises under the Constitution of the United States; provided that the ordinance is otherwise within the powers of the municipality. A municipal ordinance, not passed in accordance with legislative authority, is not a law of the State; and a suit to enjoin its enforcement does not arise under the Constitution of the United States.[11] Where the complaint averred that the enforcement of the ordinance would deprive the complainant of its property without due process of law and the State constitution contained a prohibition of such deprivation, it was held that the remedy must be first sought in the State courts.[12] It has been said: that under the settled doctrine

[8] Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341; affirming 60 Fed. 957; Mercantile Tr. & D. Co. v. Columbus, 203 U. S. 311, 51 L. ed. 198; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245; Consolidated Water Co. v. San Diego, 84 Fed. 369; Michigan Tel. Co. v. Charlotte, 93 Fed. 11; Consolidated Water Co. v. San Diego, 93 Fed. 849, 35 C. C. A. 631; Iron Mountain R. Co. of Memphis v. Memphis, C. C. A., 96 Fed. 113; Kimball v. City of Cedar Rapids, 99 Fed. 130; Mercantile Trust & Deposit Co. of Baltimore v. Collins Park & B. R. Co., 99 Fed. 812; Anoka Water Works, Electric Light & Power Co. v. City of Anoka, 109 Fed. 580; American Water Works & Guarantee Co. v. Home Water Co., 115 Fed. 171; Riverside & A. Ry. Co. v. Riverside, 118 Fed 736; Des Moines City Ry. Co. v. Des Moines, 151 Fed. 854. But see Bienville Water-Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92; affirming 95 Fed. 539.

[9] Des Moines City Ry. Co. v. Des Moines, 151 Fed. 854.

[10] Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 46 L. ed. 808; s. c., as Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453, 50 L. ed. 1102; Farmers' Loan & Tr. Co. v. Meridian, 139 Fed. 673. But see *infra*, § 79 and note 25, *infra*.

[11] Mayor, etc., of Savannah v. Holst, C. C. A., 132 Fed. 901; reversing 131 Fed. 931; Louisville v. Cumberland Tel. & T. Co., C. C. A., 155 Fed. 725, 12 Ann. Cas. 500; Seattle El. Co. v. Seattle, R. & S. Ry. Co., C. C. A., 185 Fed. 365; City and County of San Francisco v. United Railroads of San Francisco, C. C. A., 190 Fed. 507.

[12] Seattle El. Co. v. Seattle, R. & S. Ry. Co., C. C. A., 185 Fed. 365, 372. See, also, Hamilton Gas Light Co. v. Hamilton City, 146 U. S. 258, 265, 13 Sup. Ct. Rep. 90, 36 L. ed. 963; Barney v. New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737. *Contra*, San Francisco Gas & El. Co. v. City and County of San Francisco, 189 Fed. 943.

that the courts can only deal with the question of the constitutionality of a legislative act after it has been passed, and are without jurisdiction to interfere with proposed or pending legislation, either State or municipal, the action of a city council in adopting the report of a committee finding that the franchise of a street railway company will expire at a certain time, contrary to the contention of the company, and recommending that the council take measures to dispossess the company at the expiration of such time unless there is a previous renewal, does not give a Federal court jurisdiction of a suit to determine the controversy between the company and the city in respect to the terms of the grant, on the ground that it presents a constitutional question as to the impairment of the contract rights of the company.[13] Where, in addition to these facts, it appeared that the receivers of the corporation had received a notice from the superintendent of streets, that all permits issued to the company to work and make repairs upon the streets of the city were to be revoked at a specified time, it was held, that the receivers had a cause of action arising under the Constitution of the United States.[14] The mere refusal of a municipal corporation to perform a contract, even though that refusal is expressed in an ordinance containing a direction that the other party to the contract perform some act which the contract does not require but imposing no penalty for disobedience,[15] does not present a case arising under the Constitution of the United States.[16] In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competitor, the bill alleged that such purchase was *ultra vires* because the Georgia Constitution forbade the legislature to grant such powers to any corporation where its effect might be to lessen or destroy competition. The petition for removal contended that this impaired the obligation of the contract embodied in the company's charter, which was granted before this provision of the Constitution took effect. It was held, that

[13] Elkins v. Chicago, 119 Fed. 957.

[14] Blair v. Chicago, 201 U. S. 400, 405, 50 L. ed. 801.

[15] St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788.

[16] St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788; Dawson v. Columbia Tr. Co., 197 U. S. 178, 49 L. ed. 713; Shawnee Sewerage & Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544. See Defiance Water Co. v. City of Defiance, 191 U. S. 184, 48 L. ed. 140.

this presented a Federal question, although the Supreme Court of Georgia had theretofore decided that the charter did not confer the right claimed.[17] It was held: that in an action by stockholders of a corporation, to set aside a lease executed by it as inconsistent with its charter, illegal and void, no Federal question was involved within the meaning of the removal act, when complainant alleged that the action of the directors in making the lease without the consent of the stockholders was not due process of law, and the defendants relied upon an act of the legislature not mentioned in the bill, which they averred that the plaintiff claimed impaired the obligation of a contract.[18] In an action in the nature of *quo warranto*, brought in the name of the State by her attorney general to prevent a railroad company from controlling certain lands, defendant petitioned for removal, alleging that it acquired ownership in the land under an act of the legislature, and in accordance therewith exercised rights of ownership; that subsequently the act granting the land was repealed; and that such repealing act was a law impairing the obligation of contracts, and depriving persons of property without due process of law. It was held, that the petition showed a case arising under the Constitution of the United States, which was not eliminated by the attorney general's disclaimer of reliance on the repealing act.[19] It was held: that where a railroad corporation set up as a defense that its charter was a grant by the State, giving to the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, that this grant was protected by the Constitution of the United States, and that a subsequent statute of the State upon the subject impaired the validity of such grant in violation of the Constitution, that such defense involved a question arising under the Constitution of the United States, and the case was removable.[20] In a suit in a Federal court raising the question whether the State was attempting to impair the obligation of a contract,

[17] South Carolina v. Port Royal & A. R. Co., 56 Fed. 333.

[18] Central R. Co. of New Jersey v. Mills, 113 U. S. 249, 28 L. ed. 949: affirming Mills v. Central R. Co., 20 Fed. 449.

[19] Illinois v. Illinois Cent. R. Co., 33 Fed. 721. But see § 24, note 56, *supra*.

[20] Illinois v. Chicago, B. & Q. R. Co., 16 Fed. 706. But see *supra*, § 24, notes 26–35.

a decision that this question was *res adjudicata* as against the State does not oust the Federal jurisdiction, on the theory that it makes the case turn on a question not Federal.[21] It was held: that jurisdiction in the Circuit Courts of the United States over cases where any person is sought to be deprived of his rights under the Constitution of the United States, did not authorize a writ of *certiorari* to a State court for the removal of proceedings by the State against a railroad company, under a State statute, entitled "An act to prevent extortion and unjust discrimination in the rates charged the passengers, etc., and to punish the same," where it was insisted by defendant that this act of the State legislature impaired the obligation of the contract which the State had made with the company by its charter.[22] A proceeding by a State to forfeit a franchise cannot be removed to the Federal courts, on the ground that it impairs the obligation of a contract; the prohibition of the Constitution being that "no State shall pass any law impairing the obligation of contracts."[23] Whenever the right or title of either party is grounded upon State legislation which undertakes to transfer to him property belonging to the other without due process of law, there is a controversy as to the operation and effect of the Constitution, to which the Federal jurisdiction attaches.[24] A suit to enjoin an action by or under a State authority within the jurisdiction conferred by a State statute, which action is alleged with some reasonable foundation for the position, to take the complainant's property without due process of law;[25] or to deny him the equal protection of the laws;[26] or, when such action is legislative in its nature, to impair the obligation

21 Stone v. Bank of Kentucky, 174 U. S. 799, 43 L. ed. 1187; affirming Bank of Kentucky v. Stone, 88 Fed. 383.

22 Illinois v. Chicago & A. R. Co., Fed. Cas. No. 7,006 (6 Biss. 107).

23 Kentucky v. Louisville Bridge Co., 42 Fed. 241.

24 Crystal Springs Land & Water Co. v. Los Angeles, 76 Fed. 148.

25 Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443; San Joaquin & King's River Canal & Irrigation Co. v. Stanislaus County, 90 Fed. 516; San Francisco Gas & El. Co. v. City and County of San Francisco, 189 Fed. 943. See Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560.

26 Southern Ry. Co. v. North Carolina Corp. Commission, 97 Fed. 513; St. Louis, I. M. & S. Ry. Co. v. Davis, 132 Fed. 629; Douglas Park Jockey Club v. Grainger, 146 Fed. 414; Michigan Railroad Tax Cases, 138 Fed. 223; Central R. Co. of New Jersey v. Jersey City, 199 Fed. 237, 245. In the last two

of a contract that plaintiff holds,[27] arises under the Constitution of the United States. Such a suit, when there is no color for the contention that the defendants act under a statute of the State, does not;[28] unless perhaps when they act in a quasi-judicial capacity.[29] Trespasses on the property rights of an individual, committed by public officers or agents professedly acting under authority of a State law, but which are not only unauthorized by such law, but by a fair construction thereof are prohibited, cannot be imputed to the State, so as to bring them within the constitutional inhibition to deprive persons of property without due process of law, and therefore do not confer jurisdiction on a Federal court to grant relief.[30] The provisions of the Fourteenth Amendment, securing personal rights, are directed against the States and their agencies, and not against the acts of private individuals, and these give no right of action in the Federal courts on the ground that a constitutional question is involved.[31] A suit arises under the Constitution of the United States when brought to enjoin the enforcement of an order by a State, or county,[32] or municipal,[33] board, which reduces the charges of a corporation employed in a public service so low as to amount to a deprivation of its property without due process of law. The averment, that, if a temporary injunction granted by an inferior State court, which because of the alleged invalidity of a contract between a municipality and a water company restrained the future payment of rentals ac-

cases, a charge was made of a discrimination against the complainants in assessments for taxation.

27 Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341; affirming 60 Fed. 957. And other authorities cited *supra*, note 8.

28 St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315; Barney v. New York, 193 U. S. 430, 48 L. ed. 737; Huntington v. New York, 193 U. S. 441, 48 L. ed. 741; affirming 118 Fed. 683; Kiernan v. Multnomah County, 95 Fed. 849; Arbuckle v. Blackburn, 65 L.R.A. 864, 113 Fed. 616, 51 C. C. A. 122; St. Louis, I. M. & S. Ry. Co. v. Davis, 132 Fed. 629.

29 Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38, 52 L. ed. 78.

30 Barney v. New York, 193 U. S. 430, 48 L. ed. 737; Huntington v. New York, 118 Fed. 683; affirmed 193 U. S. 441, 48 L. ed. 741.

31 Marten v. Holbrook, 157 Fed. 716.

32 San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 90 Fed. 516.

33 Wilmington City Ry. Co. v. Taylor, 198 Fed. 159.

cruing under the same, should ultimately be made perpetual, the company would thereby be deprived of its property without due process of law, does not justify a Federal Circuit Court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the contract.[34] A street railroad company which has acquired a franchise to construct its line has a property right therein of which it cannot be deprived without due process of law, and it has also contract rights which cannot be impaired by the State through subsequent legislation; but, before it can invoke the provisions of the Constitution of the United States for the protection of such rights by a suit in a Federal court, it must show that it has done all the things required under the laws of the State to vest it with the contract and rights which it seeks to protect.[35] The Iowa Code provided, that any building where intoxicating liquors are manufactured, sold, or given away, contrary to law, shall be a nuisance, and may, along with the vessels and their contents, and fixtures, be abated by "an action in equity." The person proceeded against was also made liable to fine and imprisonment. Defendant, in a proceeding under this statute, removed the case to the Federal court on the grounds that, inasmuch as the Supreme Court of the State had declared the law to be valid, he was virtually deprived of his right to a trial by jury, and that he had, prior to the passage of the act, at a large expense established the place sought to be declared a nuisance, and that it may only fit for a saloon and brewery. It was held, that no Federal question was involved, and the case was remanded to the State court.[36] A suit by property owners to enjoin city officials from levying taxes and from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the State Constitution, cannot be maintained in a Federal court, on the theory that the assessment of taxes and other official acts by the defendants, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue is whether the statute en-

[34] Defiance Water Co. v. Defiance, 191 U. S. 184, 48 L. ed. 140.

[35] Underground R. R. v. New York, 116 Fed. 952.

[36] Schmidt v. Cobb, 119 U. S. 286, 30 L. ed. 321 (a divided court).

larging the corporate limits is invalid under the State Constitution, and no Federal question is involved.[37] A complaint which alleges that defendants entered into a conspiracy by unlawful means to deprive plaintiff of his liberty and property, and that they unlawfully, forcibly, and without due process of law caused his arrest and confinement in a State insane asylum, states a cause of action for false imprisonment, not involving any Federal question, and which it is the province of the State, and not the federal courts to redress.[38] It was held: that a bill filed by the State of Illinois in a State court against the Chicago Drainage District, a corporation created by an act of its legislature, to enjoin the defendant, in the prosecution of the work for which it was chartered, from the reduction of the level of the water in the Illinois and Michigan canal, and alleging as grounds for such relief that, by the acts of Congress authorizing the State to construct the canal and granting lands in aid thereof, the State was required forever to maintain such canal as a navigable waterway for the free passage of any property of the United States, and that under the terms of such acts the State could confer no power on the defendant to destroy the same; shows that a Federal question is involved in the suit, which renders it removable.[39] It was held: that a suit which raised questions concerning the validity and construction of State legislation, dividing its territory into congressional districts in pursuance of the apportionment made by Congress, did not arise under the Constitution and laws of the United States.[40] That the State courts have the right to pass upon the title to a State office and to expel the incumbent from the same, because he holds an office under the United States, in violation of the State Constitution.[41] That an action in the nature of *quo warranto*, to determine the title to the office of elector of President and Vice-President of the United States, brought in a State court, is not removable to the Circuit Court of the United States on the ground that the matters in dispute therein arise under the Constitution and laws

[37] McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936; affirming 84 Fed. 726.

[38] Marten v. Holbrook, 157 Fed. 716.

[39] People v. Sanitary Dist. of Chicago, 98 Fed. 150.

[40] Anthony v. Burrow, 129 Fed. 783.

[41] Bishop v. State, 149 Ind. 233, 48 N. E. 1038, 39 L.R.A. 278.

of the United States.[42] Jurisdiction of an action to enjoin the taxation of a bridge by the local authorities as a toll bridge, it being taxed by the State as a part of complainant's railroad, is not conferred upon a Federal court, by an allegation that the bridge was built under authority of an act of Congress, where the right of the State to tax the bridge is conceded, the controversy being as to the method of taxation under the State laws.[43] A mere protest against the payment of a license tax on the ground that the law seeking to impose the same is unconstitutional will not give a Federal court jurisdiction to try and determine the constitutionality of the law.[44] A suit brought in the State court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance and would endanger the health, morals, peace and good order of the community, is not removable to a District Court of the United States as one arising under the Constitution and laws of the United States; since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, such an assumption only demonstrates that the bill cannot be maintained and not that the cause of action arose under the Constitution or laws of the United States.[45]

A suit arises under the Constitution of the United States when brought to enjoin State officers from assessing,[46] for taxation, complainant's property at a higher percentage of its value than that at which other property in the State is assessed, or from collecting taxes so assessed,[47] when the State officers act

[42] State v. Bowen (South Carolina), 8 S. C. (8 Rich.) 382.

[43] St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315.

[44] Corbus v. Alaska Treadwell Gold-Min. Co., 99 Fed. 334.

[45] Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 46 L. ed. 144; reversing 96 Fed. 353.

[46] W. U. Tel. Co. v. Poe, 61 Fed. 449; W. U. Tel. Co. v. Norman, 77 Fed. 13; Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. 168. See C. C. A., 88 Fed. 350.

[47] Third Nat. Bank v. Mylin, 76 Fed. 385. See County of San Mateo v. Southern Pacific R. Co., 13 Fed. 145; where a removal of an action to collect State and county taxes was allowed, because it appeared that, in accordance with the State Constitution, the amount of mortgages thereupon had not been deducted from the property of the

in obedience to a State statute;[48] and even, it has been held, when they do not, but the assessment is made or to be made by a State court of equalization as a *quasi* judicial body, although the State statutes and Constitution require uniformity.[49] Suits arise under the Constitution of the United States, which are brought: to enjoin an assessment that plaintiff alleges was made in violation of his right to an exemption because of the ownership of United States bonds.[50] To enjoin the enforcement of a special assessment for a betterment, made under a rule or system which throws such an unjust burden upon the landowner as to deprive him of property without due process of law.[51] To enjoin the collection of taxes upon shares of stock in a national bank, which are taxed at a higher rate than other moneyed capital within the State, in violation of section 5319 of the Revised Statutes of the United States.[52] To enjoin the collection of taxes on the capital stock of a bank, when it is claimed that the statute under which they were levied impairs the obligation of the contract concerning taxation embodied in the bank's charter.[53]

An issue whether full force and effect had been given to the judgment of a State court has been held not to involve the construction of the Constitution of the United States.[54] The question whether a party to proceedings in a State court continued such after a certain judgment in his favor, and the estate represented by him as administrator became bound by proceedings subsequent to the judgment, is not dependent for solution upon any construction of the Constitution or laws of the United

defendant and other *quasi* public corporations when assessed; although in assessing for taxation other property, the amount of mortgages thereupon was first deducted.

[48] County of San Mateo v. Southern Pacific R. Co., 13 Fed. 145.

[49] Raymond v. Chicago Union Traction Co., 207 U. S. 20, 38, 52 L. ed. 78, 88; Southern Ry. Co. v. North Carolina Corp. Commission, 97 Fed. 513. *Contra*, St. Louis Irr. & S. Ry. Co. v. Davis, 132 Fed. 629.

[50] People's Sav. Bank v. Layman, 134 Fed. 635.

[51] Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443.

[52] Third Nat. Bank v. Mylin, 76 Fed. 385.

[53] Union & Planters' Bank v. Memphis, 111 Fed. 561, 49 C. C. A. 455.

[54] Chicago & A. R. Co. v. Wiggins' Ferry Co., 108 U. S. 18, 27 L. ed. 636; affirming order Wiggins' Ferry Co. v. Chicago & A. R. Co., 11 Fed. 381, 3 McCrary, 609; Merritt v. Am. Steel Barge Co., C. C. A., 75 Fed. 813.

States, so as to give the right of removal to the Federal court.[55] A mortgagee may sue in a court of the United States to prevent contracts pledged by the mortgagor from impairment by State legislation, irrespective of the citizenship of the mortgagor.[56]

§ 26. Suits arising under treaties of the United States. A suit arise under a treaty of the United States when its decision depends upon a construction or the determination of the validity of the same.[1] It was held: that an action by a tribal Indian for false imprisonment under process of a State court, because of the violation of a State law from which he claimed exemption, arose under the laws and treaties of the United States.[2] Otherwise not, although the suit was brought to protect rights which are claimed under such treaty.[3] It was held: that where both parties claimed under Mexican grants, confirmed and patented in accordance with a provision of a treaty, the plaintiff claiming certain water rights thereunder, which the defendant disputed; the suit did not arise under a treaty of the United States.[4] Where a complaint in ejectment against private individuals alleged that plaintiff was ousted in violation of the provisions of the treaty with France, of October 21, 1808, for the protection of the inhabitants of the ceded territory in the enjoyment of their property, it was held that it did not show a case arising under a treaty of the United States, there being no assertion of any right, title, privilege or immunity, derived from such treaty as against the defendants, and no charge that they took possession by direction of the Government of the United States.[5] A suit may be maintained in a District Court of the United States by the consul of Austria and Hungary, to restrain a beneficial association from using the name of the Emperor of Austria and Hungary, as a part of its corporate name, and the use of his portrait as a part of its advertising literature, in order fraudulently to induce his subjects, resident in the United

55 Gibbs v. Crandall, 120 U. S. 105, 30 L. ed. 590.

56 City and County of Denver v. New York Tr. Co., C. C. A., 187 Fed. 890.

§ 26. 1 Muse v. Arlington Hotel Co., 168 U. S. 430, 42 L. ed. 531.

2 Peters v. Malin, 111 Fed. 244.

3 Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199; Muse v. Arlington Hotel Co., 168 U. S. 430, 42 L. ed. 531. See Gill v. Oliver, 11 How. (U. S.) 529, 545, 13 L. ed. 799, 806.

4 Crystal Springs Land & Water Co. v. Los Angeles, 177 U. S. 169, 44 L. ed. 720; affirming 82 Fed. 114.

5 Filhiol v. Maurice, 185 U. S. 108, 46 L. ed. 827.

States, to believe that the association is conducted under the customs of their own country, and that their Emperor is identified with the same and a patron thereof.[6]

§ 27. Suits where the parties are Federal corporations. In general. When either party is a corporation chartered by Congress, the case is one arising under the Constitution and laws of the United States; and except in the case of national banks,[1] a District Court of the United States may take jurisdiction of the same, either originally,[2] or by removal.[3] The court will take judicial notice that a party to the action is incorporated by an act of Congress, although the pleadings are silent upon the subject.[4] It is not the domicile of a corporation created by an act of Congress which confers jurisdiction on the Federal courts of suits to which it is a party, but the fact that it was so created, and that any suit by or against it arises under a law of the United States.[5] It was held, that by the consolidation of a Federal with a State corporation, the former did not lose any of its rights or franchises as such, and was not estopped from removing suits brought against it in the State courts to those of the United States, notwithstanding that the laws of the State in question provided: "If any railroad company, organized under the laws of this State, shall consolidate by sale or otherwise with any railroad company organized under the laws of any other State or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction in all matters which may arise as if

6 Von Thodorovich v. Franz Joseph Beneficial Ass'n, 154 Fed. 911.

§ 27. 1 See *infra*, § 28.

2 Osborn v. U. S. Bank, 9 Wheat. 738, 823, 6 L. ed. 204, 224; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506; U. S. Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470.

3 Pacific R. R. Removal Cases; Union Pac. R. Co. v. Myers, 115 U. S. 1, 29 L. ed. 319; reversing Myers v. Union Pac. Ry. Co., 16 Fed. 292, 3 McCrary, 578; Knights of Pythias v. Kalinski, 163 U. S. 289, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Matter of Dunn, 212 U. S. 374, 53 L. ed. 558; Cruikshank v. Fourth Nat. Bank, 16 Fed. 888, 21 Blatchf. 322; Allen v. Texas & P. R. Co., 25 Fed. 513; Supreme Lodge of Knights of Pythias of the World v. Hill, 76 Fed. 468, 22 C. C. A. 280; Union Pac. R. Co. v. McComb, 58 How. Prac. 478; Texas & P. Ry. Co. v. Watson, 43 S. W. 1060.

4 Matter of Dunn, 212 U. S. 374, 53 L. ed. 558.

5 Supreme Lodge, Knights of Pythias v. England, 94 Fed. 369, 36 C. C. A. 298.

said consolidation had not taken place."[6] When a party is a corporation, which derives its charter from a Territorial statute, that fact does not make the case arise under the laws of the United States,[7] although it was organized in pursuance of the corporation laws of Arkansas under an act of Congress,[8] which directed that they should be enforced in that Territory with the same effect as if enacted in *haec verba*.[9]

[6] Allen v. Texas & P. R. Co., 25 Fed. 513.

[7] Adams Express Co. v. Denver & R. G. R. Co., 16 Fed. 712; Maxwell v. Federal Gold & Copper Co., C. C. A., 155 Fed. 110. An act of Congress provides: that the Oregon Short Line Railway Company, a corporation of the Territory of Wyoming, "is hereby made a railway corporation in the Territories of Utah, Idaho and Wyoming," under the same limitations, and with the same rights that it previously had under its articles of incorporation in Wyoming, and with all the rights and privileges within these Territories secured to railway companies by a previous act of Congress granting to railroads the right of way through public lands. Another act of Congress provides: that the Utah & Northern Railway Company, a corporation organized under the laws of Utah, "is hereby made a railway corporation in the Territories of Utah, Idaho and Montana," under the same limitations, and with the same rights that it then had under its articles of incorporation. It was held on a petition of the Oregon Short Line & Utah Northern Railroad Company, a corporation formed by a consolidation of these two companies: that the statute gave no powers or rights to be exercised outside of the Territories named therein, and therefore did not give such corporations a Federal character; and that petitioner and its several constituent companies were Territorial organizations, and not entitled to a removal to the Federal court of an action brought against it in the Supreme Court, as a suit arising under the laws of the United States. Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048; affirming Skottowe v. Oregon Short Line & U. N. Ry. Co., 22 Or. 430, 30 Pac. 222, 16 L.R.A. 593; approving Conlon v. Oregon Short Line & U. N. Ry. Co., 21 Or. 462, 28 Pac. 501. In an elaborate opinion 32 Wash. Law Rep. 758, 761, Fred Dennet, Esq., of D. C. bar argued: that organizations incorporated under the Code of the District of Columbia (Act of March 3, 1901, amended January 31 and June 30, 1902) have the right to remove suits brought against them. See Lyons v. Bank of Discount, 154 Fed. 391.

[8] 31 St. at L. 794. See Kansas P. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 415, 28 L. ed. 794, 795, 5 Sup. Ct. 208.

[9] Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205; Boyd v. Great Western Coal & Coke Co., 189 Fed. 115. *Contra*, Canary Oil Co. v. Standard Asphalt & Rubber Co., 182 Fed. 663. See Daly v. National Life Ins. Co., 64 Ind. 1; Knights of Pythias v. Kalinski, 163 U. S. 289, 41 L. ed. 163; 16 Sup. Ct. 1047.

If the Federal corporation is actually interested in the controversy,[10] the joinder of another defendant, even if he is the receiver of the other, will not prevent the removal.[11] It was held: that proceedings for the condemnation of a right of way cannot be removed into a Federal court by a Federal corporation joined as a defendant, when it does not appear that such corporation is concerned in the litigation, for in such case the record does not show that the case is one arising under the Constitution and laws of the United States.[12]

§ 28. National banking associations. The Judicial Code provides concerning suits to which national banks are parties, that the District Courts of the United States shall have jurisdiction "of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."[1] This differs from the previous law, which specifically provided: "In

See, also, Harv. Law Review, XXV., pp. 291, 292, 295.

[10] Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co., 160 U. S. 77, 40 L. ed. 346; affirming 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359.

[11] Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co., 160 U. S. 77; affirming 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359; Matter of Dunn, 212 U. S. 374, 53 L. ed. 558; Lund v. Chicago, R. I. & P. Ry. Co., 78 Fed. 385; Martin v. St. Louis Southwestern Ry. Co. of Texas, 134 Fed. 134; Texas & P. Ry. Co. v. Bloom, 85 Tex. 279, 20 S. W. 133. See Fisk v. Union Pac. R. Co., Fed. Cas. No. 4,827 (6 Blatchf. 362); s. c., Fed. Cas. No. 4,828 (8 Blatchf. 243). *Contra*, Scott v. Choctaw, O. & G. R. Co., 112 Fed. 180; Hazard v. Durant, 9 R. I. 602; Texas & P. Ry. Co. v. Huber (Texas), 75 S. W. 547. See also, *supra*, § 24, notes 58, 59, 60, and *infra*, § 35.

[12] Seattle & M. R. Co. v. State, 52 Fed. 594; distinguishing Union Pac. R. Co. v. City of Kansas, 115 U. S. 1, 29 L. ed. 319.

§ 28. [1] § 24, subd. 16, 36 St. at L. 1087.

such cases the Circuit and District Courts shall not have jurisdiction other than such that they would have in cases between individual citizens of the same State."[2] Whether this omission extends the jurisdiction over suits to which national banking associations are parties, has not yet been decided.

Under this former law it was held as follows: This deprives the Federal courts of jurisdiction of a suit by a national bank located in the District of Columbia, unless some other Federal question is involved.[3] The Federal courts have jurisdiction of a suit by a national bank to assert a right protected by the Constitution of the United States,[4] or which it derives from an act of Congress,[5] when the construction of the Constitution or statute is necessarily involved; of a suit for the appointment of a receiver of a national bank;[6] of suits against the agents appointed by the shareholders of national banks in pursuance of the statutes of the United States;[7] of a suit to charge a national bank with liability as a stockholder in another corporation, where the power of the defendant to hold stock is disputed;[8] of a suit by a national bank upon the bond of its cashier, conditioned upon the performance of his duties "according to the law and the by-laws" of the bank,[9] of a suit by a national bank against its officers, to recover the amount of

[2] 25 St. at L. 433, § 4. Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816; affirming Cooper v. Leather Manufacturers' Nat. Bank, 29 Fed. 161; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601; Thomas v. National Bank of D. O. Mills, 106 Fed. 438, 45 C. C. A. 407. A State court can issue the writ of mandamus against the officers and directors in a proper case. In re Tuttle, 170 N. Y. 9. In re Fisher's Estate (Iowa 1905), 102 N. W. 797. See § 5, note 18, *supra*.

[3] Am. Nat. Bank v. Tappan, 174 Fed. 431.

[4] Larabee v. Dolley, 175 Fed. 365, 384.

[5] Ibid.

[6] Snohomish County Bank v. Puget Sound Nat. Bank, 81 Fed. 518; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517. For the jurisdiction of suits by or against such receivers, see *infra*, § 35.

[7] International Trust Co. v. Weeks, 203 U. S. 364, 51 L. ed. 224; Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518; Guarantee Co. of North Dakota v. Hanway, 104 Fed. 369, 44 C. C. A. 312; International Trust Co. v. Weeks, 116 Fed. 898; Weeks v. International Trust Co., 125 Fed. 370, 60 C. C. A. 236; reversing 116 Fed. 898.

[8] California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198.

[9] Walker v. Windsor Nat. Bank, C. C. A., 56 Fed. 76.

loans made in violation of the Revised Statutes of the United States;[10] of a suit by a creditor to recover money loaned to a national bank, where it is alleged that plaintiff was deceived and defrauded by a violation of the acts of Congress;[11] but not, where his pleading makes no reference to such statutes;[12] nor of a suit by a depositor, for false representations in advertisements, statements and reports;[13] of a suit by a creditor of a national bank against a stockholder of the same to enforce a statutory liability created by U. S. R. S. § 5151;[14] of a suit by a stockholder to prevent obedience by the bank to a statute which is obnoxious to the Federal Constitution;[15] of a suit by a stockholder for an accounting by the directors for losses, caused through their disobedience of acts of Congress,[16] of a suit in which there is a question as to the validity of a tax on a shareholder in a national bank.[17] Where all the parties on the other side of the controversy are citizens of a different State from that where the national bank is located, the District Court may have jurisdiction of the case if the residence and value of the subject-matter fulfill the statutory requirements.[18]

29. Patent and copyright cases. Where the bill prays an injunction against the infringement of a patent or copyright, the suit arises under the laws of the United States; although the defendant does not dispute the validity of the patent or copyright; but rests his defense upon a license or other contract giving him a right to use the same,[1] or upon the contention that the complainant, who is a licensee, has forfeited his rights

10 National Bank of Commerce v. Wade, 84 Fed. 10; Abbott v. National Bank of Commerce, 56 P. 376, 20 Wash. 552.

11 Bailey v. Mosher, 63 Fed. 488, 11 C. C. A. 304, 27 U. S. App. 339.

12 Stuart v. Bank of Staplehurst (Nebraska), 78 N. W. 298.

13 Prescott v. Haughey, 65 Fed. 653.

14 Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738.

15 Larabee v. Dolley, 175 Fed. 365, 384.

16 Huff v. Union Nat. Bank, 173 Fed. 333.

17 Richards v. Rock Rapids, 72 Iowa, 77, 33 N. W. 372.

18 Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144; First Nat. Bank v. Forest, 40 Fed. 705.

§ 29. 1 White v. Rankin, 144 U. S. 628, 36 L. ed. 569; Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. ed. 910; reversing 109 Fed. 497, 48 C. C. A. 349; Walter A. Wood H. Co. v. Minneapolis E. H. Co., 61 Fed. 256; Elgin W. P. & P. Co. v. Nichols, C. C. A., 65 Fed. 215; Dunham v. Bent, 72 Fed. 60; Young R. L. N. Co. v. Young L. N. Co., 72 Fed. 62;

under the license, and although other relief is prayed;[2] except when the complaint or defendant's answer clearly shows that the suit is in reality brought to enforce a contract.[3] A bill in equity, filed in a State court, alleged that defendant had asserted to persons intending to purchase boilers from complainant that such boilers were an infringement of defendant's patent, and that defendant had threatened legal proceedings against such intending purchasers. It further alleged that such statements were false; that defendant would not bring suit for infringement, "in order that said statements might be answered and refuted in a court of justice;" and prayed that he might be injoined from making such assertions in the future, and asked damages by reason of such assertions in the past. It was held, that the substantial controversy was as to the infringement of the patent, and that the Federal court had jurisdiction, and the cause was removable.[4] The statute vesting exclusive jurisdiction in the Federal courts of "cases" arising under the patent laws,[5] does not deprive the State courts of power to determine questions arising under the patent laws; for there is a clear distinction between a case and a question, arising under

Atherton Mach. Co. v. Atwood-Morrison Co., C. C. A., 102 Fed. 949; reversing 99 Fed. 113, 43 C. C. A. 72; Victor Talking Mach Co. v. The Fair, C. C. A., 123 Fed. 424; Wooster v. Crane & Co., C. C. A., 147 Fed. 515. But see Silver v. Holt, 84 Fed. 809; McMullen v. Bowers, 102 Fed. 494, 42 C. C. A. 470; Holt v. Silver, 169 Mass. 435, 48 N. E. 837.

[2] Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 46 L. ed. 910; Harrington v. Atlantic & Pacific Tel. Co., 143 Fed. 329; Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., C. C. A., 77 Fed. 288, 294, 25 C. C. A. 267, 35 L.R.A. 728; Rupp & Wittgenfeld Co. v. Elliott, C. C. A., 131 Fed. 730, 65 C. C. A. 544; Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579. But see Cortelyou v. Johnson & Co., 207 U. S. 196, 28 Sup. Ct. 105, 52 L. ed. 167; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 345, 28 Sup. Ct. 722, 52 L. ed. 1086; Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co., C. C. A., Second Ct., 175 Fed. 1019, 99 C. C. A. 664; Am. Graphophone Co. v. Victor Talking Mach. Co., C. C. A., 188 Fed. 428; s. c., 188 Fed. 431.

[3] Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 287, 46 L. ed. 910, 913. See Herzog v. Heyman, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E. 1127; New Marshall Engine Co. v. Marshall Engine Co., 223 U. S. 473, 56 L. ed. 513.

[4] Moyes v. Stirling Co., 71 Fed. 43.

[5] Jud. Code, § 256, 36 St. at L. 1087.

those laws. The former arises when the plaintiff, in his opening pleading, sets up a right under the patent laws as a ground of recovery, and then the State courts have no jurisdiction. The latter may appear in the plea, answer, or testimony, and the State courts are authorized to decide them.[6] It has been said: that a dispute as to the assignability of a license to use a patent arises under the laws of the United States.[7] But suits to determine the title to a patent which are not founded upon Section 4915 of the Revised Statutes of the United States, do not arise under the laws of the United States.[8] All suits which are founded upon Section 4915 of the Revised Statutes arise under the laws of the United States.[9] Suits to compel[10] to set aside[11] the assignment of a patent or copyright,[12] to enforce by a judgment for royalties,[13] or otherwise,[14] or to set aside a contract for the use of a patent or copyright, such as a license,[15] although an injunction against the manufacture of articles covered by the patent is prayed incidentally,[16] do not arise under the laws of the United States, unless the validity of the patents and copyrights are disputed. An action on a judgment obtained

6 Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 42 L. ed. 458; Herzog v. Heyman, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E. 1127.

7 Walter A. Wood Co. v. Minneapolis E. H. Co., 61 Fed. 256.

8 Montgomery P. S. C. Co. v. Street S. C. Line. 43 Fed. 329.

9 Bernardin v. Northall, 77 Fed. 849. See *infra*, § 147.

10 Pliable Shoe Co. v. Bryant, 81 Fed. 521; Merrill v. Miller, 28 Mont. 134, 72 P. 423; New Marshall Engine Co. v. Marshall Engine Co., 223 U. S. 473, 56 L. ed. 513.

11 Harrington v. Atlantic & Pacific Tel. Co., C. C. A., 185 Fed. 493.

12 Hoyt v. Bates, 81 Fed. 641.

13 Albright v. Teass, 106 U. S. 613, 27 L. ed. 295; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46, 31 L. ed. 683; Felix v. Scharnweber, 125 U. S. 54, 31 L. ed. 687; Rhodes v. Ashurst. 176 Ill. 351, 52 N. E. 118; affirming 71 Ill. App. 242. But see St. Paul v. Starling, 127 U. S. 376, 32 L. ed. 251.

14 Marsh v. Nichols S. S. Co., 140 U. S. 344, 35 L. ed. 413. See Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 42 L. ed. 458. See Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579; Beavers v. Spinks (Mississippi), 26 So. 930.

15 Wilson v. Sandford, 10 How. 99, 13 L. ed. 344; Hartell v. Tilghman. 99 U. S. 547. 25 L. ed. 357; Wade v. Lawder, 165 U. S. 624, 41 L. ed. 851; Standard D. Mfg. Co. v. Nat. Tooth Co., 95 Fed. 291; Kurtz v. Strauss, 100 Fed. 800; McMullen v. Bowers, C. C. A., 102 Fed. 494; Kurtz v. Straus, 106 Fed. 414, 45 C. C. A. 366; Cely v. Griffin, 113 Fed. 981.

16 New Marshall Engine Co. v. Marshall Engine Co., 223 U. S. 473, 56 L. ed. 513; Lefkowitz v. Foster Hose Supporter Co., 161 Fed. 367.

in a patent suit for damages and profits, does not arise under the laws of the United States,[17] although the defendants are the directors of an insolvent corporation, who were not parties to the original suit.[18] On a bill in the State court by the equitable assignee of a patent right, under an agreement executed many months before the patent was applied for, against the subsequent assignee of the patent after it was issued, to compel an assignment to complainant, defendant obtained a removal on a petition averring that it was an assignee for a valuable consideration and without notice, and invoking for his protection U. S. R. S. § 4898; the complainant's agreement not having been recorded. It was held, on motion to remand, that Section 4898 was designed for the protection of *bona fide* purchasers, and that the question of the construction, application, and enforcement of this statute in their favor, as against prior equitable assignees, was a Federal question; and the motion was denied.[19]

§ 30. Trademark cases. A suit to enjoin the imitation of a trademark does not arise under the laws of the United States, unless the bill shows that the trademark is duly registered, and that it is used on goods intended to be transported to a foreign country or to be used in lawful trade with an Indian tribe.[1] or is used in trade among the several States.[2] Where the requisite difference of citizenship exists, the District Court may take jurisdiction, either originally or upon removal of a bill to enjoin the infringement of any trademark, whether registered or not.[3] A suit to restrain unfair competition and trade, where the complainant seeks no protection for a registered trademark, does not present a Federal question.[4]

17 H. C. Cook Co. v. Beecher, 217 U. S. 497, 54 L. ed. 855; affirming 172 Fed. 166.

18 Ibid.

19 American Solid Leather Button Co. v. Empire State Nail Co., 47 Fed. 741.

§ 30. 1 Trademark Cases, 100 U. S. 82, 25 L. ed. 550; Ryder v. Holt, 128 U. S. 525, 32 L. ed. 529; Hutchinson, Pierce & Co. v. Loewy, 217 U. S. 457, 54 L. ed. 838; Bernstein v. Danwitz, 190 Fed. 604; Allen B. Wrisley Co. v. George E. Rouse S. Co., C. C. A., 90 Fed. 5, dismissing appeal 87 Fed. 589; Warner v. Searle & Hereth Co., 191 U. S. 195, 48 L. ed. 145. See §§ 148, 149, 279, *infra*.

2 Bernstein v. Danwitz, 190 Fed. 604.

3 Edison v. Thomas A. Edison, Jr., Chemical Co., 128 Fed. 1013.

4 Burt v. Smith, C. C. A., 71 Fed.

§ 31. Land and mining cases. Where the plaintiff's pleadings show that the decision of the case depends upon the construction of the land or mining laws, the suit arises under the laws of the United States; and if the matter in dispute exceeds the jurisdictional amount, a District Court of the United States may take jurisdiction of the same, either originally,[1] or upon removal.[2] It seems: that this is always the case where the complaint shows that the validity of a land or mining patent is in dispute.[3] An action of ejectment,[4] or of trespass,[5] or a bill to quiet title,[6] where the plaintiff rests his title upon a land or mining patent of the United States, the validity of which defendant does not dispute; does not so arise. Nor does a suit to set aside a land patent solely on account of fraud;[7] nor a suit by a home-

161; Allen B. Wrisley Co. v. George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496; dismissing appeal 87 Fed. 589; Illinois Watch Co. v. Elgin Nat. W. Co., C. C. A., 94 Fed. 667; s. c., 179 U. S. 665, 677, 45 L. ed. 365, 382; A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 134 Fed. 571, 67 C. C. A. 418.

§ 31. [1] Florida Cent. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486; Northern Pac. Ry. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575; affirming 104 Fed. 425, 43 C. C. A. 620; Cheesman v. Shreve, 37 Fed. 36; Jones v. Florida C. & P. R. Co., 41 Fed. 70; Pierce v. Molliken, 78 Fed. 196; Evans v. Durango Land & Coal Co., 80 Fed. 433, 25 C. C. A. 531; Gillis v. Downey, C. C. A., 85 Fed. 483; Florida C. & P. R. Co. v. Bell, C. C. A., 87 Fed. 369; Linkswiler v. Schneider, 95 Fed. 203; Nevada Sierra Oil Co. v. Miller, 97 Fed. 681; Wallula Pac. Ry. Co. v. Portland & S. Ry. Co., 154 Fed. 902.

[2] Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442; Spokane Falls & No. Ry. Co. v. Ziegler, 167 U. S. 65, 42 L. ed. 79; Miller v. Wattier, 24 Fed. 49; Dunton v. Muth, 45 Fed. 390; Walker v. Richards, 55 Fed. 129; Southern Pac. R. Co. v. Townsend, 62 Fed. 161; McCune v. Essig, C. C. A., 122 Fed. 588; affirming 118 Fed. 273.

[3] Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442; Florida Cent. & P. R. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486; Pierce v. Molliken, 78 Fed. 196; McCune v. Essig, C. C. A., 122 Fed. 588; affirming 118 Fed. 273.

[4] Bonin v. Gulf Company, 198 U. S. 115, 49 L. ed. 970; Los Angeles Farming & Milling Co. v. Hoff, 48 Fed. 340; Washington v. Island Lime Co., 117 Fed. 777.

[5] In re Helena & L. Smelting & Reduction Co., 48 Fed. 609; Argonaut Min. Co. v. Kennedy Mining & Milling Co., 84 Fed. 1; Peabody Gold-Min. Co. v. Gold Hill Min. Co., 97 Fed. 657.

[6] Hoadley v. City and County of San Francisco, 94 U. S. 4, 24 L. ed. 34.

[7] Holland v. Hyde, 41 Fed. 897. *Contra*, where the bill also alleged that the patent had been issued without a compliance with the statute as to notice or proofs, and with-

stead entryman to secure his protection, while making the improvements required by the acts of Congress, from interference by parties who claim the land under the Town Site Act, but whose claims have been rejected by the Secretary of the Interior;[8] nor a suit by any entryman to protect his improvements and claim from waste and trespass by a defendant, who claims no right under a statute of the United States.[9] Nor a suit in support of an adverse claim to land or mining patent under U. S. R. S. § 2326; unless its decision turns upon a disputed construction of the Federal Constitution, a treaty, or a Federal statute.[10] Where prior decisions have so defeated the rights of the parties that they are removed from controversy, it cannot be said that the construction of the statute is disputed.[11] The questions of fact: as to what is a "vein," "lode," or "ledge," and as to what is the top or apex of a vein or lode within the meaning of Sections 2320, 2322 and 2325 of the Revised Statutes of the United States;[12] and as to what are the boundaries mentioned in a mining patent or land grant;[13] or the boundaries of a State as prescribed by the act of Congress admitting it to the Union, when the construction of the statute is not in question,[14] or, it

out authority at law. Cates v. Producers' & Consumers' Oil Co., 96 Fed. 7.

[8] Blackburn v. Portland G. M. Co., 175 U. S. 571, 44 L. ed. 276; Shoshone M. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864; Butler v. Shafer, 67 Fed. 161; King v. Lawson, 84 Fed. 209. But see Jones v. Florida, C. & P. R. Co., 41 Fed. 70.

[9] Blackburn v. Portland G. M. Co., 175 U. S. 571, 44 L. ed. 276; Shoshone M. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864; Larned v. Jenkins, 109 Fed. 100, 48 C. C. A. 252. These cases overruled a number of previous decisions of the Circuit Courts to the contrary.

[10] McGilvra v. Ross, 215 U. S. 70, 54 L. ed. 95. See Columbia Valley R. Co. v. Portland & S. Ry. Co., C. C. A., 162 Fed. 603, where the construction of a statute was involved

[11] Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030; Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 585, 44 L. ed. 276, 282; Blue Bird Min. Co. v. Largey, 49 Fed. 289; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., C. C. A., 85 Fed. 867.

[12] Colorado Central Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030; Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 585, 44 L. ed. 276, 282; Blue Bird Min. Co. v. Largey, 49 Fed. 289.

[13] Robinson v. Anderson, 121 U. S. 522; Los Angeles Farming & Milling Co. v. Hoff, 48 Fed. 340; Joy v. St. Louis, 122 Fed. 524. *Contra*, Green v. Valley, 101 Fed. 882.

[14] Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776. But see Moore v. McGuire, 205 U. S. 214, 51 L. ed. 776.

has been held, as to the priority of the location;[15] do not involve Federal questions. Questions as to what are the rights recognized by the local laws, rules, regulations, customs and decisions, which the statutes of the United States direct shall be enforced, do not, it has been held, arise under the Constitution and laws of the United States.[16] An allegation in a declaration of ejectment, that the plaintiff was ousted in violation of a specified treaty and of the Fifth Amendment to the Federal Constitution, is insufficient to support the jurisdiction.[17] Where the complaint charged a continuing trespass, demanding a lump sum as damages, the plaintiff claiming under a series of titles to the same land, the adjudication of one of which alone involved a Federal question, it was held, that the whole case might be removed.[18] It has been said: that where the complaint shows that the controversy arises under the land laws of the United States, a court of equity may entertain and determine all incidental questions between the respective parties arising out of their conflicting claims and may grant an injunction and appoint a receiver.[19]

§ 32. Cases arising under the laws relating to navigable waters. It has been held: that cases arise under the Constitution and laws of the United States, where the plaintiff by his complaint asserts a right under the Federal Constitution and certain acts of Congress, to maintain a dock on a navigable stream;[1] where a suit is brought to enjoin an obstruction upon a navigable stream, such as a bridge,[2] or a log boom,[3] and the

15 Wise v. Nixon, 76 Fed. 3; Dewey Min. Co. v. Miller, 96 Fed. 1; Peabody Gold Min. Co. v Gold Hill Min. Co., 97 Fed. 657. *Contra*, Nevada Sierra Oil Co. v. Miller, 97 Fed. 681.

16 Trafton v. Nougues, Fed. Cas. No. 14,134 (4 Sawyer, 178); Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co., 175 U. S. 639, 44 L. ed. 305; dismissing appeal 51 Pac. 146, 16 Utah, 125.

17 Filhiol v. Maurice, 185 U. S. 108, 46 L. ed. 827.

18 Evans v. Durango Land & Coal Co., 80 Fed. 433, 25 C. C. A. 531.

19 Nevada Sierra Oil Co. v. Miller, 97 Fed. 681.

§ 32. 1 Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525; Calumet Grain & Elevator Co. v. Chicago, 188 U. S. 431, 47 L. ed. 532; Kenyon v. Squire, 1 Wash. St. 9, 24 Pac. 28.

2 New Orleans M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96; E. A. Chatfield Co. v. New Haven, 110 Fed. 788.

3 U. S. v. Bellingham Bay Boom Co., 176 U. S. 211, 44 L. ed. 437; reversing 81 Fed. 658, 26 C. C. A. 547.

plaintiff claims that the same is forbidden by an act of Congress,[4] or by a Federal official acting under lawful authority,[5] or where the court takes judicial notice of an act of Congress under which the defendant contends that the obstruction is authorized;[6] where the plaintiff claims the right to accretions along a river front under letters patent of the United States, issued in pursuance of an act of Congress and the construction of the act under which the patent was issued is in question;[7] but that the defendants cannot obtain a writ of error to review a judgment of a State court granting an injunction against their interference with the plaintiff's possession of lands claimed in the complaint under an act of Congress, when the defense is that they had acquired by priority of possession rights to the use of the water which have vested and accrued, are recognized and acknowledged by the local customs, laws and decisions as provided in § 2339 of the Revised Statutes of the United States.[8]

§ 33. Suits on judicial and official bonds. Actions upon bonds required by the orders of the Federal courts, such as *supersedeas* bonds,[1] injunction bonds,[2] or bonds in support of attachments by the Federal courts,[3] receivers' bonds,[4] and suits upon the bonds of deputy collectors,[5] United States marshals,[6]

[4] U. S. v. Bellingham Bay Boom Co., 176 U. S. 211, 44 L. ed. 437; reversing 81 Fed. 658, 26 C. C. A. 547; where the statute permitted such a suit, when the obstruction was not affirmatively authorized by law, whether State or Federal, and the only question for consideration was whether the obstruction was authorized by a State statute.

[6] E. A. Chatfield Co. v. New Haven, 110 Fed. 788.

[6] New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96.

[7] King v. St. Louis, 98 Fed. 641.

[8] Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co., 175 U. S. 639, 44 L. ed. 305; dismissing appeal 51 Pac. 146, 16 Utah, 125; In re Helena & L. Smelting & Reduction Co., 48 Fed. 609.

§ 33. [1] Crane v. Buckley, 105 Fed. 401.

[2] Lamb v. Ewing, C. C. A., 54 Fed. 269; Leslie v. Brown, 90 Fed. 171, 32 C. C. A. 556.

[3] Files v. Davis, 118 Fed. 465.

[4] United States v. Douglas, 113 N. C. 190, 18 S. E. 202.

[5] Crawford v. Johnson, Fed. Cas. No. 3,369 (Deady, 457); Orner v. Saunders, Fed. Cas. No. 10,584 (3 Dill. 284).

[6] Feibelman v. Packard, 109 U. S. 421, 27 L. ed. 984; Bachrack v. Norton, 132 U. S. 337, 33 L. ed. 377; Lawrence v. Norton, 13 Fed. 1, 4 Woods, 383; McKee v. Brooks, 64 Tex. 255. *Contra*, Phillips v. Edelstein, (Texas), 2 Willson, Civ. Cas.

cashiers of national banks,[7] clerks of Federal courts,[8] and other Federal officers,[9] arise under the laws of the United States. Suits by material men upon the bonds of contractors with the Federal government arise under the Constitution and laws of the United States.[10] A suit on the bond of a clerk of a court of the United States which depends upon the scope and effect of the bond and the meaning of the statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which a District Court has original jurisdiction without diversity of citizenship.[11] A District Court of the United States has jurisdiction of a suit brought by a trustee in bankruptcy, to enforce the bond of his predecessor.[12]

§ 34. Suits by and against officers of the United States. Suits brought by officers of the United States in the exercise of their official functions arise under the laws of the United States and are removable.[1] It was held: that an action by a United States marshal against his deputy, to recover according to contract a part of fees collected, is not removable.[2] Suits against officers of the United States for acts done by virtue, or under color, of their office, arise under the laws of the United States and may be removed.[3] Thus, a suit against a marshal of the

Ct. App. § 449; where the suit was brought for the wrongful seizure of property under a writ of attachment.

[7] Walker v. Windsor Nat. Bank, C. C. A., 56 Fed. 76.

[8] Howard v. U. S., 184 U. S. 676, 46 L. ed. 754; affirming 102 Fed. 77, 42 C. C. A. 169.

[9] U. S. v. Belknap, 73 Fed. 19; an Indian agent.

[10] U. S. Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 51 L. ed. 516; U. S. v. Churchyard, 132 Fed. 82; U. S. ex rel. Giant Powder Co. v. Axman, 152 Fed. 816. *Contra*, U. S. v. Henderlong, 102 Fed. 2; U. S. v. Sheridan, 119 Fed. 236; U. S. v. O'Brien, 120 Fed. 446, 448; U. S. v. Barrett, 135 Fed. 189; Burrell v. U. S., C. C. A., 147 Fed. 44, 46.

[11] Howard v. U. S., 184 U. S. 676, 46 L. ed. 754; affirming 102 Fed. 77, 42 C. C. A. 169.

[12] U. S. ex rel. Schauffler v. Union Surety & Guaranty Co., 118 Fed. 482.

§ 34. [1] Johnson v. Rankin (Texas), 95 S. W. 665.

[2] Setzer v. Douglass, 91 N. C. 426; Hildebrand v. Douglass, 91 N. C. 430.

[3] Cleveland, C. C. & I. R. Co. v. McClung, 119 U. S. 454, 30 L. ed. 465; affirming 15 Fed. 905; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314; Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. ed. 492; Auten v. U. S. Nat. Bank, 174 U. S. 125, 141, 43 L. ed. 920, 926; Van Zandt v. Maxwell, Fed. Cas. No. 16,884 (2 Blatchf. 421); Warner v. Fowler, Fed. Cas. No. 17,182 (4 Blatchf. 311); Ellis

United States for an abuse of Federal process against the defendant to the writ,[4] or for levying under a writ upon property claimed by a stranger to the suit, but which the marshal claims belongs to the defendant to the writ,[5] arises under the laws of the United States, and is removable; at least when the plaintiff's initial pleading shows that the defendant's acts, of which complaint is made, were done in his official capacity.[6] Where this did not appear in the plaintiff's pleading, it was held, that the action was not removable.[7] But a suit against a marshal for a levy upon goods which he does not claim to be the property of the person named in the writ, is not removable.[8] It was held: that an action by a deputy marshal against his principal, for fees due him, is not removable.[9] The fact that a private individual is made a co-defendant with the marshal in the suit does not divest the court of jurisdiction.[10] It was held, that an action against private individuals, for wrongfully causing a United States marshal to levy execution on plaintiff's chattels, is a case arising under the laws of the United States and may be removed.[11] Suits against receivers of national banks and receivers appointed by the Federal courts are considered in the following sections. An action by or against the agent of the shareholders appointed to take charge of the assets of a national bank, arises under the laws of the United States.[12]

v. Norton, 16 Fed. 4, 4 Woods, 399; Front St. Cable Ry. Co. v. Drake, 65 Fed. 539; Drake v. Paulhamus, C. C. A., 66 Fed. 895; Wood v. Drake, 70 Fed. 881; Galatin v. Sherman, 77 Fed. 337; Eighmy v. Poucher, 83 Fed. 855; Woods v. Root, C. C. A., 123 Fed. 402.

[4] Front St. Cable Ry. Co. v. Drake, 65 Fed. 539; Wood v. Drake, 70 Fed. 881.

[5] Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314; affirming 28 Fed. 123; Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. ed. 492; Ellis v. Norton, 16 Fed. 4, 4 Woods, 399; Drake v. Paulhamus, C. C. A., 66 Fed. 895.

[6] Walker v. Coleman, 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254. *Contra*, Ellis v. Norton, 16 Fed. 4, 4 Woods, 399, Wood v. Drake, 70 Fed. 881; Howard v. Stewart, 34 Neb. 765, 52 N. W. 714.

[7] Rothschild v. Matthews, 22 Fed. 6.

[8] Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; Kelsey v. Dallon, Fed. Cas. No. 7,678; McKee v. Coffin, 66 Tex. 304, 1 S. W. 276.

[9] Upham v. Scoville, 40 Ark. 170.

[10] Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. ed. 492; But see Wardens, etc. of St. Luke's Church v. Sowles, 51 Fed. 609; Frank v. Leopold & Feron Co., 169 Fed. 922; *infra*, § 35, *supra*, § 24, note 54.

[11] Hurst v. Cobb, 61 Fed. 1.

[12] Barron v. McKinnon, 179 Fed. 759.

§ 35. Suits by and against receivers of national banks. A suit by the receiver of a national bank, appointed by the Comptroller of the Currency, arises under the laws of the United States, and may be removed by the defendant when it involves the jurisdictional amount.[1] A suit against a receiver of a national bank, similarly appointed, arises under the laws of the United States and may be removed;[2] but not unless the matter in dispute exceeds the statutory limit;[3] nor, it has been said, when the receiver is not a necessary, although he is a proper, party to the action.[4] The receiver of a national bank cannot intervene and remove a suit instituted against the bank before his appointment, unless the bank might have removed the case.[5] A bill against such a receiver of a national bank and an executor to recover a legacy, where some of the decedent's assets were deposited in the bank, was dismissed as not arising under the laws of the United States.[6]

§ 36. Suits by and against receivers of Federal corporations. Where either party to a suit is a receiver of a corporation created by an act of Congress, the suit arises under the laws of the United States.[1] It has been held: that the same rule applies

§ 35. [1] Johnson v. Rankin (Texas), 95 S. W. 665. See Armstrong v. Ettlesohn, 36 Fed. 209; Armstrong v. Trautman, 36 Fed. 275; McConville v. Gilmour, 1 L.R.A. 498, 36 Fed. 277; Stephens v. Bernays, 44 Fed. 642; Yardley v. Dickson, 47 Fed. 835; Fisher v. Yoder, 53 Fed. 565; Short v. Hepburn, 75 Fed. 113, 21 C. C. A. 252; Thompson v. German Ins. Co., 76 Fed. 892; McCartney v. Earle, C. C. A., 115 Fed. 462.

[2] Hot Springs Independent School Dist. No. 10 of Fall River County v. First Nat. Bank, 61 Fed. 417; Auburn Sav. Bank v. Hayes, 61 Fed. 911; Gilbert v. McNulta, 96 Fed. 83. See Merrill v. Nat. Bank of Jacksonville, 173 U. S. 131, 43 L. ed. 640; Auten v. U. S. Nat Bank, 174 U. S. 125, 43 L. ed. 920; Witters v. Sowles, 42 Fed. 701; Bartley v. Hayden, 74 Fed. 913; McDonald v. State of Nebraska, 101 Fed. 171, 41 C. C. A. 278. *Contra*, Bird v. Cockrem, Fed. Cas. No. 1,429 (2 Woods, 32); Tehan v. First Nat. Bank, 39 Fed. 577.

[3] Follett v. Tillinghast, 82 Fed. 241.

[4] Speckert v. German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682.

[5] Wichita Nat. Bank v. Smith, 72 Fed. 568, 19 C. C. A. 42, 36 U. S. App. 530; writ of error dismissed, Smith v. Wichita Nat. Bank, 42 L. ed. 1214; Speckert v. German Nat. Bank, C. C. A., 98 Fed. 151; reversing 85 Fed. 12.

[6] Wardens, etc., St. Luke's Church v. Sowles, 51 Fed. 609. But see *supra*, § 34.

§ 36. [1] Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

to receivers, appointed by the Comptroller of the Currency, of the assets of banking or trust companies organized under the laws of any of the United States, which have an office or banking house for the receipt of deposits or savings within the District of Columbia.[2]

§ 37. Suits by and against receivers of Federal courts. A suit by a receiver appointed by a Federal court, which is brought to enforce a cause of action vested before his appointment in the corporation which he represents, does not ordinarily arise under the laws of the United States; and consequently, it cannot be removed where the requisite difference of citizenship does not exist.[1] Such a suit may, however, be begun in a Circuit Court of the United States originally, because it is ancillary to that in which the receiver was appointed.[2]

Where, however, the validity of the order or decree of a Federal court appointing a receiver, or the construction of such an order or decree, is in question, the suit arises under the laws of the United States, whether the receiver is a plaintiff,[3] or defendant.[4] Otherwise it seems that it does not.[5] It has been held: that the court will take judicial notice of the fact that a defend-

2 Lyons v. Bank of Discount, 154 Fed. 391. See 34 St. at L. 458.

§ 37. 1 Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 43 L. ed. 814; Pepper v. Rogers, 128 Fed. 987.

2 White v. Ewing, 159 U. S. 36, 40 L. ed. 67; Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 43 L. ed. 814; Bowman v. Harris, 95 Fed. 917; Connor v. Alligator L. Co., 98 Fed. 155; Alexander v. So. Home Bldg. & L. Ass'n, 120 Fed. 963; Hampton Roads Ry. & El. Co. v. Newport News & O. P. Ry. & El. Co., 131 Fed. 534; Gunby v. Armstrong, C. C. A., 133 Fed. 417. So when he is an ancillary receiver. Brookfield v. Hecker, 118 Fed. 942.

3 Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 581, 43 L. ed. 814, 818.

4 Board of Com'rs v. Peirce, 90 Fed. 764; for an injunction; Shinney v. North Am. Savings, L. & Bldg. Co., 97 Fed. 9; to determine the right to assets claimed by a receiver; State v. Frost, 113 Wis. 623, 89 N. W. 915; for an injunction.

5 So held of actions against receivers to recover damages for their negligence or that of their employees. Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633; Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 579, 43 L. ed. 814, 817; Gableman v. P., D. & E. Ry. Co., 179 U. S. 335, 45 L. ed. 220. (These cases overruled a number of decisions of the lower courts to the contrary.) Ray v. Peirce, 81 Fed. 881; Pitkin v. Cowen, 91 Fed. 599; Gableman v. Peoria, D. & E. Ry. Co., 101 Fed. 1, 41 C. C. A. 160; Echols v. Smith (Kentucky), 42 S. W. 538.

For damage caused through his

ant is a receiver; although there is no allegation to that effect in the plaintiff's pleading;[6] and that the joinder of other defendants with a receiver will not deprive him of a right of removal to which he would have been entitled had he been sued alone.[7]

§ 38. Suits by and against trustees in bankruptcy. The bankruptcy law provides: that "the Circuit Courts of the United States shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."[1] It has been held: that in a suit between the trustees of a bankrupt and another, when the requisite difference of citizenship exists between the bankrupt and such other party, and the matter in dispute exceeds the jurisdictional amount; the suit may be removed by the defendant, whether the suit is brought by,[2] or against, the trustee.[3] The effect of the new Judicial Code upon this section of the Bankruptcy Law has not yet been decided.

§ 39. Suits arising out of litigation in the Federal courts. It has been held: that the following cases, arising out of litigation in the Federal court arise under the Constitution and laws of the United States, and may be removed when the matter in dispute exceeds the jurisdictional amount: a suit where the

malicious conduct in carrying on the business of the receivership. Rural Home Telephone Co. v. Powers, 176 Fed. 986. For the cancellation of notes and bonds which the plaintiff had executed to the receivers under duress and fraud and for an injunction against the negotiation of the same, praying, in the alternative, a recovery of damages and the impression of a trust upon the property in the receivers' hands. Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co., 180 Fed. 586. And for a vacation of the franchise of the corporation over whose property the receiver was appointed. People v. Bleecker St. & F. F. R. Co., 178 Fed. 156. See, also, Dale v. Smith, 182 Fed. 360; Vanderbilt v. Kerr, 188 Fed. 537.

[6] Pitkin v. Cowen, 91 Fed. 599.

[7] Landers v. Felton, 73 Fed. 311. *Contra.* Shearing v. Trumbull, 75 Fed. 33; Marrs v. Felton, 102 Fed. 775; Rupp v. Wheeling & L. E. R. Co., 121 Fed. 825, 58 C. C. A. 161.

§ 38. [1] 30 St. at L. § 23. p. 552.

[2] Corbitt v. President, etc., of Farmers' Bank of Delaware, 113 Fed. 417.

[3] Bush v. Elliott, 202 U. S. 477, 50 L. ed. 1114.

plaintiff's pleading shows that he contests the validity of a writ, order, judgment, or decree of a Federal court;[1] a suit for malicious prosecution, or false imprisonment, upon a charge of a violation of a law of the United States;[2] and a suit where there is a dispute as to how far a State statute, concerning liens upon land, applies to a judgment of a court of the United States.[3] It has been held: that the purchaser at a Federal foreclosure sale, which had assumed as part of the price all liabilities incurred by the receivers, was not entitled to remove a suit to enforce such liability.[4] It has been said: that the construction of orders and decrees of a Federal court, according to their true meaning, does not involve a Federal question.[5] It has been held: that the following cases do not arise under the laws of the United States: a suit upon a judgment recovered in a court of the United States;[6] a suit in which either party claims title under a sale made under the order, judgment, or decree of a Federal court, when the validity and construction of that order, judgment or decree is not in question;[7] a bill by a discharged bankrupt, to enjoin a levy under a judgment previous to his discharge, upon land which the court has set apart to him as exempt under the State homestead laws;[8] an action by an attorney for damages caused by his disbarment by a State court, because of language spoken in a court of the United States.[9] It

§ 39. [1] Connor v. Scott, Fed. Cas. No. 3,119, 4 Dillon, 242; to enforce a vendor's lien, where it appeared that the defendant claimed the land through the deed of an assignee in bankruptcy, the validity of which plaintiff disputed; First Nat. Bank v. Society for Savings, 80 Fed. 581, 25 C. C. A. 466; for an injunction against a tax levy ordered by the mandamus of a Federal court. See Houser v. Clayton, Fed. Cas. No. 6,739 (3 Woods, 273); Johnson v. New Orleans Nat. Banking Ass'n (Louisiana), 33 La. Ann. 479

[2] Ma-ka-ta-wah-qua-twa v. Rebok, 111 Fed. 12.

[3] Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209; Sowles v. Witters, 46 Fed. 497.

[4] Reed v. Northern Pac. Ry. Co., 86 Fed. 817. But see Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385; and *infra*, § 51.

[5] United States v. Douglas, 113 N. C. 190, 18 S. E. 202.

[6] Provident Savings Society v. Ford, 114 U. S. 635, 29 L. ed. 261; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543.

[7] Carson v. Dunham, 121 U. S. 421, 30 L. ed. 992; Gay v. Lyons, Fed. Cas. No. 5,281, 3 Woods, 56.

[8] King v. Neill, 26 Fed. 721.

[9] Green v. Rogers, 56 Fed. 220; Green v. Elbert, 63 Fed. 308.

has been further held: that a case does not arise under the laws of the United States simply because a Federal court has decided in another suit the questions of law which were involved;[10] and that an issue, whether full force and effect had been given to the judgment of a State court, does not involve the construction of the Constitution of the United States.[11] It was held: that a suit arises under the laws of the United States, when brought against a private person for wrongfully causing a marshal to levy a Federal execution upon the plaintiff's property, which the defendant claimed to belong to the judgment debtor.[12] The Circuit Courts of the United States have also ancillary jurisdiction over many cases connected with litigation previously brought there. This subject is considered later.[13]

§ 40. Controversies between citizens of different States. In general. A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from every party upon the other.[1] The citizenship of formal parties, with no real interest in the controversy, does not affect the jurisdiction.[2] In certain cases, the joinder of improper parties, plaintiff or defendant, will not prevent a removal.[3] In determining between whom the controversy exists, the court is not bound by the title of the case or the form of the proceedings; but should examine the record, ascertain the matter in dispute and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be.[4] A controversy exists when-

10 Leather Manufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816; affirming order Cooper v. Leather Manufacturers' Nat. Bank, 29 Fed. 161; Berger v. Douglas County Com'rs, 5 Fed. 23, 2 McCrary, 483.

11 Merritt v. Am. Steel Barge Co., C. C. A., 75 Fed. 813.

12 Hurst v. Cobb 61 Fed. 1.

13 *Infra*, § 51.

§ 40. 1 Blake v. McKim, 103 U. S. 336, 26 L. ed. 563.

2 Removal Cases, 100 U. S. 457, 25 L. ed. 593; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Harter v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822; Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Taylor v. Holmes, 14 Fed. 499; New Chester Water Co. v. Holly Mfg. Co., C. C. A., 53 Fed. 19, 26; *infra*, §§ 104, 118; see Chapter on Removal of Causes. But see Blackburn v. Portland G. M. Co., 175 U. S. 571, 44 L. ed. 276; Pittsburg, C. & St. L. Ry. Co. v. B. & O. R. Co., C. C. A., 61 Fed. 705. *Infra*, § 42.

3 See Chapter on Removal of Causes, *infra*.

4 Removal Cases, 100 U. S. 457,

ever there is a justiciable demand, although the defendant does not resist the relief sought; and, at least, in the absence of fraud, even if he has requested the plaintiff to institute the suit.[5]

There is no jurisdiction, because of difference of citizenship, when any one of the necessary, and not formal, parties is a citizen of the District of Columbia,[6] or a citizen of a Territory;[7] even if other parties to the controversy, on the same side as such citizen of the district or Territory, are citizens of different States from that of the plaintiff;[8] but formerly a resident of the District of Columbia might, in a proper case, maintain a crossbill in a suit where the jurisdiction was founded upon there being a controversy between citizens of different States.[9]

It has been said that a person who changes his permanent residence to a foreign country, although he still remains a citizen of the United States, ceases to be a citizen of a State who can be sued in a Federal court, where the jurisdiction is founded upon a difference of citizenship;[10] but a better statement of the rule seemed to be that she cannot then be sued there upon that ground, when served in the State of her former domicile.

A change of citizenship after the jurisdiction has once attached will not divest it,[11] even, it was held, in case of a change

468, 25 L. ed. 593, 597; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Carson v. Hyatt, 118 U. S. 279, 286, 30 L. ed. 167, 169; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70; Anderson v. Bowers, 40 Fed. 708; Brown v. Murray Nelson & Co., 43 Fed. 614; Mangels v. Donau Br. Co., 53 Fed. 513; Cilley v. Patten, 62 Fed. 498; Board of Trustees v. Blair, 70 Fed. 414; *infra*, § 43. But see Reavis v. Reavis, 98 Fed. 145.

5 Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

6 Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332; Wescott v. Fairfield, Pet. C. C. 45; Barney v. Baltimore, 1 Hughes, 118; Cameron v. Hodges, 127 U. S. 322, 32 L. ed. 132; Hooe v. Jamieson, 166 U. S. 395, 41 L. ed. 1049.

7 New Orleans v. Winter, 1 Wheaton, 91, 4 L. ed. 44; Cameron v. Hodges, 127 U. S. 322, 32 L. ed. 132; Snead v. Sellers, C. C. A., 66 Fed. 371; McClelland v. McKane, 154 Fed. 164.

8 Watson v. Bonfils, C. C. A., 116 Fed. 157.

9 Ulman v. Jaeger's Adm'r, 155 Fed. 1011.

10 Hammerstein v. Lyne, 200 Fed. 165, 172. See *infra*, § 46.

11 Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. ed. 242; Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154; Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078; Tug River Coal & Salt Co. v. Brigel, C. C. A., 86 Fed. 818; Haracovic v.

of citizenship made before an amended bill was filed.[12] The subsequent consolidation of a foreign with a domestic corporation will not defeat the jurisdiction.[13] When at the time a bill is filed the court has no jurisdiction, jurisdiction cannot subsequently be conferred by an amendment striking out a party plaintiff who was properly and necessarily made such at the commencement of the suit;[14] but in one case the court retained jurisdiction by allowing an amendment which made one of the original plaintiffs a defendant.[15] When they are not indispensable parties, jurisdiction may be retained upon a discontinuance or dismissal as regards defendants who are citizens of the same State as the plaintiff; after,[16] as well as before,[17] they have appeared; and even, it was held, where they were restored a few days later upon their petition for intervention;[18] but the resignation after suit brought of a defendant trustee,[19] and the filing of a disclaimer by a defendant,[20] who were citizens of the complainant's State, were held not to save the jurisdiction. Jurisdiction is not lost because a defendant ceases to resist the plain-

Standard Oil Co., 105 Fed. 785; Collins v. Ashland, 112 Fed. 175. But see Weaver v. Kelly, 92 Fed. 417; Mangels v. Donau B. Co., 53 Fed. 513.

12 Tug River C. & S. Co. v. Brigel, 86 Fed. 818.

13 Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081, C. C. A., 75 Fed. 433, 22 C. C. A. 378; Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co., 29 Fed. 337.

14 Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078. But see Hicklin v. Marco, C. C. A., 56 Fed. 549; Whittle v. Artis, 55 Fed. 919.

15 Conolly v. Taylor, 2 Peters, 556, 7 L. ed. 518.

16 Beebe v. Louisville, N. O. & T. R. Co., 39 Fed. 481, 484; Morse v. South, 80 Fed. R. 206, 207; Claiborne v. Waddel, 50 Fed. 368; Hicklin v. Marco, C. C. A., 56 Fed. 549; Horn v. Lockhart, 17 Wall. 570, 21 L. ed. 657; Bane v. Keefer, 66 Fed. 610; Mason v. Dullingham, 82 Fed. 689; Grove v. Grove, 93 Fed. 865; Sioux City T. R. & W. Co. v. Trust Co. of N. Am., C. C. A., 82 Fed. 124; Oxley Stave Co. v. Coopers' Union, 72 Fed. 695; s. c. as Hopkins v. Oxley Stave Co., C. C. A., 83 Fed. 912; Smith v. Consumers' C. O. Co., 86 Fed. 359; Tug R. C. & S. Co. v. Brigel, C. C. A., 86 Fed. 818; *infra*. § 46; see Chapter on Removal of Causes.

17 A. R. Barnes & Co. et al. v. Berry et al., 156 Fed. 72.

18 Sioux City T. & W. Co. v. Trust Co. of N. Am., C. C. A., 82 Fed. 124; s. c. 173 U. S. 99. 43 L. ed. 628.

19 Ruohs v. Jarvis-Conklin Mt. Tr. Co., 84 Fed. 513.

20 Wetherby v. Stinson, C. C. A., 62 Fed. 193. But see Frazer Lubricator Co. v. Frazer, 23 Fed. 305; Wirgman v. Persons, 126 Fed. 449, 451.

tiff's demand;[21] nor by the addition of new parties, whose citizenship would have prevented their original joinder in the suit, and who come in by amendment,[22] or by intervention,[23] or by succession through an assignment of the plaintiff's interest,[24] or by operation of law.[25]

It has been held that there is a controversy between citizens of different States when one of them has a justiciable claim against the other, although the latter consents to the jurisdiction and to the appointment of a receiver before the complainants had obtained judgment in an action at common-law;[26] and in the case of a suit by a stockholder to procure the appointment of a receiver because of insolvency, when his shares have been assigned to him for the purpose of the commencement of the suit.[27]

§ 41. Parties to the controversy. A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from that of every party upon the other.[1] In determining between whom the contro-

21 Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641.

22 Ober v. Gallagher, 93 U. S. 199, 206, 23 L. ed. 829, 831; Stewart v. Dunham, 115 U. S. 61, 64, 29 L. ed. 329, 330; Phelps v. Oakes, 117 U. S. 236, 29 L. ed. 888; Hardenbergh v. Ray, 151 U. S. 112, 38 L. ed. 93. But see Mangels v. Donau Br. Co., 53 Fed. 513; Weaver v. Kelly, 92 Fed. 417.

23 Osborne & Co. v. Barge, 30 Fed. 805; Belmont Nail Co. v. Col. I. & S. Co., 46 Fed. 336; Henderson v. Goode, 49 Fed. 887; United El. S. Co. v. La. El. L. Co., 68 Fed. 673; Society v. Shakers v. Watson, C. C. A., 68 Fed. 730; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Cole v. Philadelphia & E. Ry. Co., 140 Fed. 944; Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159; *infra*, § 258. *Contra*, Forest Oil Co. v. Crawford, C. C. A., 101 Fed. 849. See also Clyde v. Richmond & D. R. Co., 65 Fed. 336.

24 Sioux City Tr. R. & W. Co. v. Trust Co. of North America, C. C. A., 82 Fed. 124; s. c. 173 U. S. 99, 43 L. ed. 628; Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159. *Contra*, Pittsburgh, S. & N. R. Co. v. Fiske, C. C. A., 178 Fed. 66.

25 Glover v. Shepperd, 21 Fed. 481; Jarboe v. Templer, 38 Fed. 213. *Contra*, Adams Exp. Co. v. Denver & R. G. Ry. Co., 16 Fed. 712.

26 *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

27 *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

§ 41. 1 Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. ed. 435; Corporation of New Orleans v. Winter, 1 Wheaton, 91, 4 L. ed. 44; Conolly v. Taylor, 2 Peters, 556; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.), 497, 11 L. ed. 353; Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130; Susquehanna & W. V. Railroad & Coal Co. v. Blatch-

versy exists, the court is not bound by the title of the cause or the form of the pleadings; but should examine the record, ascertain the matter in dispute and arrange the parties on opposite sides of the same, according to the facts, no matter what their technical place as plaintiffs or defendants may be.[2]

It has been held: that a party whose claim is adverse to the complainant is on the opposite side of the controversy to him,

ford, 11 Wall. 172, 20 L. ed. 179; Ayers v. City of Chicago, 101 U. S. 184, 25 L. ed. 838; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; Shainwald v. Lewis, 108 U. S. 158, 27 L. ed. 691; affirming order 5 Fed. 510, 6 Sawyer, 585; Bissell v. Horton, Fed. Cas. No. 1,448; Ketchum v. Farmers' Loan & Trust Co., Fed. Cas. No. 7,736 (4 McLean, 1); Hubbard v. Northern R. R. Co., Fed. Cas. No. 6,818 (3 Blatchf. 84); Tuckerman v. Bigelow, Fed. Cas. No. 14,228; Lovejoy v. Washburne, Fed. Cas. No. 8,550 (1 Biss. 416); Petterson v. Chapman, Fed. Cas. No. 11,042 (13 Blatchf. 395); Teal v. Walker, Fed. Cas. No. 13,812; Dormitzer v. Illinois & St. L. Bridge Co., 6 Fed. 217; Walsh v. Memphis, C. & N. W. R. Co., 6 Fed. 797; Karns v. Atlantic & O. R. Co., 10 Fed. 309; Mitchell v. Tillotson, 12 Fed. 737; Ouachita & M. R. Packet Co. v. Aiken, 16 Fed. 890; Holland v. Ryan, 17 Fed. 1; Walser v. Memphis, C. & N. W. Ry. Co., 19 Fed. 152; Hazard v. Robinson, 21 Fed. 193; Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529; Covert v. Waldron, 33 Fed. 311; Oxley Stave Co. v. Coopers' International Union of North America, 72 Fed. 695; Consolidated Water Co. v. Babcock, 76 Fed. 243; Ludlow's Heirs v. Kidd's Heirs, 3 Ohio (3 Ham.), 48; Miller v. Lynde (Connecticut), 2 Root, 444, 1 Am. Dec. 86; Tesson v. Gusman (Louisiana), 26 La. Ann. 248; New Orleans v. Seixas (Louisiana), 35 La. Ann. 36; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70, 14 Am. Rep. 579; North River Steamboat Company v. Hoffman (New York), 5 Johns. Ch. 300; Fairchild v. Durand (New York), 8 Abb. Prac. 305; Fisk v. Chicago, R. I. & P. R. Co. (New York), 53 Barb. 472. *Contra*, Bradley, J., in Girardey v. Moore, Fed. Cas. No. 5,462 (3 Woods, 397).

[2] Removal Cases, 100 U. S. 457, 468, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Carson v. Hyatt, 118 U. S. 279, 286, 30 L. ed. 167, 169; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70; Evers v. Watson, 156 U. S. 527, 39 L. ed. 520; Girardey v. Moore, Fed. Cas. No. 5,462 (3 Woods, 397); Dodge v. Perkins, Fed. Cas. No. 3,954 (4 Mason, 435); Burke v. Flood, 1 Fed. 541, 6 Sawyer, 220; Marvin v. Ellis, 9 Fed. 367; Sayer v. La Salle & P. Gaslight & Coke Co., 14 Fed. 69, 9 Biss. 372; Anderson v. Bowers, 40 Fed. 708; Brown v. Murray Nelson & Co., 43 Fed. 614; Mangels v. Donau Br. Co., 53 Fed. 513; Pittsburg, C. & St. L. Ry. Co. v. Baltimore & O. R. Co., 61 Fed. 705, 10 C. C. A. 20, 22 U. S. App. 359; Cilley v. Patten, 62 Fed. 498; Oberlin College v. Blair, 70 Fed. 414; Hutton v. Joseph Bancroft & Sons'

although their relations are not hostile,[3] and that the jurisdiction is not defeated because the complainant seeks to compel defendants, who are citizens of the same State, to litigate a dispute between them in the Federal court, when the plaintiff has a cause of action against them both.[4] In a suit by taxpayers against county officers and bondholders, to enjoin payment of the bonds, the defendant officers were presumed to be on the same side of the controversy as the taxpayers.[5] Complainant, a citizen of Iowa, filed a bill charging that a judgment had been fraudulently obtained against a city of Iowa, in favor of defendant, citizen of another State, by means of a combination between him and others not made parties to the bill. The relief sought was to have the judgment declared void. The mayor, treasurer, and recorder of the city were made defendants, that they might be restrained from paying the judgment *pendente lite,* but there was no charge that they had participated in the fraud, or that they had any interest adverse to complainant. It was held: that, though there was no separate controversy between complainant and the defendant charged with the fraud, the other defendants were only nominal parties, their interest being in fact adverse to the latter; and their joinder as defendants could not affect his right to have the cause removed.[6] A State granted to a county the swamp lands donated to the State by Congress, and located in said county, for school purposes. A bill was filed in a State court by the State, on behalf of the county school board, against the county and certain citizens of other States, to set aside conveyances of such lands. Defendants other than the county sought to remove the cause to the Federal court on the ground of diverse citizenship. It was held: that the county was a necessary party, and, it and complainant being fellow citizens, the suit could not be

Co., 77 Fed. 481; Reese v. Zinn, 103 Fed. 97; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650; Mirabile Corp. v. Purvis, 143 Fed. 920; Miller v. Lynde, 2 Root, 444, 1 Am. Dec. 86.

[3] Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 187 Fed. 474.

[4] Feidler v. Bartleson, C. C. A., 161 Fed. 30. But see First Nat. Bank v. Bridgeport Tr. Co., 117 Fed. 969; cited *infra,* § 42.

[5] Harter v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Anderson v. Bowers, 40 Fed. 708.

[6] May v. St. John, 38 Fed. 770.

removed.[7] In a suit by the trustee of a mortgage, to enforce a right of action held by the mortgagor,[8] or to protect the mortgaged property from injury,[9] the mortgagor will be considered to be on the same side of the controversy as the complainant, unless it clearly appears that he is actively opposed to the relief prayed.[10] In a suit by a bondholder or other *cestui que trust*, to enforce a right after his trustee has refused to sue upon the same, the defendant trustee is considered to be upon the same side of the controversy as the plaintiff;[11] unless the latter seeks some relief antagonistic to the other beneficiaries of the trust,[12] or when the plaintiff claims some substantial relief against the trustee.[13] In an action against the trustee of a deed of trust and his *cestui que trust*, brought by the assignee in insolvency of the grantor to prevent a sale of the property and for an accounting between the grantor and the beneficiary, the trustee is an indispensable party adverse in interest to the plaintiffs, and, if a resident of the same State as the plaintiffs, the District Court of the United States has no jurisdiction of the action as a controversy be-

[7] Missouri v. New Madrid County, 73 Fed. 304.

[8] Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713; Williams v. City Bank & Tr. Co., C. C. A., 186 Fed. 419. See Adams v. City of Woburn, 174 Fed. 192.

[9] Consol. Water Co. v. Babcock, 76 Fed. 243; Boston S. D. & Tr. Co. v. Racine, 97 Fed. 817; Old Colony Tr. Co. v. Atlanta Ry. Co., 100 Fed. 798. *Cf.* Mercantile Tr. & D. Co. v. Collins P. & B. R. Co., 99 Fed. 812. But see Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865.

[10] Dawson v. Columbia Trust Co., 197 U. S. 178, 180, 49 L. ed. 713, 715.

[11] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70; Barry v. Mo., K. & T. Ry. Co., 27 Fed. 1; Needham v Wilson, 47 Fed. 97; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33; Shipp v. Williams, C. C. A., 62 Fed. 4; Bowdoin College v. Merritt, 63 Fed. 213; Kildare Lumber Co. v. National Bank, C. C. A., 69 Fed. 2; First Nat. Bank v. Radford Tr. Co., C. C. A., 80 Fed. 569, 573; Dunn v. Waggoner, 11 Tenn. (3 Yerg.) 59; Swann v. Myers, 79 N. C. 101. But see Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356. But see Einstein v. Georgia, So. & F. Ry. Co., 120 Fed. 1008.

[12] Rust v. Brittle Silver Co., C. C. A., 58 Fed. 611; Kildare Lumber Co. v. National Bank, C. C. A., 69 Fed. 2; First Nat. Bank v. Radford Tr. Co., 80 Fed. 569, 571, 573. See Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

[13] Fitz Gerald v. Thompson, 222 U. S. 555, 56 L. ed. 314.

tween citizens of different States, although the *cestui que trust* is a citizen of a different State.[14]

In a stockholder's suit to enforce a right of his corporation, where it is shown that the corporation is under the control of the other defendants, it will be treated as upon the same side of the controversy that they are, for the purpose of determining the jurisdiction.[15] In one to prevent the majority of the stockholders from causing the corporation to act in fraud of the minority, the corporation is to be aligned on the same side as the majority stockholders.[16] It has been held: that in a stockholder's suit, where the plaintiff has failed to comply with the equity rules by showing efforts to secure action by the other stockholders on an excuse for such failure, the corporation is to be treated as upon the same side of the controversy as the complainants.[17] Where the controversy for the control of the corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or holder of the title, it is properly made a party defendant and should not be aligned as a plaintiff merely because the plaintiffs belong to the faction that claims the power to appoint the mem-

[14] Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435.

[15] Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606; overruling a number of decisions of the lower courts to the contrary. Woolsey v. Dodge, Fed. Cas. No. 18,032, 6 McLean, 142; s. c., as Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; DeNeufville v. New York & N. R. Co., C. C. A., 81 Fed. 10; MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co., 119 Fed. 96, 55 C. C. A. 648; Redfield v. Baltimore & O. R. Co., 124 Fed. 929; Mills v. City of Chicago, 127 Fed. 731; Groel v. United Electric Co. of New Jersey, 132 Fed. 252; Howard v. Nat. Telephone Co., 182 Fed. 215; Crawford v. Seattle, R. & S. Ry. Co., 198 Fed. 920. Before the decision of Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, it was held that where a stockholder's bill did not conform to the requirement of the equity rules, by showing efforts made to secure action by the stockholders, or an excuse for such failure, the corporation must be aligned with the complainants. Waller v. Coler, 125 Fed. 821.

[16] De Neufville v. New York & N. Ry. Co., C. C. A., 81 Fed. 10; Redfield v. Baltimore & O. R. Co. 124 Fed. 929; Elkins v. Chicago, 119 Fed. 957.

[17] Waller v. Coler, 125 Fed. 821; Groel v. United El. Co., 132 Fed. 252. These cases were decided before Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606. A similar ruling has been made since that decision. Gage v. Riverside Trust Co., 156 Fed. 1002, 1007.

bers of the board.[18] In such a case, it has been held that trustees of the corporation, although in sympathy with the complainant, should be aligned with the defendants.[19] But in a suit to enjoin striking employees of a contractor with complainant, from intimidating the contractor, it was held, that such contractor, although he did not oppose the relief sought, could not be aligned on the same side of the controversy as the plaintiff so as to defeat the jurisdiction.[20]

In a suit by the creditors of an insolvent corporation citizens of another State from the corporation and its assignees, charging improper conduct on the part of the assignees and praying for a receiver, it was objected to the jurisdiction of the Federal court that the action was really one by the corporation against the assignees, and that the suit was brought by the creditors for the purpose of bringing the suit in the Federal courts. It was held, that, as the creditors had the right to sue, this objection was not tenable.[21]

The jurisdiction must appear on the face of the record.[22] Where one of the parties is made a defendant merely because he has refused to join as a party plaintiff, he is considered to be on the same sale of the controversy as the plaintiff, when the jurisdiction is determined;[23] unless there is a substantial dispute between him and the plaintiff as to the division of the proceeds, or some other question involved in the suit; in which case it has been held, that he is on the side of the controversy opposite to such plaintiff.[24] In an action on a bond secured by

18 Helm v. Zarecor, 222 U. S. 32, 56 L. ed. 77. But see Stephens v. Smartt, 172 Fed. 466.

19 Sharpe v. Bonham, 224 U. S. 241, 56 L. ed. 747.

20 Carroll v. Cheas. & O. Coal Agency Co., C. C. A., 124 Fed 305; s. c., as Cheas. & O. Coal Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

21 Bell v. Ohio Life Ins. Co., Fed. Cas. No. 1,261.

22 Bell v. Ohio Life Ins. Co., Fed. Cas. No. 1,261.

23 Edgerton v. Gilpin, Fed. Cas. No. 4,280 (3 Woods. 277); Missouri v. Alt, 73 Fed. 302; Johnson v. Ford, 109 Fed. 501; Einstein v. Georgia, S. & F. Ry. Co., 120 Fed. 1008; Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760; Menefee v. Frost, 123 Fed. 633. See also Bland v. Fleeman, 29 Fed. 669; Woodrum v. Clay, 33 Fed. 897; Megibben's Adm'rs v. Perin, 49 Fed. 183; approved as to this point upon reversal. Perin v. Megibben, C. C. A., 53 Fed. 86, 91.

24 Everett v. Independent School Dist. of Rock Rapids, 109 Fed. 697; Wood v. Deskins, C. C. A., 141 Fed. 500.

a mortgage, brought by citizens of one State against the citizens of another, one of the defendants, by her answer, prayed that the mortgage and bond be declared valid and foreclosed for her benefit and that of plaintiffs. The bond and mortgage were not divisible. All the defendants, including the one praying for relief, were citizens of the same State. It was held, that the Federal court had no jurisdiction as it was substantially an action between citizens of the same State.[25] An Ohio corporation filed a bill in a Federal court in West Virginia against B., as trustee and individually, M., A., P., K., and the personal representative and heirs of G., all of whom were citizens of West Virginia, and a Pennsylvania corporation, alleging that land claimed by plaintiff and by K. and G. was conveyed to B., as trustee, to sell, and pay the proceeds to plaintiff, K., and G.; that B. conspired with M., P. and A., who, on G.'s death qualified as his personal representative, and pursuant thereto, the value of the land having greatly increased, sold it to M. for much less, fraudulently concealing from plaintiff the fact of the increase; that the consent of K. to the sale was obtained by permitting him to retain a one-fifth interest in the land, the other four-fifths being held by A., who joined the conspiracy to defraud G.'s heirs, M., P. and B.; and that after title was conveyed by B. to M. the land was leased to the P. Co. for a bonus much larger than the price accounted for by B., with a royalty on oil taken from the land and other rentals and payments. Complainant prayed that M., B., A., P., and K. be decreed to account for and pay over to plaintiff K., and the heirs of G., moneys received from the Pennsylvania Company, and that the latter be required to attorn to such beneficiaries. It was held, that the real controversy was as to the fraud alleged to have been committed by B., A., M., P. and K.; that plaintiff and the heirs of G. were, on the one side, opposed to the other parties; that such heirs were indispensable parties, and, being citizens fo the same State as part of the other defendants, the court was without jurisdiction.[26] Where one tenant in common brought a suit against his co-tenant and others for partition of the land held in common, and to quiet the title as against claims of the defendant other than his co-tenant, but

[25] Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70.

[26] Trustees of Oberlin College v. Blair, 70 Fed. 414.

did not press it as a bill for partition, it was held, that it might be sustained as a bill to quiet the title of the complainant's undivided interest, notwithstanding there was a want of diverse citizenship between him and the defendant, his co-tenant.[27] In an action by two of three trustees against a corporation residing in another State, it was held, that the fact that one of the trustees, who refused to join as plaintiff in the suit, and was made a defendant, was a citizen of the same State as the corporation, did not deprive the Federal court of jurisdiction, on the ground that the trustee residing in the same State with defendant was a necessary party plaintiff, since that trustee was made such in order that the rights of all interested parties might be determined in one proceeding.[28] It was said: that if the jurisdiction of the court would be ousted by making all the parties concerned in interest plaintiffs, those who are citizens of the same State with the real defendants may refuse to join in the suit, and may be made defendants.[29] It has been held: that in a suit for a partition, where all the defendants were citizens of different States from that of the plaintiffs' citizenship, there should be no re-alignment of parties to defeat the jurisdiction because there were disputed questions in the case between the plaintiffs, which did not appear in the bill, although they might subsequently arise and be determined in the suit.[30] Complainants filed a bill in a Circuit Court of the United States in California against defendants, who were citizens of that State, alleging that complainants were heirs at law of a decedent from whom, prior to his death, one of the defendants, who was also a brother and one of his heirs, had procured a conveyance of all his property without consideration, which was invalid by reason of the decedent's insanity; that subsequently such defendant, who was insolvent, had con-

27 Morse v. South, 80 Fed. 206. But see German Savings & Loan Soc. v. Tull, C. C. A., 136 Fed. 1; holding: that, in a suit for partition, the fact that disputed questions, not appearing upon the face of the bill, might arise between the plaintiffs, who were citizens of the same State, did not make it necessary to treat one of them as defendant and so defeat the jurisdiction.

28 Einstein v. Georgia Southern & F. Ry. Co., 120 Fed. 1008. See Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

29 Wisner v. Ogden, Fed. Cas. No. 17,914 (4 Wash. 631).

30 German Sav. & Loan Soc. v. Tull, C. C. A., 136 Fed. 1, 10.

veyed such property to his co-defendant in payment of an antecedent indebtedness. The prayer of the bill was that the conveyances be set aside as to such shares of the property as would have been inherited by complainants. It was held, that the court could not determine from such allegations and prayer that the interest of the defendant, who was a co-heir with complainants, would be best served by their success, so as to require such an arrangement of parties as would make him a complainant, and defeat the court's jurisdiction; there being no proof of fraud or collusion by him and complainants.[31] Where the validity of a mortgage is in question, the mortgagor is presumed to be on the same side of the controversy as the other parties who attack the mortgage.[32] It has been held: that in an action by a mortgagor to cancel certain mortgages and to foreclose a subsequent trust deed to the same property, although the *cestuis que trustent* have a common interest with plaintiff in showing the discharge of said mortgages, they are nevertheless his adversaries as to the other matters in controversy, and will not be rearranged as parties plaintiff, so as to show diversity of citizenship.[33] In a garnishee proceeding after judgment, it was held, that the judgment debtor was on the same side of the controversy as the judgment creditor.[34] In an action for damages under the Kansas statute, because the plaintiff's cattle caught Texas fever from cattle driven into the State in violation of the law, where the importer of the Texan cattle and those to whom he had sold the same under a contract, whereby they assumed his liability to the plaintiff, were joined as defendants; it was held, that the importer's interest was not so adverse to that of his vendees as to justify his classification as a plaintiff, and thereby give such vendees a right of removal on the ground of diverse citizenship.[35] In a suit by an attaching creditor to set aside judgments obtained against the debtor by confession, it was held, that other attaching creditors, whom

31 Reavis v. Reavis, 98 Fed. 145.

32 Removal Cases, 100 U. S. 457, 469, 25 L. ed. 593; Wolcott v. Sprague, 55 Fed. 545; Boatmen's Bank v. Fritzlen, C. C. A., 135 Fed. 650, 658, 660; reversing 128 Fed. 608; United States Mortg. Co. v. McClure, 70 Pac. 543, 42 Or. 190.

33 Springer v. Sheets, 115 N. C. 370, 20 S. E. 469.

34 Baker v. Duwamish Mill Co. 149 Fed. 612.

35 Woodrum v. Clay, 33 Fed. 897.

he had joined as defendants, were on the same side of the controversy as the plaintiff.[36]

§ 42. Formal parties to the controversy. The citizenship of formal parties, with no real interest in the controversy, does not affect the jurisdiction.[1] Such are parties holding the naked legal title, with no actual interest or control over the subject-matter of the litigation, when all the equitable interests are therein represented.[2] Plaintiff and another contracted as partners to do certain work in the construction of a railroad as subcontractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed: that plaintiff should furnish the materials and do the work and receive and disburse the money received therefor, accounting

36 Pollok v. Louchheim, 19 Fed. 465.

§ 42. 1 Wormley v. Wormley, 8 Wheaton, 421, 5 L. ed. 651; Wood v. Davis, 18 How. 467, 15 L. ed. 460; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Harter v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Corbin v. Van Brunt, 105 U. S. 576, 26 L. ed. 1176; Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822; Hervey v. Illinois Midland Ry. Co., Fed. Cas. No. 6,434 (7 Biss. 103); Girardey v. Moore, Fed. Cas. No. 5,462 (3 Woods, 397); Edgerton v. Gilpin, Fed. Cas. No. 4,280 (3 Woods, 277); Taylor v. Rockefeller, Fed. Cas. No. 13,802; Chicago, St. L. & N. O. R. Co. v. McComb, Fed. Cas. No. 2,670 (17 Blatchf. 371); Foss v. First Nat. Bank, 3 Fed. 185, 1 McCrary, 474; Deford v. Mehaffy, 14 Fed. 181; Taylor v. Holmes, 14 Fed. 498; Bates v. New Orleans, B. R. & V. R. Co., 16 Fed. 294; Gudger v. Western N. C. R. Co., 21 Fed. 81; Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 27 Fed. 770; New Chester Water Co. v. Holly Mfg. Co., C. C. A., 53 Fed. 19, 26; Carver v. Jarvis-Conklin Mortgage Trust Co., 73 Fed. 9; Garrard v. Silver Peak Mines, 76 Fed. 1; Title Guarantee & Trust Co. v. Studebaker, 100 Fed. 358; Wirgman v. Persons, C. C. A., 126 Fed. 449; affirming decree Persons v. Beling, 116 Fed. 877; Steiner v. Mathewson, 77 Ga. 657; Withers v. John Hopkins Place Sav. Bank (Georgia), 30 S. E. 766; Harper v. Gaitheman (Kentucky), 1 Ky. Law. Rep. 419; Danvers Sav. Bank v. Thompson, 133 Mass. 182; Calloway v. Ore Knob Copper Co., 74 N. C. 200; Hadley v. Dunlap, 10 Ohio St. 1; Smith v. Baltimore & O. R. Co., 7 Ohio Dec. 542.

2 Boon v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Banigan v. City of Worcester, 30 Fed. 392; Lawrence v. Southern Pac. Co., 165 Fed. 241; Atchison, T. & S. F. Ry. Co. v. Phillips, C. C. A., 176 Fed. 663, holding that in an action by a widow under the California statute to recover damages for the death of her husband, the other heirs of the deceased, who are not entitled to share in the recovery, are necessary, but merely formal, parties. But see Dunn v. Waggoner, 11 Tenn. (3 Yerg.), 59.

to his associate only for a share of the net profits of the contract. After the completion of the work, plaintiff brought suit in a Federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due under the contract, alleging such facts in his bill and that no net profits were earned under the contract. It was held: that it was competent for plaintiff to allege, for jurisdictional purposes, the contract between him and his nominal partner; and that under such agreement the citizenship of such partner did not affect the jurisdiction of the court, since he had no interest in the recovery and was neither an indispensable nor a necessary party.[3] The husband of a married woman when made a party to a suit affecting her separate estate is such a formal party.[4] In a suit in which it appears by the record that a party sues for the use of another, such plaintiff is a nominal party.[5] It has been held, that the following plaintiffs are formal parties, whose citizenship will not affect the jurisdiction, the status of the person interested in the recovery being alone considered: a State officer who sues to collect a penalty for the benefit of the State;[6] the nominal payee of a bond suing for the use of another, who is entitled to the benefit of the same, such as the United States in a suit upon the bond of a receiver;[7] the State in a suit upon

[3] Ban v. Columbia Southern Ry. Co., 117 Fed. 21, 54 C. C. A. 407; reversing 109 Fed. 499.

[4] Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; First Nat. Bank v. Bridgeport Tr. Co., 117 Fed. 969.

[5] Browne v. Strode, 5 Cranch, 303, 3 L. ed. 108; Dimmock v. Doolittle, 29 Fed. 545; New Chester Water Co. v. Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399, 3 U. S. App. 264; affirming 48 Fed. 879. And cases cited *infra*, notes.

[6] Ferguson v. Ross, 3 L.R.A. 322, 38 Fed. 161. As to when the State may be a formal party see *Ex parte* Nebraska, 209 U. S. 436, 52 L. ed. 876. Certain State statutes required railroads to post on blackboards erected in telegraph passenger stations the time of the arrival of passenger trains, stating whether the same are late, and, if so, how much; and provided a penalty for a violation of this requirement, to be recovered in the name of the State by the prosecuting attorney for the benefit of himself and the county school fund. It was held: that an action by the State, under such action, was not removable to the Federal court for diversity of citizenship, on the ground that the prosecuting attorney and the county receiving the penalty, if recovered, were the real parties in interest. Southern Ry. Co. v. State (Indiana), 72 N. E. 174.

[7] U. S. v. Douglas, 113 N. C. 190, 18 S. E. 202.

the bond of a public officer;[8] or an administrator;[9] or upon the bond of an attaching creditor;[10] the governor of a State in a suit upon a sheriff's bond,[11] or a forthcoming bond;[12] a marshal in a suit upon an attachment bond;[13] and, it has been said, a State in any suit brought in its name on the relation of another;[14] but not, it has been held, the United States in a suit brought for the benefit of a material man upon a contractor's bond.[15] So, it has been held, are: an agent,[16] or attorney,[17] or officer,[18] or director,[19] of a corporation, when made defendant in a suit against it seeking no relief against him even when in the controversy they sympathize with the complainant,[20] public officers against whom no relief is sought, except an injunction against their official action in aid of an

[8] Indiana ex rel. Stanton v. Glover, 155 U. S. 513, 39 L. ed. 243.

[9] Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822.

[10] Missouri ex rel. Rauch v. Bowles Milling Co., 80 Fed. 161.

[11] McNutt v. Bland, 2 How. 9, 11 L. ed. 159.

[12] Wade v. Wortsman, 29 Fed. 754; Wortsman v. Wade, 77 Ga. 651, 4 Am. St. Rep. 102.

[13] Huff v. Hutchinson, 14 How. 586, 14 L. ed. 553.

[14] Jack v. Williams, 113 Fed. 823, 824. See Missouri v. Alt, 73 Fed. 302. *Contra*, State of Ohio v. Columbus & Xenia R. Co., 48 Fed. 626; an application for a mandamus.

[15] U. S. Fidelity & G'y Co. v. U. S. for the benefit of Kenyon, 204 U. S. 349, 51 L. ed. 516; affirming U. S. v. Churchyard, 132 Fed. 82; U. S. v. Henderlong, 102 Fed. 2; U. S. v. Sheridan, 119 Fed. 236; U. S. v. O'Brien, 120 Fed. 446, 448; U. S. v. Barrett, 135 Fed. 189; Burrell v. U. S., C. C. A., 147 Fed. 44, 46.

[16] Wood v. Davis, 18 How. 467, 15 L. ed. 460; City of New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817; Brown v. Murray Nelson & Co., 43 Fed. 614; Overman Wheel Co. v. Pope Mfg. Co., 46 Fed. 577; Sidway v. Missouri Land & Live Stock Co., 116 Fed. 381; Carothers v. McKinley Mining & Smelting Co., 122 Fed. 305.

[17] Brown v. Murray Nelson & Co., 43 Fed. 614.

[18] Hatch v. Chicago. R. I. & P. R. Co., Fed. Cas. No. 6,204 (6 Blatchf. 105); Pond v. Sibley, 7 Fed. 129, 19 Blatchf. 189; National Bank of Lyndon v. Wells River Mfg. Co., 7 Fed. 750; City of New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817; Lamm v. Parrot Silver & Copper Co., 111 Fed. 241.

[19] Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122; Pond v. Sibley, 7 Fed. 129, 19 Blatchf. 189; Politz v. Wabash R. Co., 153 Fed. 941.

[20] Sharpe v. Bonham, 224 U. S. 241, 56 L. ed. 747; overruling Stewart v. Mitchell, 172 Fed. 905; Stephens v. Smartt, 172 Fed. 466. See Helm v. Zarecor, 222 U. S. 32, 56 L. ed. 77.

act of another defendant, which the bill also seeks to enjoin.[21] Where one, acting as agent only, made insurance in his own name, and for all others concerned, although he and the underwriter were citizens of the same State; it was held, that the underwriter might be sued in those courts by the principal, who was a citizen of a different State.[22]

To a bill filed by trustees on behalf of the creditors of a partnership against a corporation of which one of the partners was president, for an accounting and the appointment of a receiver, upon allegations that the president so managed the affairs was the corporation and the partnership as to defraud the latter, and to divert its funds for the benefit of himself and the corporation; it was held, that the president of the corporation, his partner in the firm,[23] and the firm itself were indispensable parties defendant, and where they were citizens of the same State as complainants such bill could not be maintained in a Federal court.[24] The directors are not nominal parties to a suit against them and their corporation, to cancel stock subscriptions and to compel them, individually, as well as the corporation, to refund the amounts already paid by the subscribers;[25] nor where they are charged with actual participation in a fraud.[26]

It was held that the following are formal parties: State and county officers in a suit to enjoin them from levying, collecting and disbursing the taxes required to pay certain bonds, when the bill also sought the declaration that the bonds be declared void and their collection enjoined, making bondholders parties defendant;[27] a register of deeds in a suit to set aside certain land contracts with a prayer for an injunction against his recording the same;[28] an officer appointed to sell land under a decree, when made defendant in a suit to set aside that decree

21 So held, of a sheriff and commissioners of appraisal, who were made defendants to a suit to enjoin a corporation from prosecuting condemnation proceedings. Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co., 27 Fed. 770.

22 Ruan v. Gardner, Fed. Cas. No. 12,100 (1 Wash. C. C. 145).

23 Cabaniss v. Reco Min. Co., C. C. A. 116 Fed. 318.

24 Ibid.

25 Seddon v. Virginia, T. & C. S. & I. Co., 36 Fed. 6, 1 L.R.A. 108.

26 Fox v. Mackay, 60 Fed. 4.

27 Aroma Tp. v. Auditor of Public Accounts, 2 Fed. 33.

28 Hyde v. Victoria Land Co., 125 Fed. 970.

for fraud.[29] An assignee for the benefit of creditors, a citizen of the State of Rhode Island, filed a bill in equity in the State court, against a Massachusetts creditor of his assignor, who had obtained a State execution, and the officer charged with the service thereof, who was a citizen of Rhode Island, to establish his trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the Circuit Court of the United States for the Rhode Island district; it was held, that the officer was not a formal, or unnecessary party to the bill, that his presence could not be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed.[30] Citizens of Tennessee, holding policies of life insurance in a foreign corporation, filed their bill in the chancery court against that and other foreign corporations for relief and to subject to the satisfaction of their claims the property of that company, including certain State bonds deposited by it with the treasurer of the State "as security for risks taken by citizens of this State," and, for this purpose, made the treasurer, a citizen of Tennessee, a party defendant. It was held, that the treasurer was a material party defendant, and the court refused, on the application of the foreign corporations, to accept their petition and bond and to authorize a removal.[31] It was held: that the jurisdiction of the Circuit Court of the United States is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same State as the complainant, in order that such executors may perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the State.[32] Where the holder of the equitable title is a party to the suit, a dry trustee, or passive trustee, or one who merely holds the legal title without any power over the property in question, he is generally considered to be a formal party.[33] Where the trust is active and the trustee has a power over the property, he is

29 Carver v. Jarvis-Conklin Mortgage Trust Co., 73 Fed. 9.

30 Nye v. Nightingale, 6 R. I. 439.

31 Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 656.

32 Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963.

33 Boon v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Banigan v. City of Worcester, 30 Fed. 392. See Law-

usually considered to be a necessary party to the suit, whose citizenship must be considered in determining the jurisdiction.[34] Where two citizens of one State, trustees for bondholders under a mortgage of a railroad owned by a corporation of another State, foreclosed the mortgage, bought in the road in trust for the bondholders, and leased it to a citizen of the State to which they themselves belonged; and then a majority of the bondholders, citizens of the State where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a State court against the lessee of the road by the trustees who had made the lease; it was held: that defendant could not remove the suit from the State court to the Federal court on the ground, that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties; they, the trustees, not having been discharged from, nor in any way incapacitated from executing, their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds.[35] It has been held: that trustees are formal parties to a controversy concerning a claim for the cancellation of bonds secured by the deed of trust, although an injunction against a foreclosure is prayed.[36] In a suit to set aside a deed of trust made for the benefit of creditors, it appeared that plaintiff and the trustee were citizens of the same State, but that the beneficiaries under the deed, other than plaintiff, were citizens of another State. It was held, that the

rence v. Southern Pac. Co., 165 Fed. 241; Atchison, T. & S. F. Ry. Co. v. Phillips, C. C. A., 176 Fed. 663. But see Dunn v. Waggoner, 11 Tenn. (3 Yerg.), 59.

[34] So held, of a trustee of land conveyed to him, to secure the payment of a loan in a suit to cancel the conveyance or to enjoin a sale thereunder. Thayer v. Life Association of America, 112 U. S. 717, 28 L. ed. 864; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435; reversing decree Fordyce v. Peper, 16 Fed. 516, 5 McCrary, 221; Teal v. Walker, Fed. Cas. No. 13,812. *Contra*, Chester v. Wellford, Fed. Cas. No. 2,662 (2 Flip. 347). So held of trustees of a mortgage in a foreclosure suit brought by the beneficiary, after they have refused to sue. Allen-West Commission Co. v. Brashear, 176 Fed. 119.

[35] Knapp v. Railroad Co., 87 U. S. (20 Wall.), 117, 22 L. ed. 328.

[36] Lake St. El. R. Co. v. Ziegler, 99 Fed. 114, 39 C. C. A. 431.

trustee was an indispensable party to the suit, and that the Federal court, and therefore, had not jurisdiction.[37] It has been held: that in a controversy as to the priority of different liens upon mortgaged land, the mortgagor is a formal party, when the validity of neither of the liens is disputed;[38] and that so is the lessor of a railroad when the lease is for more than ninety years and the lessee has assumed all the lessor's obligations;[39] and that so is the owner of the fee as well as the lessee railway company, in a proceeding to condemn a right of way in the possession of the lessee holding a term of ninety years.[40] Defendants sued by fictitious names are always treated as formal parties, whose presence on the record does not affect the right of removal.[41] A garnishee is not considered to be a party to the suit, when determining the right of removal.[42] Where the essential parties on the adverse sides of a controversy were citizens of different States; it was held, that the fact that the executors of the deceased father of the principal defendant, who had been made defendants in order to reach his interest in his father's estate, were citizens of the same State as plaintiffs, would not affect the right of removal.[43] It has been held, that the following persons are not mere formal parties, and that their citizenship must be considered when the jurisdiction is determined: a party against whom a decree is essential to the relief sought by the suit;[44] a stakeholder in the possession of

[37] Rust v. Brittle Silver Co., 58 Fed. 611, 7 C. C. A. 389, 19 U. S. App. 237.

[38] Removal Cases, 100 U. S. 457, 469, 25 L. ed. 593. But see Thompson v. Dixon, 28 Fed. 5; Tug River Coal & Salt Co. v. Brigel, C. C. A., 67 Fed. 625.

[39] Seaboard Air Line Ry. v. North Carolina R. Co., 123 Fed. 629; Olanta Coal Min. Co. v. Beech Creek R. Co., 144 Fed. 150; Chase v. Beech Creek R. Co., 144 Fed. 571. *Contra*, Bellaire v. Baltimore & Ohio R. R. Co., 146 U. S. 117, 36 L. ed. 910; Washington v. Columbus & C. M. R. Co., 53 Fed. 673.

[40] Seaboard Air Line Ry. Co. v. North Carolina R. Co., 123 Fed. 629.

[41] Parkinson v Barr, 105 Fed. 81; Loop v. Winters' Estate, 115 Fed. 362.

[42] Cook v. Whitney, Fed. Cas. No. 3,166 (3 Woods, 715); Corbitt v. President, etc., of Farmers' Bank of Delaware, 113 Fed. 417.

[43] Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69.

[44] Wormley v. Wormley, 21 U. S. (8 Wheat.), 421, 5 L. ed. 651; Carneal v. Banks, 23 U. S. (10 Wheat.), 181, 6 L. ed. 297; Ward v. Arredondo, Fed. Cas. No. 17,148 (1 Paine, 410); Post v. Buckley, 119 Fed. 249.

property, to recover which the suit is brought;[45] an administrator with the will annexed in a suit for a construction of the will;[46] the personal representative of a deceased in an action to recover damages for his death, although the proceeds are for the exclusive benefit of the members of the dead man's family;[47] a tenant in common with a leasehold interest and an equity for improvements, when joined with the landlord in a suit for ejectment;[48] a corporation in a stockholder's suit, to cancel a contract which it has made;[49] a corporation in a suit by its mortgagee, to cancel a contract made by it with another, although it was alleged that its assets were insufficient to pay the mortgage;[50] a corporation in a suit to compel the transfer of stock, the certificates for which were held or claimed by another defendant.[51] Where the stakeholder brought a suit of interpleader; it was held, that a difference of citizenship between the defendants justified a removal.[52] Under the Illionis statute, which gives the right of appeal to any one aggrieved by the order of a probate court allowing a claim, as construed by the Supreme Court of the State, any person appealing, other than the administrator, might prosecute the appeal in his own name. It was held, that where the claimant was the administrator, and a temporary administrator was appointted by the probate court to represent the estate, but the claim was actually contested by

45 Wilson v. Oswego Tp., 151 U. S. 56, 38 L. ed. 70; Massachusetts & S. Constr. Co. v. Cane Creek Tp., 155 U. S. 283, 39 L. ed. 152; Scoutt v. Keck, 73 Fed. 900, 20 C. C. A. 103. But see Pacific R. Co. v. Ketchum, 101 U. S. 289, 298, 25 L. ed. 932; Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69; Reeves v. Corning, 51 Fed. 774, 778; N. Y. Constr. Co. v. Simon, 53 Fed. 1; and cases cited.

46 Security Co. v. Pratt, 64 Fed. 405.

47 Laubscher v. Fay, 197 Fed. 879.

48 Beardsley v. Torrey, Fed. Cas. No. 1,190 (4 Wash. C. C. 286); Cleveland v. Cleveland, C. C. & St. L. Ry. Co., C. C. A., 146 Fed. 171. *Contra*, Gwynne v. Roe, 4 Ohio (4 Ham.), 435; Texas v. Lewis, 12 Fed. 1; brought in Texas for trespass to try title to land, and the tenant disclaimed title.

49 East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240, 30 L. ed. 382.

50 Consol. Water Co. v. Babcock, 76 Fed. 243. See Dawson v. Columbia Trust Co., 197 U. S. 178, 49 L. ed. 713; cited *supra*.

51 Crump v. Thurber, 115 U. S. 56, 29 L. ed. 328; Rogers v. Van Nortwiek, 45 Fed. 513; Patterson v. Farmington Street Ry. Co., 111 Fed. 262.

52 First Nat. Bank v. Bridgeport Tr. Co., 117 Fed. 969; Feidler v. Bartleson, C. C. A., 161 Fed. 30, cited, *supra*, § 41.

an heir of the decedent, who appealed from an order allowing the claim, the question of diversity of citizenship between the parties was to be determined upon the citizenship of such appellant, and not upon that of the temporary administrator.[53] In an ejectment instituted in a State court of Pennsylvania by a citizen of Pennsylvania, against the tenant in possession, also a citizen of that State, his lessor, a citizen of Maryland, after a judgment by default against the tenant, was, upon his petition admitted as a defendant to the suit. The new defendant then removed the cause; but the Circuit Court remanded the same for want of jurisdiction; since the remover was a co-defendant with the tenant in possession, a citizen of plaintiff's State.[54] Where a stockholder in a corporation sued to enjoin the use by another corporation of stock in the former, upon the ground that the latter had no corporate power to acquire the same; it was held, that the former company was not a necessary party, and that its joinder could not prevent a removal.[55] It was held: that a corporation, which had sold all its property and franchises except the mere right to exist, and which had no officers or place of business, was only a nominal party in a suit against a stockholder to make him liable for his unpaid subscription; notwithstanding the fact that the corporation had still the power to recognize and collect the stockholders' dues.[56] But upon a bill for the specific performance of a contract between two individuals for the sale of certain shares of stock issued by a corporation, and to recover damages for the breach of such contract, which bill did not allege the insolvency of the other party to the contract, nor that he was about to dispose of the stock; it was held that no cause of action was stated against the corporation, and that, if joined, it was merely a formal party, which could not affect the jurisdiction.[57] It has been held: that a corporation is a mere formal, and not a necessary, party to a suit to enjoin the use or transfer of certificates of stock which it has issued.[58] In an action against a principal

[53] Schneider v. Eldredge, 125 Fed. 638.

[54] Beardsley v. Torrey, Fed. Cas. No. 1,190 (4 Wash. C. C. 286).

[55] Higgins v. Baltimore & O. R. Co., 99 Fed. 640.

[56] Wellman v. Howland Coal & Iron Works, 19 Fed. 51.

[57] Lukas v. Milliken, 139 Fed. 816.

[58] County Court v. Baltimore & O. R. Co., 35 Fed. 161.

and a surety, the surety cannot be considered as a merely formal party.[59] In a suit in support of an adverse claim to a land patent, the original applicant is not a formal party, although he has assigned his claim to another person joined in the suit.[60] A defendant, who has disclaimed an interest in the controversy,[61] or, who has made a default in appearance or pleading,[62] is not considered as a formal party, and his citizenship may prevent a removal. The fact that a defendant is pecuniarily irresponsible, so that a judgment against him would be of no value, does not make him a formal party.[63]

§ 43. **Unnecessary parties to the controversy.**—In certain cases it has been held: that the citizenship of defendants, who are proper but not necessary nor indispensable parties to the controversy may be disregarded.[1] Such it has been held are: the mortgagor in a suit to determine the ownership of the bond and mortgage;[2] defendants who have been made parties to a suit merely because they are alleged to be indebted to the principal defendant;[3] in a suit for an accounting of lands sold by a corporation, the stockholders and incorporators of the same, who have procured the conveyance to it of the lands, in

[59] Mutual Reserve Fund Life Ass'n v. Farmer, C. C. A., 77 Fed. 929.

[60] Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. ed. 276.

[61] New Jersey Zinc Co. v. Trotter, Fed. Cas. No. 10,167; Hax v. Caspar, 31 Fed. 499; Dow v. Bradstreet Co., 46 Fed. 824; Goodnow v. Litchfield, 47 Fed. 753. See Wetherby v. Stinson, C. C. A., 62 Fed. 173; *supra*. Held *contra* (as to original jurisdiction) Frazer Lubricator Co. v. Frazer, 23 Fed. 305; (as to right to removal) Wirgman v. Persons, C. C. A., 126 Fed. 449, 451; Wallin v. Reagan, 171 Fed. 758. In the former case at least, the disclaiming defendant was not a necessary party. *Contra*, Day v. Oatis (Mississippi), 37 So. 559; Reed v. Hardeman County, 77 Tex. 165, 13 S. W. 1024; (removal denied). See Cooper v. Preston, 105 Fed. 403; Davies v. Wells, 134 Fed. 139.

[62] Putnam v. Ingraham, 114 U. S. 57, 29 L. ed. 65; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Lederer v. Sire, 105 Fed. 529. *Contra*, Judah v. Iowa Barb-Wire Co., 32 Fed. 561. Steele v. Culver, 211 U. S. 26, 53 L. ed. 74.

[63] Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co., 85 Fed. 876.

§ 43. [1] Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518; Ruckman v. Ruckman, 1 Fed. 587; Deford v. Mehaffy, 14 Fed. 181; Corbin v. Boies, 18 Fed. 3; Cella, Adler & Tilles v. Brown, 136 Fed. 439.

[2] Ruckman v. Ruckman, 1 Fed. 587.

[3] Deford v. Mehaffy, 14 Fed. 181.

which the plaintiffs claimed an interest;[4] the debtor in a suit by a creditor to set aside a judgment against him, alleged to have been obtained by fraud;[5] the agent for another defendant in a suit for the specific performance of a contract made by the latter with the complainant, and for the delivery of securities in pursuance of the same, although such agent claimed an interest in such securities;[6] in a stockholder's suit to enjoin the exchange by his corporation of debentures for new mortgage bonds with a stock bonus, the individual directors, the registrar of the stock, the depositary of the debentures, the trustees of the mortgage, and a committee representing the debenture holders in the transaction;[7] a person for whose benefit a corporation was organized in a suit to enjoin such corporation from operating a ferry.[8] It has been held: that the following persons are *necessary* parties to the respective controversies between their co-defendants and the plaintiff, and that the suits in which such controversies are litigated are not removable for difference of citizenship if they are citizens of the same State as their opponent: a lessor corporation in a suit by its stockholders to set aside a lease which it had made;[9] a lessee in a suit to set aside in his lessor's title;[10] the mortgagor who has transferred the mortgaged land in a suit to foreclose the mortgage, where it is sought to charge him with a deficiency;[11] in a suit to cancel a judgment the judgment creditor although he has transferred orders by the debtor for the payment of the same

[4] Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518.

[5] Corbin v. Boies, 18 Fed. 3.

[6] Cella, Adler & Tilles v. Brown, 136 Fed. 439.

[7] Politz v. Wabash R. Co., 153 Fed. 941.

[8] New York v. New Jersey Steamboat Transp. Co., 24 Fed. 817.

[9] Central R. Co. of New Jersey v. Mills, 113 U. S. 249, 28 L. ed. 949; affirming Mills v. Central R. Co. of New Jersey, 20 Fed. 449.

[10] Miller v. Sharp, 37 Fed. 161.

[11] Under Act Conn. 1878, providing that the foreclosure of a mortgage shall be a bar to any further suit on the debt unless the persons liable therefor are made parties, where the mortgagor and mortgagee are citizens of that State, and the mortgagor has conveyed the premises to a citizen of New York; the mortgagor is a necessary party to foreclosure proceedings against the latter, if it is sought to charge him with any deficiency of the appraised value of the land to pay the mortgage debt, and the case is not a controversy wholly between citizens of different States, and is not removable. Coney v. Winchell, 116 U. S. 227, 29 L. ed. 610; affirming order Winchell v. Carll, 24 Fed. 865.

to him;[12] a party who has acquired the right to redeem certain securities pledged by another, in a suit to foreclose the right of redemption thereof;[13] in a suit to recover a deposit, a savings bank after it has brought in another claimant to the deposit as an additional party defendant, when the money has not yet been paid into court;[14] and, it has been said, any person whose interest is so bound up with the others, that his legal presence as a party is an absolute necessity.[15] In an action for the assignment of dower brought by a citizen of Illinois, it appeared that, of the defendants in possession of the property, one, a citizen of Illinois. It did not appear that the trustee was authorized to represent his interests in the property for the purposes of this suit. It was held: that, as the beneficiary was a necessary party, and a citizen of the same State as plaintiff, the case could not be removed.[16] One who appears by the proceedings in the land office to be the applicant for a patent to a mining claim, and to be asserting his compliance with the statute, is a proper and necessary party defendant in a suit in support of an adverse claim under R. S. §§ 2325, 2326, not merely a nominal party, and he cannot be disregarded in determining the question of the jurisdiction of a Federal court on the ground of diverse citizenship.[17]

§ 44. Trustees and other representatives. Where a party sues or is sued as a trustee,[1] receiver,[2] executor or administra-

12 Independent District of Rock Rapids v. Bank of Rock Rapids, 48 Fed. 2.

13 Danvers Sav. Bank v. Thompson, 130 Mass. 490.

14 Bailey v. New York Sav. Bank, 2 Fed. 14, 18 Blatchf. 77.

15 City of New Orleans v. Seixas (Louisiana), 35 La. Ann. 36. See First Nat. Bank v. Smith, 6 Fed. 215; Watson v. Evers, 13 Fed. 194; Nulton v. Isaacs (Virginia), 30 Grat. 726.

16 Rand v. Walker, 117 U. S. 340, 29 L. ed. 907.

17 Blackburn v. Portland Gold-Min. Co., 175 U. S. 571, 44 L. ed. 276.

§ 44. 1 Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. ed. 629; Bonnafee v. Williams, 3 How. 574, 11 L. ed. 732; Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. ed. 179; Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501; Glenn v. Walker, 27 Fed. 577; Earp v. Coleman, 28 Fed. 340; Morris v. Lindauer, C. C. A., 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510; Gill v. Stebbins, Fed. Cas. No. 5,431 (2 Paine, 417); Adams v. White, Fed. Cas. No. 68; Goodnow v. Oakley, 68 Iowa, 25,

tor,[3] or as the representative of a class,[4] and none of the persons whom he represents is named in the title of the cause,[5] nor appears to have an interest hostile to such representative;[6] his citizenship, not that of his beneficiaries, nor of those whom he represents, nor the location of the trust estate,[7] is to be considered. The citizenship of the next friend or guardian *ad litem* of an infant,[8] of a lunatic,[9] or of a married woman,[10] is disregarded. But where the guardian of an infant,[11] or the

25 N. W. 912. But see Mead v. Walker, 15 Wis. 499. It has been said that the rule does not apply to a mere agent or trustee for another's use, whose agency is not coupled with an interest, but is revocable at any time. Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728, 734.

2 Farlow v. Lea, Fed. Cas. No. 4,649, 2 Cinn. Law Bull. 329; Davies v. Lathrop, 12 Fed. 353; Brisenden v. Chamberlain, 53 Fed. 307; Snead v. Sellers, C. C. A., 66 Fed. 371; Pepper v. Rogers, 128 Fed. 987.

3 Childress v. Emory, 8 Wheaton, 642, 5 L. ed. 705; Bonnafee v. Williams, 3 How. 574, 11 L. ed. 732; Rice v. Houston, 13 Wall. 66, 20 L. ed. 484; Blake v. Mckim, 103 U. S. 336, 26 L. ed. 563; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380; McElmurray v. Loomis, 31 Fed. 395; Harper v. Norfolk & W. R. Co., 36 Fed. 102; Bangs v. Loveridge, 60 Fed. 963; Popp v. Cincinnati, H. & D. Ry. Co., 96 Fed. 465; Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Bishop v. Boston & M. R. R., 117 Fed. 771; Laubscher v. Fay, 197 Fed. 879; Browne v. Browne, Fed. Cas. No. 2,035 (1 Wash. 429); Dodge v. Perkins, Fed. Cas. No. 3,954 (4 Mason, 435); Carter v. Treadwell, Fed. Cas. No. 2,480 (3 Story, 25); Hill v. Henderson, 14 Miss. (6 Smedes & M.), 351; Miller v. Sunde, 1 N. D. 1, 44 N. W. 301; Geyer v. John Hancock Mut. Life Ins. Co., 50 N. H. 224, 9 Am. Rep. 185; Middleton's Ex'rs v. Middleton (Pennsylvania), 7 Wkly. Notes Cas. 144.

4 Omaha Hotel Co. v. Wade, 97 U. S. 13; Jackson & Sharp Co. v. Burlington & L. R. Co., 29 Fed. 474; Putnam v. Timothy Dry-Goods & Carpet Co., 79 Fed. 454; International Trust Co. v. T. B. Townsend Brick & Contracting Co., 95 Fed. 850; Alsop v. Conway, C. C. A., 188 Fed. 568.

5 U. S. v. Myers, Fed. Cas. No. 15,844 (2 Brock. 516).

6 See *supra*, § 41.

7 Shirk v. City of La Fayette, 52 Fed. 857.

8 Williams v. Ritchey, Fed. Cas. No. 17,734 (3 Dill. 406); Woolridge v. McKenna, 8 Fed. 650; Dodd v. Ghiselin, 27 Fed. 405; Voss v. Neineber, 68 Fed. 947. *Contra*, In re McClean's Estate, 26 Fed. 49.

9 Wiggins v. Bethune, 29 Fed. 51; Wilcoxen v. Chicago, B. & Q. R. Co., 116 Fed. 444.

10 Ruckman v. Palisade Land Co., 1 Fed. 367; Mead v. Walker, 15 Wis. 499.

11 Mexican Cent. Ry. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245.

curator or committee of a lunatic,[12] sues in his own name under the authority of a State statute, his citizenship, not that of his ward, is the test of the right of removal. Notwithstanding a State statute providing that a non-resident could not act as administrator; it was held, that an administrator there appointed was not estopped from showing, upon an application for a removal, that he was a citizen of another State.[13] When a mortgage bondholder sued for a foreclosure, in behalf of himself and all the other bondholders, only 120 bonds having been issued; and the latter, who had not been made parties, the complaint alleging that some, but not all, were unknown to the plaintiff, intervened and prayed the same relief; it was held, that all such bondholders were indispensable parties, and in determining the jurisdiction of the court, must be considered to be upon the same side as the plaintiff, thus compelling a dismissal of the suit.[14] In an action for the assignment of dower, brought in a State court by a citizen of Illinois, it appeared that of two defendants who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his co-defendant, a citizen of Illinois, though it did not appear that he was authorized to represent his interests in the property for the purposes of the suit. It was held, that the beneficiary was a necessary party, and, being a citizen of the same State as plaintiff, was not entitled to a removal; and that, the controversy not being separable, the trustee, although a citizen of another State, could not sustain a petition for removal.[15]

§ 45. Controversies to which aliens are parties. The Judicial Code gives the District Courts original jurisdiction of all suits of a civil nature, at common-law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and "is between citizens of a State and foreign States, citizens, or subjects."[1] A District Court of the United States has original jurisdiction of an action by an alien against a citizen and resi-

[12] Wiggins v. Bethune, 29 Fed. 51; Stout v. Rigney, 107 Fed. 545, 46 C. C. A. 459.

[13] McDuffie v. Montgomery, 128 Fed. 105.

[14] Mangels v. Donau Brewing Co., 53 Fed. 513; distinguishing Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329.

[15] Rand v. Walker, 117 U. S. 340, 29 L. ed. 907.

§ 45. [1] § 24, 36 St. at L. 1087.

dent of the State where the suit is brought;[2] but not, except perhaps in patent, copyright and trade-mark cases,[3] of an action by an alien against a citizen of another State, who does not reside within the district.[4] A citizen of one of the United States cannot be sued by an alien in any district which he does not inhabit.[5] The fact that the alien is a resident of the district where the suit is brought does not give the court jurisdiction of such a case.[6] Where no Federal question was involved, it was held that, when the defendants are citizens of different districts, they could not be sued by an alien in any one of them.[7] An alien who has no residence within the United States may be sued by a citizen of one of the United States in the Federal court in any district where he can be served with process.[8] So it has been held in suits to enjoin the infringement of patents,[9] as well as in other cases; and even when the defendant is an alien corporation, over which the State statute deprives its courts of jurisdiction;[10] provided that it transacts business within the State, but not otherwise;[11] and also when the plaintiff is a citizen and resident of a different State from that where the suit is brought.[12]

A non-resident alien defendant may remove a suit involving the jurisdictional amount when all the parties on the opposite side of the controversy are citizens and residents of the same State of the United States and when the plaintiffs reside in

[2] Von Thodorovich v. Franz Josef Beneficial Ass'n., (E. D. Pa.) 154 Fed. 911.

[3] See *infra*, § 62.

[4] Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 507, 38 L. ed. 248, 252; Fribourg v. Pullman Co., (E. D. N. C.) 176 Fed. 981; McAulay v. Moody, (D. Or.) 185 Fed. 144.

[5] Ibid.

[6] Miller v. N. Y. Cent. & H. R. R. Co., (D. Mass.) 147 Fed. 771.

[7] McAulay v. Moody, (D. Or.) 185 Fed. 144.

[8] *Re* Hohorst, 150 U. S. 653, 37 L. ed. 1211; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964; Carp v. Queen Ins. Co., 168 Fed. 782. *Contra*, Meyer v. Herrera, (W. D. Texas, San Antonio Division) 41 Fed. 65.

[9] United Shoe Mach. Co. v. Duplessis Independent Shoe Mach. Co., (D. Mass.) 133 Fed. 930.

[10] Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964.

[11] Tierney v. Helvetia Swiss Fire Ins. Co., 163 Fed. 82.

[12] Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964; Jarowski v. Hamburg-American Packet Co., C. C. A., 182 Fed. 320.

the district where the suit is brought;[13] and it has been held when they reside elsewhere.[14] A resident alien cannot when no Federal question is involved.[15] It has been held, that when a non-resident alien is joined as a defendant with a non-resident citizen of a different State from that of a resident plaintiff, they may jointly remove the case if the jurisdictional amount is involved;[16] but this cannot be done when the plaintiff is not a resident of the State where the suit is brought.[17] The authorities are in conflict as to whether a defendant, who is a citizen and resident of a different State from that where the suit is instituted, can remove an action brought by an alien in the State court. The preponderance of the more recent authorities holds that he cannot, whether the alien is a resident,[18] or non-resident[19] of the State where the suit is brought.

[13] Cooley v. McArthur, 35 Fed. 372.

[14] Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., C. C. A., 196 Fed. 340.

[15] Johnson v. Monell, Fed. Cas. No. 7,399 (1 Woolw. 390); Sands v. Smith, Fed. Cas. No. 12,305 (1 Abb. U. S. 368, 1 Dill. 290); Cudahy v. McGeoch, 37 Fed. 1; Walker v. O'Neill, 38 Fed. 374; Eddy v. Casas, 118 Fed. 363; Miller v. New York Cent. & H. R. R. Co., 147 Fed. 771; Rooker v. Crinkley, 113 N. C. 73, 18 S. E. 56.

[16] Ballin v. Lehr, 24 Fed. 193; where the report does not show whether the alien was a resident or a nonresident; Roberts v. Pac. & A. Ry. & Nav. Co., C. C. A., 121 Fed. 785, 58 C. C. A. 61, affirming 104 Fed. 577; Ladew v. Tennessee Copper Co., 179 Fed. 245. See, also, Rateau v. Bernard, 3 Blatchf. 244, Fed. Cas. No. 11,579. *Contra*, Tracy v. Morel, (D. Nebraska) 88 Fed. 801.

[17] Carp v. Queen Ins. Co. (W. D. Mo.) 168 Fed. 782. *Contra*, Ladew v. Tennessee Copper Co., (S. D. Tenn.) 179 Fed. 245, 256.

[18] Kamenicky v. Catterall Printing Co., (S. D. New York) 188 Fed. 400; Odhner v. Northern Pac. Ry. Co., (S. D. New York) 188 Fed. 507; Sagara v. Chicago, R. I. & P. Ry. Co. (D. Col.) 189 Fed. 220. These cases follow the analogy of *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264. See, also, Petrocokino v. Stuart, Fed. Cas. No. 11,041; Matter of Tobin, 214 U. S. 506, 53 L. ed. 1061. *Contra*, Uhle v. Burnham, (S. D. N. Y.) 42 Fed. 1 (residence not shown); Stalker v. Pullman's Palace Car Co., (S. D. Cal.) 81 Fed. 989 (residence not shown); Smellie v. Southern Pac. Co., (N. D. Cal.) 197 Fed. 641 (residence not shown).

[19] Harold v. Iron Silver Min. Co., (D. Col.) 33 Fed. 529; Mahopoulus v. Chicago, R. I. & Pac. Ry. Co., (W. D. Mo.) 167 Fed. 165; Bagenas v. Southern Pac. Co., (N. D. Cal.) 180 Fed. 887; Hall v. Great Northern Ry. Co., (D. Montana) 197 Fed. 488. *Contra*, Sherwood v. Newport News & M. Val. Co., (W. D. Tenn.)

Where an alien is a party to a suit in a District Court of the United States, an objection to the jurisdiction founded upon residence may be waived.[20] Where the suit is originally brought in the Federal court, the plaintiff by suing makes such a waiver and the defendant is the only person who can object to the jurisdiction on this ground.[21] Where the suit is originally brought in the State court, the defendant by the removal consents to the jurisdiction of the court of the United States and the plaintiff alone can make such an objection.[22]

A District Court of the United States, where no Federal question is involved, has no jurisdiction of an action brought by an alien to enforce a chose in action that has been assigned to him, unless his assignor could have maintained the suit upon the ground of a difference of citizenship.[23]

The District Courts of the United States can obtain no jurisdiction, either originally or by removal, by reason of a diversity of citizenship, when the controversy is between two aliens;[24] nor when a citizen of the same State as that of the opposite party is on the same side of the controversy as an alien;[25] even

55 Fed. 1; Creagh v. Eq. Life Assur. Soc., (D. Wash.) 83 Fed. 849; Morris v. Clark Constr. Co., (D. S. C.) 140 Fed. 756; Iowa Lillooet Gold Min. Co. v. Bliss, (N. D. Ia.) 144 Fed. 446; Barlow v. Chicago & N. W. Ry. Co., (N. D. Ia.) 172 Fed. 513; H. J. Decker Jr. & Co. v. Southern Ry. Co., (N. D. Ala.) 189 Fed. 224; Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., C. C. A., 196 Fed. 340.

20 *Infra*, § 61.

21 H. J. Decker Jr. & Co. v. Southern Ry. Co., 189 Fed. 224. See *infra*, § 61.

22 H. J. Decker Jr. & Co. v. Southern Ry. Co., 189 Fed. 224. See *infra*, § 61.

23 Tierney v. Helvetia Swiss Fire Ins. Co., (E. D. N. Y.) 163 Fed. 82. See *infra*, § 61.

24 Mossman v. Higginson, 4 Dallas, 12, 1 L. ed. 720; Montalet v. Murray, 4 Cranch, 46, 2 L. ed. 545; King v. Cornell, 106 U. S. 395, 27 L. ed. 60; Walton v. McNeil, Fed. Cas. No. 17,134; Prentiss v. Brennan, Fed. Cas. No. 11,385 (2 Blatchf. 162); Rateau v. Bernard, Fed. Cas. No. 11,579 (3 Blatchf. 244); Hinckley v. Byrne, Fed. Cas. No. 6,510 (1 Deady, 224); Petrocokino v. Stuart, Fed. Cas. No. 11,041; Pooley v. Luco, 72 Fed. 561; Orosco v. Gagliardo, 22 Cal. 83; Barrowcliffe v. La Caisse Generale (New York), 58 How. Prac. 131. *Contra*, Liverpool, B. & R. P. Nav. Co. v. Agar, 14 Fed. 615.

25 Hervey v. Illinois Midland Ry. Co., Fed. Cas. No. 6,434 (7 Biss. 103); Watson v. Evers, 13 Fed. 194; People v. Hager, 20 Cal. 167; Davis v. Cook, 9 Nev. 134. But see Bell v. Ohio Life Ins. Co., Fed. Cas. No. 1,261.

if the controversy is separable;[26] nor can they obtain jurisdiction when a State and an alien are parties.[27]

§ 46. Determination of Citizenship. Natural Persons. A citizen of the United States is a citizen of the State in which he permanently resides and has his domicile.[1] It has been said that a person, by change of residence to a foreign country, may cease to be a citizen of any State of the Union, while remaining a citizen of the United States.[2] The exercise of the right of suffrage by a citizen of the United States is conclusive evidence of his citizenship.[3] It has been held, that voting in a party primary, and membership in a local political committee, are not conclusive evidence of citizenship.[4] Voting is not indispensable to establish citizenship.[5] It has been held, that residence alone, which is not shown to be permanent, is not conclusive of citizenship,[6] but when proved, is *prima facie* evi-

[26] King v. Cornell, 106 U. S. 395, 27 L. ed. 60.

[27] O'Conor v. Texas, 202 U. S. 501, 50 L. ed. 1120; affirming State v. O'Connor, 73 S. S. 1041, 96 Tex. 484; New Jersey v. Babcock, Fed. Cas. No. 10,163 (4 Wash. 344).

§ 46. [1] Shelton v. Tiffin, 6 Howard, 163, 12 L. ed. 387; Reynolds v. Adden, 136 U. S. 348, 34 L. ed. 360; Kemna v. Brockhaus, 5 Fed. 762; Winn v. Gilmer, 27 Fed. 817; McDonald v. Salem Capital Flour Mills Co., 31 Fed. 577, 12 Sawyer, 492; Cooper v. Galbraith, 3 Wash. 546; Lessee of Butler v. Farnsworth, 4 Wash. 101, 1 Abb. (U. S.) 211; Burnham v. Rangeley, 1 Woodb. & M. 7.

[2] Hammerstein v. Lyne, 200 Fed. 165, 172. See *supra*, § 40.

[3] Rabaud v. D'Wolf, 1 Paine, 580; Sanger v. Seymour, 25 Fed. 289; State Sav. Ass'n v. Howard, 31 Fed. 433; McDonald v. Salem C. F. Mills Co., 31 Fed. 577; Caldwell v. Firth, C. C. A., 91 Fed. 177; Laws v. Fleming, 177 Fed. 450; Thompson v. Ward, 199 Fed. 861.

[4] Gaddie v. Mann, 147 Fed. 955. A declaration by a single man, that he intended to remain upon and run a ranch in one State, and that he intended to vote at a presidential election, although he subsequently said that he did not vote because he was not a citizen of that State; were held, sufficient to establish his change of residence from another State to that where the ranch was located, he having led "a sort of nomadic life. But for the last two or three years the evidence indicated very clearly, that San Antonio," a city in such State, "was headquarters and the place of residence for business purposes or pleasure." Winn v. Gilmer, 27 Fed. 817.

[5] Shelton v. Tiffin, 6 Howard, 163, 185, 12 L. ed. 387, 397; Marks v. Marks, 75 Fed. 321.

[6] Shelton v. Tiffin, 6 How. (U. S.), 163, 185, 12 L. ed. 387, 397; Lessee of Butler v. Farnsworth, 4 Wash. 101, 1 Abb. (U. S.) 211; Chicago & N. W. R. Co. v. Ohle, 117 U. S. 123, 29 L. ed. 837; absence at

school does not constitute a change; Reynolds v. Adden, 136 U. S. 348, 352, 34 L. ed. 360, 361; Kemna v. Brockhaus, 5 Fed. 762; Woolridge v. McKenna, 8 Fed. 650; Sanger v. Seymour, 25 Fed. 289; McDonald v. Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawyer, 492; Rivers v. Bradley, 53 Fed. 305; Chiatovich v. Hanchett, 78 Fed. 193; Alabama G. S. R. Co. v. Carroll, C. C. A., 84 Fed. 772, 28 C. C. A. 207; Caldwell v. Firth, C. C. A., 91 Fed. 177; Nichols v. Nichols, 92 Fed. 1; Blair v. Silver Peak Mines, 93 Fed. 332; denying rehearing 84 Fed. 737; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Willingham v. Swift & Co., 165 Fed. 223; Harding v. Standard Oil Co., 182 Fed. 421; Sherman v. Southern Pac. Co., 192 Fed. 711; Illinois Life Ins. Co. v. Shenehon, 109 Fed. 674, where the party had no dwelling in the State of which she was held to be a citizen; but had stored her furniture therein, while she was absent to attend to litigation in another State, where she owned property and had lived before her marriage to her deceased husband. Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25, payment of the dues of a resident member in two clubs, at one of which the party had a room, accompanied by the maintenance of an office in the same city, the party's wife being absent from both States, insufficient to constitute a change, Corel v. Chicago, R. I. & P. Ry. Co., 123 Fed. 452; filing a homestead claim, and the construction of a house on the land where another family lived, accompanied by several visits to the Territory, remaining as long as two months there at one time, is insufficient. Pond v. Vermont Valley R. Co., 12 Blatchf. 280, 293; Reckling v. McKinstry, 185 Fed. 842, holding: that defendant had changed his citizenship to a State where he had lived for more than a year, under an express intention to make his home there, had engaged in business, leased business property, bought a home, joined a chamber of commerce, and paid the poll-tax, although in his affidavit he stated that he "is not determined to make this his home, or to become a citizen of this state, but is seriously considering the advisability of moving back to his home in" another State. In Laws v. Fleming, 177 Fed. 450, 453, the deposition of the plaintiff in another suit in a State court, where, in answer to the question "When did you first make Fairmont your home?" he had replied, "About the first of the year;" was not conclusive against his affidavit that he was a registered voter, paid a poll-tax, and had a furnished house temporarily closed in another State, but that because of his connection with the building of a railroad he had temporarily resided in Fairmont with no intention of establishing his business there. In Harton v. Howley, 155 Fed. 491, a married man had left his wife and child in a house built by his wife, in one State, where he usually spent Sunday, paid taxes and voted when he last exercised the right of suffrage; it was held, that he had not changed his citizenship therefrom; although for two years he had been engaged in business in another State and lived there, occupying a room in a hotel throughout the week, and testified that he was a resident of the latter State. In Jones v. Subera, 150 Fed. 462, a single man had transacted business and occupied rooms in a

dence thereof.[7] It has been held: that the acceptance and discharge of the duties of receiver of a railroad, within a State, does not constitute a change of citizenship.[8] A State statute, providing that a non-resident cannot act as an administrator, does not make an administrator appointed therein a citizen of the State; but the jurisdiction of the Circuit Court of the United States is determined by his actual citizenship, notwithstanding his appointment.[9] A statement in a document signed by him, that a person is "of" a specified State, is evidence that he is a citizen of the same;[10] but does not estop him from proving the contrary.[11] It has been held: that a husband and wife, who are not living apart under a legal separation, cannot be citizens of different States.[12] Upon the insanity of a husband, and his confinement in an asylum, his wife becomes the head of the family, and may change the place of residence to another State,

State for more than two years, and had described himself in conveyances therein as a resident thereof; it was held, that he was a citizen of that State; although he testified, that during all that time he had maintained a home in the State of his former citizenship and expected to return thereto when his business affairs in the other State were concluded. In Thompson v. Ward, 199 Fed. 861, 863, the defendant was served within the State and his wife then stated that they intended to move to another State. He did not, when served, make any statement concerning his residence, but subsequently filed an affidavit making a general statement that he resided and was a citizen of another State. Two others, residents of another State, made affidavits that he had moved his household goods from the State where he was served prior to the commencement of the suit and that he was not a citizen of Iowa, but that his headquarters had been in the other State until recently, when he had been transferred to another place in the same State, where he was now temporarily located. It was proved that, at the last general election, he had voted in the State where he was served. *Held* that the evidence was insufficient to show that he was a citizen of any other State. Stoker v. Leavenworth, 7 La. O. S. 390, holding that army officers, stationed on duty in a State, did not become citizens there; Guarantee Co. of North America v. First Nat. Bank (Virginia), 28 S. E. 909, absence while in a penitentiary is insufficient.

[7] Kemna v. Brockhaus, 5 Fed. 762; Eisele v. Oddie, 128 Fed. 941.

[8] Brisenden v. Chamberlain, 53 Fed. 307.

[9] McDuffie v. Montgomery, 128 Fed. 105.

[10] Rucker v. Bolles, C. C. A., 80 Fed. 504.

[11] Reynolds v. Adden, 136 U. S. 348; Illinois Life Ins. Co. v. Shenehon, 109 Fed. 674.

[12] Poppenhauser v. India Rubber Comb Co., 14 Fed. 707; Hatch v. Ferguson, 57 Fed. 959; Nichols v.

although her husband remains in confinement in the State where they formerly were citizens and domiciled.[13] It has been said: that a minor cannot acquire a separate domicile from that of his father during the latter's life, except by the emancipation of the child and a complete surrender of the parental control as to the choice of domicile.[14] "When a young man leaves the parental home, and strikes out into the world; goes to another State; engages in business for a considerable length of time—the natural inference would be that he intended to build himself a new home, and domicile in the State where he had taken up his residence. So, likewise, if a man of years, overtaken by misfortune—perhaps reduced from luxury to penury and want—with no family ties to bind him, and the home of former years has passed from him, and from under his control, in the desperation of his situation abandons the State where these misfortunes have overtaken him, and remains away for a term of years—enters into the business of life with a residence in a neighboring State—the inference would naturally arise that he had no desire or intention of longer remaining in the locality of all his misfortunes."[15]

When the permanent residence and citizenship of a party, at a date shortly before the beginning of the suit, is proved, the presumption is that the same continues until there is proof of a change.[16] There is no presumption that the president of a corporation is a citizen of the State that chartered it.[17] An intention to return unaccompanied by acts does not restore the former residence after it has been actually changed.[18] "A man

Nichols, 92 Fed. 1; Thompson v. Stalmann, 139 Fed. 93. See Comitis v. Parkerson, 56 Fed. 556, 22 L.R.A. 148; Jennes v. Landes, 85 Fed. 801. *Contra*, Town of Watertown v. Greaves, C. C. A., 112 Fed. 183; Gordon v. Yost, 140 Fed. 79.

[13] McKnight v. Dudley, C. C. A., 148 Fed. 204.

[14] Woolridge v. McKenna, 8 Fed. 650; where the father, after the mother's death, had placed the child in question under the permanent care of her aunt at the latter's residence in another State.

[15] Winn v. Gilmer, 27 Fed. 817, 818, 819.

[16] Heath v. Austin, Fed. Cas. No. 6,305 (12 Blatchf. 320); Collins v. City of Ashland, 112 Fed. 175.

[17] Utah-Nevada Co. v. DeLamar, C. C. A., 133 Fed. 113. But see Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543; *infra*, § 61.

[18] Pacific M. L. I. Co. v. Tompkins, C. C. A., 101 Fed. 539.

may reside in a State for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a State different from that where he formerly was domiciled or was a citizen, with intent and purpose of making the new place of residence his future permanent home, that moment he loses his former domicile,and becomes domiciled in the new place; or, in other words, he ceases to be a citizen of the former place of residence, and becomes a citizen of the State of his adoption." [19]

[19] Winn v. Gilmer, 27 Fed. 817; Kemna v. Brockhaus, 5 Fed. 762, 763, 764, 766, 767, per Dyer, J.:

"The general rule upon the subject of citizenship is well settled. It is that, 'in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the State to which he may have removed from another State. Mere residence is *prima facie* evidence of such change, although when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts.' Lessee of Butler v. Farnsworth, 4 Wash. 101, 1 Abb. (U. S.), 211. 'If a citizen of one State think proper to change his domicile, and to remove himself and family . . . into another State, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes, he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that State within the meaning of the provision of the Constitution relative to the jurisdiction of the Federal courts, and may maintain an action in the Circuit Court of the State which he has abandoned. . . . Time in relation to his new residence, occupation, a sudden removal back after instituting a suit, and the like, are circumstances which may be relied upon to show that his first removal was not *bona fide* or permanent, but will not disprove his citizenship in the place of his new domicile, if the jury are satisfied that his first removal was *bona fide* and without an intention of returning.' Cooper v. Galbraith, 3 Wash. 564. 'If there has been an actual removal, with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.' Butler v. Farnsworth, *supra*. A temporary return to one's former place of residence, with views and for objects merely temporary, does not revive a former citizenship. Burnham v. Rangely, 1 Woodb. & M. 7. 'If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the State of actual residence, it may not avail; but, where there is an actual change of resi-

The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the State of his residence to vote and hold office there.[20] When a naturalized citizen took an oath of allegiance to the sovereign of a foreign county, of whom he had never been a subject, and accepted from that King an appointment as consul, but continued to reside in the United States; it was held, that he remained an American citizen, and could not remove a case because of alienage.[21] It was held, that the marriage, in the United States of a citizen thereof to a foreign subject, with whom she lived in the United States until his death, did not make her an alien, although her husband was never naturalized.[22] A citizen of Cuba is an alien, and may sue in a Circuit Court of the United States, or may remove to such court a suit brought against him, in the cases in which an alien might so sue or remove.[23] The fact that a plaintiff has changed his residence and citizenship, for the purpose of bringing suit in the Federal court, does not divest it of jurisdiction if the change has been actually made,[24] without any

dence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States.' Pond v. Vermont Valley R. Co., 12 Blatchf. 293. So, to effect a change of citizenship from one State to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose. . . . The question is one of mixed law and fact. . . . It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one which if unexplained, would tend to throw doubt upon the permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that State would not be affected." See Adams v. Shirk, C. C. A., 117 Fed. 801.

[20] Baird v. Byrne, Fed. Cas. No. 757 (3 Wall. Jr. 1); Maloy v. Duden, 25 Fed. 673; Creagh v. Equitable Life Assur. Soc., 88 Fed. 1; Lanz v. Randall, 4 Dill. 425; Orosco v. Gagliardo, 22 Cal. 83.

[21] Fish v. Stoughton (New York), 2 Johns. Cas. 707.

[22] See Comitis v. Parkerson, 56 Fed. 556, 22 L.R.A. 148.

[23] Betancourt v. Mutual Reserve Fund Life Ass'n, 101 Fed. 305; Davis v. Dixon, 184 Fed. 509.

[24] Briggs v. French, 2 Sumn. 251, 255, 256; Catlett v. Pacific Ins. Co., 1 Paine, 594; Cooper v. Galbraith, 3 Wash. C. C. 546, 553; Case v. Clarke, 5 Mason, 70; Robertson v. Carson, 19 Wall. 94, 106, 22 L. ed. 178, 180; Wiemer v. Louisville Water Co., 130 Fed. 244.

intention to return.[25] It has been held that a party may testify that up to a certain date he was a citizen of a specified State, and that others cannot, but must confine their testimony to facts from which his citizenship can be inferred.[26]

An allegation that a party is "a citizen of London, England," was held, to be insufficient to show that he was an alien.[27] But the averment that the complainants were "all of Cognac, France, and citizens of the Republic of France," was held to be sufficient.[28] Where plaintiffs sued as executors; it was held to be insufficient to allege "that said plaintiffs, as such executors, are citizens of the State of New York;"[29] but, it was held, to be sufficient to allege that the defendants, "as they are the qualified executors of the last will and testament of James Brown, deceased, were, each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York; and that the defendant John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey."[30]

It has been held: that an allegation that the plaintiff was a citizen of the United States, and a resident of a specified State therein, was sufficient, in view of the Fourteenth Amendment, to show that he was a citizen of such State.[31] The fact that a plaintiff has changed his residence and citizenship for the purpose of bringing suit in the Federal court does not divest the jurisdiction if the change has actually been made[32] without any intention to return.[33] It has been held: that where the

[25] Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690; King v. U. S., 59 Fed. 9; Kingman v. Holthaus, 59 Fed. 305; Allen v. So. Cal. Ry. Co., 70 Fed. 370; Chambers v. Prince, 75 Fed. 176; Ala. G. S. R. Co. v. Carroll, C. C. A., 84 Fed. 772.

[26] Rucker v. Bolles, C. C. A., 80 Fed. 504.

[27] Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341. *Cf.* Rondot v. Tp. of Rogers, C. C. A., 79 Fed. 676; Jennes v. Landes, 84 Fed. 73; s. c., 85 Fed. 801. But see Betancourt v. Mutual R. F. L. Ass'n, 101 Fed. 305.

[28] Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 L. ed. 697.

[29] Amory v. Amory, 95 U. S. 186, 24 L. ed. 428.

[30] Cooke v. Seligman, 7 Fed. 263.

[31] Clausen v. American Ice Co., 144 Fed. 723.

[32] Briggs v. French, 2 Sumn. 251, 255, 256; Catlett v. Pacific Ins. Co., 1 Paine, 594; Cooper v. Galbraith, 3 Wash. C. C. 546, 553; Case v. Clarke, 5 Mason, 70; Robertson v. Carson, 19 Wall. 94, 106, 22 L. ed. 178, 180.

[33] Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690; Ala. G. S. R. Co. v.

plaintiff alleges that he is a citizen of a certain State, and that fact is denied, the burden of proof is upon the defendant.[34]

§ 47. Corporations. For the purposes of the jurisdiction of a District Court of the United States, either originally or upon removal, a corporation is treated as if it were a citizen of the State, by or under the laws of which it was chartered; or, as is generally said, it is conclusively presumed to be composed of the citizens of such State.[1] The same presumption exists as regards a corporation chartered by or under the laws of a foreign country.[2] Where, however, stockholders in a corporation are themselves joined with or against it as parties to a suit, the presumption does not extend to them in their individual capacity, although it still exists so far as the corporation is concerned.[3] The location of the principal or usual place of busi-

Carroll, C. C. A., 84 Fed. 772; Kingman v. Holthaus, 59 Fed. 305; King v. U. S., 59 Fed. 9; Chambers v. Prince, 75 Fed. 176; Allen v. So. Cal. Ry. Co., 70 Fed. 370.

34 Gilmer v. Grand Rapids, 16 Fed. 708; Foster v. Cleveland, C., C. & St. L. Ry. Co., 56 Fed. 434; Sheppard v. Graves, 14 How. 505, 14 L. ed. 518; Nat. M. Acc. Ass'n v. Sparks, C. C. A., 83 Fed. 225; Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25; Hill v. Walker, C. C. A., 167 Fed. 241.

§ 47. 1 Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 11 L. ed. 353; Marshall v. Baltimore & O. R. Co., 16 How. 314, 14 L. ed. 953; Muller v. Dows, 94 U. S. 446, 24 L. ed. 208; Steamship Co. v. Tugman, 106 U. S. 118; St. Louis & St. F. Ry. Co. v. James, 161 U. S. 545, 562, 40 L. ed. 802, 808; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; Barney v. Globe Bank, Fed. Cas. No. 1,031 (5 Blatchf. 107); Terry v. Imperial Fire Ins. Co., Fed. Cas. No. 13,838 (3 Dill. 408); Purcell v. British Land & Mortgage Co., 42 Fed. 465; Western Union Tel. Co. v. Dickinson, 40 Ind. 444; Stanley v. Chicago, R. I. & P. Ry. Co., 62 Mo. 508; Barrowcliffe v. La Caisse Generale des Assurances Agricoles et des Assurance Contre L'Incendie (New York), 1 City Ct. R. 151; Shelby v. Hoffman (Ohio), 7 Ohio St. 451; Fox v. American Casualty & Security Co. (Pennsylvania), 12 Pa. Co. Ct. R. 207, 2 Pa. Dist. R. 158. See State corporation as party in Federal courts, by Judge F. E. Baker, 13 Am. Law Review, 7.

2 Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 38 L. ed. 195; Terry v. Imperial Fire Ins. Co., Fed. Cas. No. 13,838 (3 Dill. 408); Purcell v. British Land & Mortgage Co., 42 Fed. 465; Barrowcliffe v. La Caisse Generale des Assurances Agricoles et des Assurance Contre L'Incendie (New York), 1 City Ct. R. 151; Baumgarten v. Alliance Assur. Co., 153 Fed. 301.

3 Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Bacon v. Robertson, 18 How. 480, 15 L. ed. 499; Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76; Dodd v. Louisville Bridge Co., 130 Fed. 186;

ness of the corporation is immaterial;[4] even if all of its business is transacted, and all of its offices and places of business are situated, outside of the State where it was chartered;[5] and although it was organized for the purpose of doing business in other States.[6] No such presumption exists in the case of a corporation which it is proved was organized for the sole purpose of bringing a controversy, in which its members were interested, within the jurisdiction of a District Court of the United States.[7] But where it appeared that, for several years prior to the suit in the Federal court, the original owner had discussed with counsel the advisability of conveying the land in question to a corporation, in order to be able to avoid individual liability for money borrowed to use in its improvement;[8] and where the property affected by the litigation was a small portion of that conveyed to the corporation; it was held: that the fact that the sole consideration for the transfer was the stock of the company, which had no other assets than that received from the grantors, whose citizenship was not diverse from that of the defendants, did not prevent the maintenance of the suit by the corporation in a Federal Court.[9] No such presumption exists in the case of a *de facto* corporation, which never acquired a legal existence.[10] A municipal corporation, such as a city,[11]

Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 C. C. A. 179.

[4] Phinizy v. Augusta & K. R. Co., 56 Fed. 273; United States v. S. P. Shotter Co., 110 Fed. 1.

[5] Pacific R. R. v. Missouri Pac. Ry. Co., 23 Fed. 565.

[6] Baughman v. National Waterworks Co., 46 Fed. 4.

[7] Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 336, 40 L. ed. 444, 447; Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 53 L. ed. 189; Southern Realty Investment Co. v. Walker, 211 U. S. 603, 53 L. ed. 346; Gelders v. Haygood, 182 Fed. 109, directing the disbarment of the attorneys unless within sixty days they dissolve the corporation and dismiss all suits brought in its name. See Kreider v. Cole, C. C. A., 149 Fed. 647; § 363, *infra*.

[8] Irvine Co. v. Bond, 74 Fed. 849.

[9] Slaughter v. Mallet Land & Cattle Co., C. C. A., 141 Fed. 282.

[10] Gastonia Cotton Mfg. Co. v. W. L. Wells Co., 128 Fed. 369, 63 C. C. A. 111; reversing 118 Fed. 190; Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; Ysleta v. Canda, 67 Fed. 6; Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio, 91 Fed. 37; New Orleans v. Sheppard, 10 La. Ann. 268.

[11] Ysleta v. Canda, 67 Fed. 6; New Orleans v. Sheppard, 10 La. Ann. 268.

a township,[12] or a county,[13] or a public board, composed of public officers, which has been created a corporation by the State laws,[14] is considered to be a citizen of the State within which it is situated, or to be composed of citizens of that State. An averment that the Board of Trustees of a State University was created by and exists under and by virtue of the law of a State, with authority to sue and be sued and to make and to use a common seal, without any allegation that it was a corporation created by and existing under the laws thereof, was held to be insufficient to sustain the jurisdiction of the State court on the ground of diverse citienship, where the citizenship of the trustees did not appear.[15] A national banking association, so far as the jurisdiction of the Federal courts is concerned, stands in the same position as a citizen of the State in which it is located.[16] Where a corporation, originally created in one State, afterwards becomes compulsorily a corporation of another State, in order to extend its powers, and it is engaged in interstate commerce; it is treated, for the purpose of jurisdiction, as composed of citizens of the State which first gave it corporate existence;[17] but it was said that unless the case arises under the Constitution and laws of the United States, the Federal court can-

12 Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio, 91 Fed. 37.

13 Cowles v. Mercer County, 7 Wallace, 118, 19 L. ed. 86.

14 Thomas v. Board of Trustees, 195 U. S. 207.

15 Thomas v. Board of Trustees, 195 U. S. 207, 49 L. ed. 160.

16 24 St. at L. p. 554; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144; First Nat. Bank v. Forest, 40 Fed. 705; Farmers' Nat. Bank v. McElhinney, 42 Fed. 801; *supra*, § 28.

17 St. Louis & St. F. Ry. Co. v. James, 161 U. S. 545, 40 L. ed. 802; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 43 L. ed. 1081; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; reversing 129 N. C. 336, 40 S. E. 991; Callahan v. Louisville & N. R. Co., 11 Fed. 536; Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875; Atlantic Coast Line R. Co. v. Dunning, C. C. A., 166 Fed. 850; St. Louis & S. F. R. Co. v. Cross, 171 Fed. 480; Cummins v. Chicago, B. & Q. R. Co., 193 Fed. 238; Wilson v. Southern Ry. Co. (North Carolina), 36 S. E. Rep. 701, (overruling: Debnam v. Southern Bell Telephone & Telegraph Company, 126 N. C. 831, 36 S. E. 269; Layden v. Knights of Pythias, etc., 128 N. C. 546, 39 S. E. 47; and Mathis v. Railway Company, 53 S. C. 246, 257); Wilson v. Southern Ry. Co. (South Carolina), 41 S. E. 971, 64 S. C. 162; affirming on rehearing judgment 36 S. E. 701;

not adjudicate its rights or liabilities as a corporation of a State, citizens of which are upon the other side of the controversy.[18] Otherwise, where a corporation is chartered by two or more States, it has generally been held: that it should be treated, for the purpose of jurisdiction, as composed of citizens of the State where the suit is brought;[19] but the rule

Mathis v. Southern Ry. Co. (South Carolina), 31 S. E. 240; Calvert v. Southern Ry. Co. (South Carolina), 41 S. E. 963, 64 S. C. 139; affirming on rehearing judgment 36 S. E. 750. See Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204.

[18] Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 563, 577, 43 L. ed. 1081, 1087, 1092.

[19] Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. ed. 130; Railway Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 27 L. ed. 518; Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204; Minot v. Philadelphia, W. & B. R. Co., Fed. Cas. No. 9,645 (2 Abb. U. S. 323); affirmed in 18 Wall. 206, 21 L. ed. 888; St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co., Fed. Cas. No. 12,237 (9 Biss. 144); Horne v. Boston & M. R. R., 18 Fed. 50; Colglazier v. Louisville, N. A. & C. Ry. Co., 22 Fed. 568; Union Trust Co. v. Rochester & P. R. Co., 29 Fed. 609; Page v. Fall River, W. & P. R. Co., 31 Fed. 257; Phinizy v. Augusta & K. R. Co., 56 Fed. 273; Taylor v. Illinois Cent. R. Co., 89 Fed. 119; Smith v. New York, New Haven & H. Railroad, 96 Fed. 504; Walters v. Chicago, B. & Q. R. Co., 104 Fed. 337; Boston & Maine R. R. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L.R.A. 193; Goodwin v. New York, N. H. & H. R. Co., 124 Fed. 358; Goodwin v. Boston & M. R. R., 127 Fed. 986; Alabama & G. Mfg. Co. v. Riverdale Cotton Mills, C. C. A., 127 Fed. 497; Lake Shore & M. S. Ry. Co. v. Eder, C. C. A. 174 Fed. 944; St. Louis & S. F. R. Co. v. Cross, 171 Fed. 480; Fairfield v. Great Falls Mfg. Co., 175 Fed. 305; Lewis v. Maysville & B. S. R. Co. (Kentucky), 76 S. W. 526, 25 Ky. Law. Rep. 948; Illinois Cent. R. Co. v. Hibbs (Kentucky), 78 S. W. 1116, 25 Ky. Law Rep. 1899; Horne v. Boston & M. Railroad, 62 N. H. 454; Allegheny County v. Cleveland & P. R. Co., 51 Pa. (1 P. F. Smith), 228, 88 Am. Dec. 579; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va. 812. This distinction was noted by the court in Southern Railway Co. v. Allison, 190 U. S. 326, 337, 338, 47 L. ed. 1078, 1083, 1084; but without stating whether it would be followed in the future. *Contra*, Nashua & Lowell R. R. Corp. v. Boston & L. R. R. Corp., 136 U. S. 356, 34 L. ed. 363. In that case, two railroad corporations with the same name, having their junction at the State line, were respectively incorporated by the laws of New Hampshire and Massachusetts, the New Hampshire corporation being the first created. Their subsequent consolidation was first authorized by a law of Massachusetts, which, by its terms, did not take effect until authorized by

may be different where the cause of action arose in another State from that where it is sued.[20] Where the foreign corporation, subsequent to the injury which caused the suit, became incorporated in the State where the injury was done, it was held that, for the purposes of the suit, it should be treated as a foreign corporation.[21] Where there is a merger, one corporation remaining in existence and the other being absorbed in the same, the company continues to be a citizen of the same State as that of the former.[22] In case of a consolidation of corporations chartered by different States; if the consolidation creates a new corporate entity and is made under the laws of a single State, it seems that the new company must be treated as a

a law of New Hampshire and accepted by the stockholders, both of which authorities were subsequently obtained. It was held: that the consolidated company, a New Hampshire corporation, might sue another Massachusetts corporation for an accounting in a suit in the Circuit Court of the United States for the District of Massachusetts. Of this case, Judge Lowell said: "The Supreme Court, although, perhaps not with complete logical consistency, treated the plaintiff as being a corporation created in 1835," the date of the first incorporation prior to the consolidation, "by New Hampshire and by New Hampshire alone. . . . The two corporations of New Hampshire and Massachusetts, operated together, was held, by the Supreme Court, to constitute . . . an anomalous union of two corporations created for distinct purposes by different States, which had been united as to their business and property, but not as to their corporate existence." Goodwin v. N. Y., N. H. & H. R. Co., 124 Fed. 358, 365. The statutes of Alabama required a railroad company, previously incorporated in Tennessee, to open books in Alabama for the subscription to its capital stock, in order to afford citizens of that State an opportunity to subscribe to a specified proportion of the same, and also provided that elections for directors should be held at the same time in both Alabama and Tennessee; the court held, that by reason of the particular language used in the act, there had been a new corporation formed in Alabama: and that the company could not remove a suit brought against it in Alabama by a citizen of that State. Memphis & Charleston R. R. Co. v. Alabama, 107 U. S. 581, 584, 27 L. ed. 518, 519.

20 Patch v. Wabash Railroad Co., 207 U. S. 277, 283, 52 L. ed. 204, 207.

21 Mowery v. Southern Ry. Co., 129 N. C. 351, 40 S. E. 88.

22 Lee v. Atlantic Coast Line R. Co., 150 Fed. 775; where the fact that the transaction left a large part of the capital stock of one of the companies outstanding and all that of the other surrendered and cancelled: was held, to be evidence of the intent that the former company should continue in existence.

citizen of that State alone.[23] If such consolidation, however, is made under the laws of both the States, then, it has been held: that the consolidated corporation is to be treated as a citizen of both, and when sued in either State by a citizen thereof, it has no right of removal;[24] but that the District Court of the United States has jurisdiction of a suit against it in one of these States by a citizen of another.[25] A general law enabling foreign corporations of a certain class to transact business in a State upon compliance with certain conditions, or a special enabling law to such effect, does not prevent a corporation which complies with the same from removing a suit against it because of a difference of citizenship between it and a citizen of such a State.[26] The appointment of an attorney in a foreign State

[23] Westheider v. Wabash Railroad Co., 115 Fed. 840. There the former corporations conveyed all their property to the new company, and the agreement of consolidation was recorded in the offices of the Secretary of State and recorders of the different counties where one of the railroads was situated in Illinois; but the new corporation was held, to have been incorporated under the laws of Ohio and to be a citizen thereof, and not a citizen of Illinois. In Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204; Winn v. Wabash Railroad Co., 118 Fed. 55, it was held, that the same consolidated company remained, in each of the States where one of its constituents was situated, a citizen thereof.

[24] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Patch v. Wabash Railroad Co., 207 U. S. 277, 52 L. ed. 204; Chicago & W. I. R. Co. v. Lake Shore & M. S. Ry. Co., 5 Fed. 19, 10 Biss. 122; Johnson v. Philadelphia, W. & B. R. Co., 9 Fed. 6; Paul v. Baltimore & O. & C. R. Co., 44 Fed. 513; Goodwin v. New York, N. H. & H. R. R. Co., 124 Fed. 358; Goodwin v. Boston & Maine R. R., 127 Fed. 986; Wasley v. Chicago, R. I. & P. Ry. Co., 147 Fed. 608; Cummins v. Chicago, B. & Q. R. Co., 193 Fed. 238. But see Nashua & Lowell R. R. Corporation v. Boston & Lowell R. R. Corporation, 136 U. S. 356, 34 L. ed. 363, *supra*, note 19. The Boston & Albany Railroad Company has been held to be a corporation of both Massachusetts and New York so as to justify the assessment of a transfer tax on its shares in each State. Moody v. Shaw, 173 Mass. 375; Matter of Cooley, 113 App. Div. (N. Y.) 388.

[25] Marshall v. Baltimore & O. R. Co., 16 Howard, 314, 14 L. ed. 953; Wheeling v. City of Baltimore, Fed. Cas. No. 17,502 (1 Hughes, 90); Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668, 31 U. S. App. 325; Missouri Pac. Ry. Co. v. Meeh, C. C. A., 69 Fed. 753, 30 L.R.A. 250; Smith v. New York, N. H. & H. R. Co., 96 Fed. 504; Winn v. Wabash R. Co., 118 Fed. 55; Wasley v. Chicago, R. I. & P. Ry. Co., 147 Fed. 608.

[26] Owen v. New York Life Ins. Co., Fed. Cas. No. 10,631 (1 Hughes, 322); Scott v. Texas Land & Cattle Co., 41 Fed. 225; Amsden v. Nor-

with a consent that process served upon him shall bind the corporation;[27] or the operation of a railroad in another State under a lease,[28] or under a purchase from a domestic corporation;[29] or the filing, in the office of the Secretary of State, of duly authenticated copies of its charter and by-laws;[30] or, it has been held, the subsequent acceptance of a paper described as a charter issued by the Secretary of State and reciting a merger, union and consolidation of a domestic with a foreign corporation;[31] or the legislative recognition of the existence within a State of a corporation chartered elsewhere;[32] or even the legis-

wich Union Fire Ins. Soc., 44 Fed. 515; Amsden v. Traders' Ins. Co. of Chicago, 44 Fed. 515; Goodloe v. Tennessee Coal, Iron & R. Co., 117 Fed. 348; Morton v. Mutual Life Ins. Co., 105 Mass. 141, 7 Am. Rep. 505; Fisk v. Chicago, R. I. & P. R. Co. (New York), 53 Barb. 472; Newhall v. Atlantic, etc., Ins. Co., 8 Phila. 106.

27 Lee v. Aetna Ins. Co., Fed. Cas. No. 8,181; Hatch v. Chicago, R. I. & P. R. Co., Fed. Cas. No. 6,204 (6 Blatchf. 105); Owen v. New York Life Ins. Co., Fed. Cas. No. 10,631 (1 Hughes, 322); Fales v. Chicago, M. & St. P. Ry. Co., 32 Fed. 673; Scott v. Texas Land & Cattle Co., 41 Fed. 225; Amsden v. Norwich Union Fire Ins. Soc., 44 Fed. 515; Amsden v. Traders' Ins. Co. of Chicago, 44 Fed. 515; Morton v. Mutual Life Ins. Co., 105 Mass. 141, 7 Am. Rep. 505; Fisk v. Chicago, R. I. & P. R. Co. (N. Y.), 53 Barb. 472; Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Newhall v. Atlantic, etc., Ins. Co., 8 Phila. 106; Fox v. American Casualty Ins. & Security Co. (Pennsylvania), 12 Pa. Co. Ct. R. 207, 2 Pa. Dist. R. 158.

28 Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Callahan v. Louisville & N. R. Co., 11 Fed. 536; Crane v. Chicago & N. W. Ry. Co. 20 Fed. 402; affirming Chicago & N. W. Ry. Co. v. Crane, 113 U. S. 424, 28 L. ed. 1064; Wilkinson v. Delaware, L. & W. R. Co., 22 Fed. 353; Willson v. Winchester & P. R. Co., 99 Fed. 642, 41 C. C. A. 215; affirming decree, Wilson v. Winchester & P. R. Co., 82 Fed. 15; Treadway v. Chicago & N. W. Ry. Co., 21 Iowa, 351.

29 Williams v. Missouri, K. & T. Ry. Co., Fed. Cas. No. 17,728 (3 Dill. 267); Antelope Co. v. Chicago, B. & Q. R. Co., 16 Fed. 295; Chicago, St. P., M. & O. Ry. Co. v. Dakota County, 28 Fed. 219; Conn v. Chicago, B. & Q. R. Co., 48 Fed. 177; distinguishing Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 812; Morgan v. East Tennessee & V. R. Co., 48 Fed. 705.

30 Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 30 L. ed. 83; St. Louis, A. & T. H. R. Co. v. Pennsylvania R. R. Co., 118 U. S. 630, 30 L. ed. 284; Southern Ry. Co. v. Allison, 190 U. S. 326, 47 L. ed. 1078; reversing 129 N. C. 336; Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co., 29 Fed. 337.

31 Lee v. Atlantic Coast Line R. Co., 150 Fed. 775, 792.

32 Martin's Adm'r v. Baltimore & Ohio R. Co., 151 U. S. 673, 38 L. ed.

lative grant of a charter making it a domestic corporation, when such grant is not accepted:[33] do not make a foreign corporation a citizen of such other State and cut off its right of removal. Where parties sued, or were sued, as corporations, and there was no averment that they were created by, or organized under, the laws of any specified State, it was held to be insufficient to allege that one was a citizen of a certain State;[34] or that it was "duly established by law, having its principal place of business" in a specified State,[35] or that it "claims to be" a corporation organized under the laws of a specified State, as a company of a specified character.[36] An allegation that a party was a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the western district thereof, was held to be sufficient.[37]

§ 48. Unincorporated stock companies and associations. There is no presumption as regards the citizenship of members of unincorporated joint stock companies, even where the law under which they were organized authorizes them to sue and be sued in the name of one or more of their officers; and, it has been held, that a case where one of them is a party cannot be removed because of diverse citizenship, unless all the members of such company are citizens of different States from those

311; Antelope Co. v. Chicago, B. & Q. R. Co., 16 Fed. 295; Moore v. Chicago, St. P., M. & O. Ry. Co., 21 Fed. 817; Taylor County Court v. Baltimore & O. R. Co., 35 Fed. 161; Baltimore & O. R. Co. v. Ford, 35 Fed. 170; following Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; Chapman v. Alabama G. S. R. Co., 59 Fed. 370; Markwood v. Southern Ry. Co., 65 Fed. 817.

[33] Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 30 L. ed. 83; Nashua & Lowell R. R. Corporation v. Boston & Lowell R. R. Corporation, 136 U. S. 356, 34 L. ed. 363.

[34] Thomas v. Board of Trustees of Ohio State University, 195 U. S. 207, 49 L. ed. 160; Lonergan v. Illinois Cent. R. Co., 55 Fed. 350; Frisbie v. Chesapeake & O. R. Co., 57 Fed. 1; De Loy v. Traveler's Ins. Co., 59 Fed. 319; American S. R. Co. v. Johnson, 60 Fed. 503; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Knight v. Lutcher & Moore Lumber Co., 136 Fed. 404. *Contra*, Oakey v. Commercial & Railroad Bank, 14 La. O. S. 515; Guarantee Co. of North America v. First Nat. Bank (Virginia), 28 S. E. 909.

[35] New York & New England R. R. Co. v. Hyde, C. C. A., 56 Fed. 188, 191.

[36] Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983.

[37] Mathieson Alkali Works v. Mathieson, C. C. A., 150 Fed. 241.

of all the parties on the opposite side of the controversy.[1] The same rule applies to voluntary associations, such as trade unions, which are not incorporated.[2]

§ 49. Partnerships. There is no presumption that the members of a partnership, whether general or limited, are citizens of the State where it was organized; and the citizenship of all its members must be considered when a removal is sought in a suit to which it is a party, even when the State law authorizes them to sue and be sued in the firm name.[1] It was so held in a State where a partnership was considered to be a legal entity,[2] and as to limited partnerships organized under the Michigan,[3] New York,[4] and Pennsylvania[5] statutes. Where a copartnership was sued alone by its firm name under section 3468 of the Iowa Code, authorizing a suit to be brought either against a partnership or its members, or both, the members of

§ 48. [1] Chapman v. Barney, 129 U. S. 677; Dinsmore v. Philadelphia & R. R. Co., Fed. Cas. No. 3,921; Jewish Colonization Ass'n v. Solomon & Germanski, 125 Fed. 994. *Contra*, Maltz v. American Express Co., Fed. Cas. No. 9,002 (1 Flippin, 611); Fargo v. Louisville, N. A. & C. Ry. Co., 6 Fed. 787; Baltimore & O. R. Co. v. Adams Express Co., 22 Fed. 404; Whitman v. Hubbell, 30 Fed. 81; Saunders v. Adams Express Co., 136 Fed. 494. See Rosenfield v. Adams Express Co. (Louisiana), 21 La. Ann. 233. All these cases arose under the New York statute. But see Boatner v. American Express Co., 122 Fed. 714; where the treasurer of such a joint stock association was allowed to remove a suit brought against him under section 25 of the Kentucky civil code of practice, authorizing one or more of numerous parties to sue or defend for the benefit of all.

[2] A. R. Barnes & Co. v. Berry, 156 Fed. 72; Irving v. Joint Dist., Council of New York, &c., of United Brotherhood of Carpenters, &c., 180 Fed. 896.

§ 49. [1] Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842; H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co., 174 Fed. 668, under Iowa statute; Empire Rice Mill Co. v. K. & E. Neumond, 199 Fed. 800.

[2] Empire Rice Mill Co. v. K. & E. Neumond, 199 Fed. 800, Louisiana statute.

[3] Fred Macey Co. v. Macey, 135 Fed. 725, 68 C. C. A. 363.

[4] Jewish Colonization Ass'n v. Solomon & Germanski, 125 Fed. 994.

[5] Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 842; reversing 86 Fed. 370, 30 C. C. A. 108; and overruling: Bushnell v. Park Bros. & Co., 46 Fed. 209; Carnegie, Phipps & Co. v. Hulbert, 53 Fed. 10, 3 C. C. A. 391, 10 U. S. App. 454; Andrews Bros. Co. v. Youngstown Coke Co., C. C. A., 86 Fed. 585. In all these cases the partnership was organized under Pa. Act of June 2, 1874 (P. L. 271).

the firm not being named in the plaintiff's petition, which alleged the defendant to be a corporation, it was held, that the suit could not be removed by the members of the firm, who were citizens of a different State from that of the plaintiff.[6]

§ 50. Under grants of different States. Where there is a controversy between citizens of the same State claiming land under grants of different States, it seems that the District Court of the United States has jurisdiction irrespective of the amount involved.[1] Where one party claimed land under a grant of New Hampshire made when Vermont was a part of that State, and the other under a grant from Vermont made after their separation, it was held that the controversy arose between persons claiming lands under grants of different States.[2] Where a controversy is founded upon conflicting grants of different States, the Federal courts have jurisdiction irrespective of the equitable title of the parties before either grant.[3] It was held: that the Federal courts did not take jurisdiction of a case between citizens of the same States, where the defendant claimed the land in dispute under a grant by the State of North Carolina, while the plaintiff claimed under a grant by the State of Tennessee, in which, however, the State of Tennessee did not act by virtue of her sovereignty as a State, but only by virtue of a power delegated by North Carolina to perfect titles, which, before the separation of the States, were inaccurate and imperfect.[4] Under the former Judiciary Act, it was held that a party claiming land under a grant from a State where the suit was pending could not remove the case because the other party claimed under a grant from another State.[5]

§ 51. Ancillary jurisdiction. After a Federal court has acquired jurisdiction, through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon

[6] Ralya Market Co. v. Armour & Co., 102 Fed. 530.

§ 50. [1] See Holt on Concurrent Jurisdiction, § 60; In re Hohorst, 150 U. S. 653, 660, 37 L. ed. 1211, 1214; In re Keasby & Mattison Co., 160 U. S. 221, 230, 40 L. ed. 402, 405.

[2] Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735; Colson v. Lewis, 2 Wheat. 377, 4 L. ed. 266.

[3] Colson v. Lewis, 2 Wheat. 377, 379, 4 L. ed. 266.

[4] Thompson v. Kendrick's Lessee, 6 Tenn. (5 Hayw.) 113.

[5] Shepherd's Heirs v. Young, 1 T. B. Monroe (17 Ky.) 203.

the different sides of the controversy are citizens of the same State and there is no other ground of Federal jurisdiction.[1] "The question is not whether the proceeding is supplemental and ancillary, or is independent and original, in the sense of the rules of equity pleading, but whether it is supplementary and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts."[2] Thus, not only can a bill of revivor or a supplemental bill,[3] or a cross bill,[4] be maintained in a Federal court which had jurisdiction of the original litigation; but so can a bill to enjoin the prosecution of proceedings therein at law or in equity,[5] or for set-off,[6] or a bill to restrain or regulate,[7] or to set aside,[8] or to modify,[9] or to obtain a judicial con-

§ 51. [1] Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Clarke v. Mathewson, 12 Pet 163, 9 L. ed. 1041; Freeman v. Howe, 24 How. 450, 460, 16 L. ed. 749, 752; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886; Jones v. Andrews, 10 Wall. 327, 19 L. ed. 935; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Pacific R. of Mo. v. Mo. P. R. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Dewey v. W. F. G. C. Co., 123 U. S. 329, 31 L. ed. 179; Gumbel v. Pitkin, 124 U. S. 131, 31 L. ed. 374; Seymour v. Phillips & C. Const. Co., 7 Biss. 460. But see Christmas v. Russell, 14 Wall 69, 20 L. ed. 762.

[2] Miller, J., in Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. ed. 886, 895.

[3] Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041.

[4] Morgan's La. & T. R. & St. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 34 L. ed. 625. See *infra*, § 201; Central Trust Co. v. Bridges, 57 Fed. 753.

[5] Bradshaw v. Miners' Bank, C. C. A., 81 Fed. 902; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Leigh v. Kewanee Mfg. Co., 127 Fed. 990; South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 Fed. 507; Campbell et al. v. Golden Cycle Min. Co., 141 Fed. 610; Loy v. Alston, C. C. A., 172 Fed. 90.

[6] Loy v. Alston, C. C. A., 172 Fed. 90.

[7] Dunn v. Clark, 8 Pet. 1, 8 L. ed. 845; Freeman v. Howe, 24 How. 450, 460, 16 L. ed. 749, 752; Jones v. Andrews, 10 Wall. 327, 19 L. ed. 935; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Johnson v. Christian, 125 U. S. 642, 31 L. ed. 820; Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355; Loy v. Alston, C. C. A., 172 Fed. 90.

[8] Pacific R. of Mo. v. Mo. P. R. Co., 111 U. S. 505, 522, 28 L. ed. 498, 504; Foster v. Mansfield, C. & L. M. R. Co., 36 Fed. 627; s. c., 146 U. S. 88, 36 L. ed. 899; Carey v. Houston & T. C. Ry. Co., 161 U. S. 115, 40 L. ed. 638; Maitland v. Gibson, 79 Fed. 136; Lacanagrues v. Chapins, 144 U. S. 119, 36 L. ed. 368; Broadis v. Broadis, 86 Fed. 951; Ladd v. West, 55 Fed. 353;

struction,[10] or to enforce by injunction,[11] *scire facias*,[12] levy of a tax,[13] or otherwise,[14] a judgment or decree of, or a bond[15] given to, or an attachment,[16] or execution[17] issued by, a Federal court, even where other incidental relief is prayed,[18] irrespective of the citizenship of the parties. So can a bill or petition for the appointment of a receiver in aid of a pending action at law; for

Hill v. Kuhlman, C. C. A., 87 Fed. 498; McDonald v. Seligmans, 81 Fed. 753; Richardson v. Loree, C. C. A., 94 Fed. 375; O'Connor v. O'Connor, 146 Fed. 994; Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355; Loy v. Alston, C. C. A., 172 Fed. 90. Where an action was brought upon the award of an arbitrator, it was *held* that a suit to set aside the award for fraud was ancillary to the same, but that the court could not thus obtain jurisdiction to bring in a stranger to the former action, who was a citizen of the same State as the complainant, for the purpose of impeaching an award in the latter's favor, made at the same arbitration, which was separate and distinct from that between the other parties. Hecht v. Youghiogheny & Lehigh Coal Co., 162 Fed. 812.

9 Thompson v. Schenectady Ry. Co., 124 Fed. 274.

10 Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886; Jenks v. Brewster, 96 Fed. 625; Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355; Loy v. Alston, C. C. A., 172 Fed. 90.

11 Railroad Co. v. Chamberlain, 6 Wall. 748, 18 L. ed. 859; Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123; Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co., 198 U. S. 188, 49 L. ed. 1008; Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385. But see Alabama & G. Mfg. Co. v. Riverdale Cotton Mills, C. C. A., 127 Fed. 497.

12 Pullman's P. C. Co. v. Washburn, 66 Fed. 790; s. c. in C. C. A., 76 Fed. 1005; Lafayette County v. Wonderly, C. C. A., 92 Fed. 313.

13 Preston v. Calloway, C. C. A., 183 Fed. 19; Maitland v. Gibson, 79 Fed. 136; Brun v. Mann, C. C. A., 12 L.R.A.(N.S.) 154, 151 Fed. 145, 149.

14 Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355; Loy v. Alston, C. C. A., 172 Fed. 90. But see Central Trust Co. v. Grantham, 83 Fed. 540. Where creditors brought a class-suit to administer in equity the amounts due the corporation from stockholders within the territorial jurisdiction, it was *held* that, ancillary to the jurisdiction which was thus obtained, the court might in an ancillary bill enter a decree against a stockholder whose liability was less than $2,000. Robertson v. Conway, C. C. A., 188 Fed. 579.

15 Lamb v. Ewing, 56 Fed. 269; Leslie v. Brown, 95 Fed. 171.

16 Lant v. Manley, C. C. A., 75 Fed. 627; Davis v. Martin, C. C. A., 113 Fed. 6; Hatcher v. Hendrie & Bolthoff Mfg. & Sy. Co., C. C. A., 113 Fed. 6.

17 Lant v. Manley, C. C. A., 75 Fed. 627; Davis v. Martin, C. C. A., 113 Fed. 6.

18 Hill v. Kuhlman, C. C. A., 87 Fed. 498.

example, one of ejectment.[19] or, it seems, when authorized by the State practice, in aid of a judgment at law;[20] a bill by a stranger to a suit to enjoin a sale by the marshal of property which he claims to be his;[21] and a bill to determine the manner in which the proceeds of a judgment or decree shall be distributed, at least when they have been paid into court.[22] A bill to enjoin proceedings in a District Court of the United States was there maintained, although it made an indispensable party defendant one, a suit against whom the Federal court had previously remanded because of the insufficiency of the matter in dispute.[23] A bill for the reformation of a policy of insurance is ancillary to an action upon such policy.[24] An original bill or a petition, to foreclose a mortgage,[25] or a mechanic's lien,[26] or other lien[27] upon a railway or other property, or upon the proceeds of property, in the possession of a receiver appointed by a Federal court in a prior suit to foreclose a prior or subsequent mortgage, or otherwise in its possession, can be brought in such court independent of the citizenship of the parties, even after sale in the former suit; although it brings in new parties whose citizenship would have defeated the jurisdiction had they been joined in the original bill.[28] So may a suit to partition the property.[29] Ancillary jurisdiction includes the power to

19 Ulman v. Clark, 75 Fed. 868.

20 See Mutual Res. Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 L. ed. 987.

21 Davis v. Martin, C. C. A., 113 Fed. 6.

22 Myers v. Luzerne County, 124 Fed. 436.

23 Virginia-Carolina Chem. Co. v. Home Ins. Co., C. C. A., 113 Fed. 1.

24 Rosenbaum v. Council Bluffs Ins. Co., 3 L.R.A. 189, 37 Fed. 724; Abraham v. North G. F. Ins. Co., 3 L.R.A. 188, 37 Fed. 731.

25 Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 34 L. ed. 625; Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co., 44 Fed. 115; Carey v. Huston, T. & C. R. Co., 52 Fed. 671; Compton v. Jesup, 68 Fed. 263; Toledo, St. L. & K. C. Ry. Co. v. Continental T. R. Co., C. C. A., 95 Fed. 497.

26 Central Tr. Co. v. Bridges C. C. A., 57 Fed. 753.

27 Blake v. Pine M. I. & C. Co., C. C. A., 76 Fed. 624; Central Tr. Co. v. Benedict, C. C. A., 78 Fed. 198; Central Tr. Co. v. Carter, C. C. A., 78 Fed. 225; State Tr. Co. v. Kansas City P. & G. R. Co., 115 Fed. 367. As to the jurisdiction by cross-bill, see also Everett v. Independent School District, 102 Fed. 529; Brooks v. Laurent, C. C. A., 98 Fed. 647; *infra*, § 201.

28 Lilienthal v. McCormick, C. C. A., 117 Fed. 89.

29 City of New Orleans v. Howard, C. C. A., 160 Fed. 393.

hear and determine all questions respecting the title, the possession, or the control, of property in the custody of the court;[30] even after the property has been sold, when the claim relates to matters that were disposed of, or that might have been disposed of, by the proceedings resulting in the same;[31] and irrespective of any difference of the citizenship of the parties, a District Court of the United States may entertain a bill, to restrain parties claiming liens from seeking to enforce the same against the property elsewhere than in such District Court.[32] When property has been seized by a marshal of the United States, the Federal court may take jurisdiction, by removal, of a proceeding in a State court to enjoin the marshal from proceedings under the writ.[33] There is no ancillary jurisdiction of a suit to foreclose a mortgage upon a line that has been in the possession of Federal receivers of a street railroad system, who have been operating the same under a lease which they have elected to surrender, when they have offered to return the property to the lessor.[34] After a Federal court has appointed a receiver, it has ancillary jurisdiction over all suits brought by him irrespective of the citizenship of the parties and of the amount involved.[35] He cannot, however, remove into such a court all suits brought

30 Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385.

31 Julian v. Central Trust Co., 193 U. S. 93, 48 L. ed. 629; Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385.

32 Julian v. Central Trust Co., 193 U. S. 93; Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 379, 385.

33 Frank v. Leopold & Feron Co., 169 Fed. 922.

34 Guaranty Tr. Co. v. Second Ave. R. Co., 165 Fed. 487.

35 White v. Ewing, 159 U. S. 36, 40 L. ed. 67; Pope v. Louisville, N. A. & C. Ry. Co., 173 U. S. 573, 43 L. ed. 814; Connor v. Alligator L. Co., 98 Fed. 155; Bowman v. Harris, 95 Fed. 917; Alexander v. So. Home Bldg. & L. Ass'n, 120 Fed. 963; Hampton Roads Ry. & El. Co. v. Newport News & O. P. Ry. & El. Co., 131 Fed. 534; Gunby v. Armstrong, C. C. A., 133 Fed. 417; Cooper v. Newton, 160 Fed. 190. So when he is an ancillary receiver. Brookfield v. Hecker, 118 Fed. 942. Held, that jurisdiction may thus be taken of a petition by the receivers for an injunction to restrain the enforcement of a State statute reducing the charges for the transportation of passengers or freight. Trust Co. of America v. Chicago, P. & St. L. Ry. Co., 199 Fed. 593; that a Circuit Court of the United States would not take jurisdiction of a suit, by a receiver appointed by a Federal court, in another Circuit Court, unless the matter in dispute exceeded the jurisdictional amount. Sullivan v. Swain, 96 Fed. 259.

against him.[36] It has been held at Circuit that a suit pending against the corporation at the time of the receivership may, on the petition of the receiver, be removed into the Federal court, at least when the plaintiff has intervened there, although original jurisdiction over the same could not have been entertained.[37] Where assets are in the course of administration, all persons entitled to participate may come in under the jurisdiction acquired between the parties by ancillary or supplemental pleading, even though jurisdiction would be lacking if said proceedings had been originally and independently prosecuted.[38] It has been held that a person, whose citizenship, if an original party, would have deprived the court of jurisdiction, cannot intervene when the court has possession of no fund or property in which he is interested.[39] It has been held that pending a foreclosure suit a bill to enjoin the sale of shares of the capital stock of the defendant, not covered by the mortgage, is not ancillary to the former suit; although the defendant has the equity or redemption therein;[40] that where a railroad had been sold under a decree of foreclosure by a Federal court such court had no jurisdiction over a subsequent suit to restrain the enforcement of a State judgment of ejectment obtained by a plaintiff who was not a party to the foreclosure;[41] that after judgment in ejectment, which awards a writ of possession, the court has no jurisdiction of an application by the marshal or other officer to whom the writ is addressed, seeking instructions as to the performance of his ministerial duties, when there are adverse claims of strangers to the suit;[42] that a Federal court after formal judgment has no jurisdiction, independent of a difference of citizenship, to enforce an agreement under which the

[36] Gableman v. Peoria, Decatur & Evansville Ry. Co., 179 U. S. 335, 45 L. ed. 220; Baggs v. Martin, 179 U. S. 206, 45 L. ed. 155; *supra*, §§ 5, 24.

[37] Rice v. Durham Water Co., 91 Fed. 433.

[38] Rouse v. Letcher, 156 U. S. 47, 49, 39 L. ed. 341, 342; Second Nat. Bank v. New York Silk Mfg. Co., Fed. Cas. No. 12,601 *a*; New York Silf Mfg. Co. v. Second Nat. Bank, 10 Fed. 204. See Henderson v. Goode, 49 Fed. 887; *infra*, § 258.

[39] Seligman v. Santa Rosa, 81 Fed. 524; United El. S. Co. v. La. El. L. Co., 68 Fed. 673.

[40] Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973, s. c., 118 Fed. 777.

[41] Central Trust Co. v. Grantham, 83 Fed. 540.

[42] Dickinson v. Huntington, C. C. A., 185 Fed. 703.

same was entered, when the construction of the judgment is not in question;[43] and that upon the authorized surrender of property by Federal receivers to a State receiver, the Federal court loses jurisdiction of a suit previously begun to foreclose a mortgage upon the same, when there is no diversity of citizenship between the parties.[44]

A creditor's bill between citizens of the same State founded upon a decree in admiralty has been held not within the jurisdiction of a Federal court.[45] It has been held at Circuit that a bill cannot thus be sustained, irrespective of the citizenship of the parties, when filed to set aside for fraud, subsequent to its entry, the decree of the Federal court or a contract affecting such decree;[46] nor when filed to set aside for fraud a stipulation and decree in a former suit, the defendants to the bill being neither parties to the former suit nor the personal representatives of such parties, but trustees created by a defendant to such suit after the decree, and where none of the property affected by the former suit was within the custody of the court;[47] nor when filed against defendants to a former decree and a third party to whom it was alleged that lands, the subject matter of the former suit, were conveyed prior to the commencement of the same.[48] After a final decree granting damages for the injury to a street railway by the construction of another railroad, where the jurisdiction had attached because a constitutional question was involved, Mr. Justice Brewer refused to take jurisdiction of a supplemental bill to enjoin the construction of the rival railroad upon other grounds, none of which presented a Federal question.[49]

Conversely, there is a similar limitation upon the jurisdiction of the Federal courts. This is well explained in the following extract from an opinion by Bradley, J.: "The question present-

[43] Stillman v. Combe, 197 U. S. 436, 49 L. ed. 822.

[44] Guaranty Tr. Co. v. Second Ave. R. Co., 171 Fed. 1020. See S. C., 165 Fed. 487.

[45] Winter v. Swinburne, 8 Fed. 49. See Provident Savings Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543; *supra*, § 24.

[46] Yeatman v. Bradford, 44 Fed. 536.

[47] Ralston v. Sharon, 51 Fed. 702. See Sowles v. First Nat. Bank of Plattsburgh et al., 133 Fed. 846.

[48] Anglo Florida P. H. Co. v. McKibben, 65 Fed. 529. See Montgomery v. McDermott, 99 Fed. 502.

[49] Omaha H. R. Co. v. Cable T. W. Co., 33 Fed. 689.

ed with regard to the jurisdiction of the Circuit Court is, whether the proceeding, to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case.[50] Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines v. Fuentes*,[51] the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts, and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof." [52] A suit to make the judgment or decree of a State court the judgment or decree, respectively, of the Federal court can be maintained at common

[50] Graver v. Faurot, 64 Fed. 241; Little Rock Ry. Co. v. Burke, 66 Fed. 83; Hall v. Ames, C. C. A., 190 Fed. 138. But see Northern Pac. Ry. Co. v. Kurtzman, 82 Fed. 241.

[51] 92 U. S. 10, 23 L. ed. 524; *Cf.* Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630; Robb v. Vo, 155 U. S. 13, 39 L. ed. 52; Hatch v. Ferguson, 52 Fed. 833; Davenport v. Moore, 74 Fed. 945; Strand v. Griffith, C. C. A., 144 Fed. 828; Schultz v. Highland Gold Mines Co., 158 Fed. 337. But see Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269; Bailey v. Willeford, 126 Fed. 803.

82, 25 L. ed. 407, 408. See Furnald

[52] Barrow v. Hunton, 99 U. S. 80, v. Glenn, 56 Fed. 372.

law[53] and in equity.[54] The Federal court may take jurisdiction of a creditor's bill to enforce a judgment of the State court in the same district.[55] Proceedings supplementary to execution under the judgment of a State court authorized by State statutes against a judgment debtor or third persons cannot be instituted in or removed to the Federal courts, although a creditor's bill may be.[56] A petition, after judgment in a State court, by plaintiff in ejectment to have the defendant's damages allowed to him, is a mere incident to the ejectment suit and the Federal courts can take no jurisdiction of it.[57] It has been held that a bill cannot be maintained to set aside or interfere with the enforcement of an interlocutory decree in a cause pending in another court, when such decree is not a contempt of a Federal court.[58] It has been held that where the jurisdiction depends solely upon the ancillary nature of the bill, upon the dismissal of the former suit the ancillary suit must be dismissed for want of jurisdiction;[59] and that relief germane to the ancillary relief, if the prayer for the same does not make the bill multifarious, can be granted, although an independent original bill for such other relief could not have been maintained in the Federal court; but that if the ancillary relief is denied, all other prayers for relief fall with the same; and that affirmative relief against a person who is not a party, nor a privy, to the original action, and whose claims have not accrued prior to its commencement, cannot be granted.[60] The dependence of an ancillary suit upon an original suit for purposes of jurisdiction does not throw both cases into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction of the same; and after

53 Barr v. Simpson, Baldwin, 543.

54 See Davis v. Davis, 65 Fed. 380; Collins v. Ashland, 112 Fed. 175.

55 Feidler v. Bartleson, C. C. A., 161 Fed. 30.

56 Webber v. Humphreys, 5 Dill. 223; Poole v. Thatcherdeft, 19 Fed. 49; Buford v. Strother, 3 McCrary, 253; s. c., 10 Fed. 406; Flash v. Dillon, 22 Fed. 1.

57 Chapman v. Barger, 4 Dillon, 587.

58 Furnald v. Glenn, C. C. A., 64 Fed. 49.

59 Cabaniss v. Reco Min. Co., C. C. A., 116 Fed. 318.

60 Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 614, 616, 617.

jurisdiction has been acquired, the pleadings, practice and proceedings are pursued exactly as if it were an original suit.[61] The court does not in the second suit take judicial notice of the pleadings or proceedings in the former litigation, unless they are formally put in evidence.[62]

§ 52. Property in the custody of another court of co-ordinate jurisdiction. In general. A court of the United States, through a spirit of judicial comity, will usually refuse to interfere with property in the custody of a State court.[1] Conversely, it will not tolerate interference by a State court with property over which it has taken jurisdiction.[2]

It has been said that "the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same place; and when one takes into its jurisdiction a specific thing, that is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is fu-

[61] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 645, per Taft, J.

[62] Richardson v. Loree, 94 Fed. 375. But see *infra*, § 329.

§ 52. [1] Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470; Taylor v. Carryl, 20 How. 583; Peale v. Phipps, 14 How. 368, 14 L. ed. 459; Levi v. Columbia Ins. Co., 1 Fed. 206; Hubbard v. Bellew, 3 Fed. 447; Union Mut. Life Ins. Co. v. University of Chicago, 6 Fed. 443; Hutchinson v. Green, 6 Fed. 833, 836–839; Hamilton v. Chouteau, 6 Fed. 339; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294, 28 L. ed. 729. But see Dwight v. Central Vermont R. Co., 9 Fed. 785.

[2] Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294, 28 L. ed. 729; Sharon v. Terry, 1 L.R.A. 572, 36 Fed. 337; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390; In re Tyler, 149 U. S. 164, 186, 37 L. ed. 689, 696; White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183.

tile and void."[3] "This rule, in its application to Federal and State courts, being the outgrowth of necessity, is a principle of right and of law, which leaves nothing to the discretion of a court, and may not be varied to suit the convenience of litigants."[4]

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relation of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the States and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the States of the Union."[5] This is a general rule of comity, which usually pre-

[3] Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 176, 182, 28 L. ed. 390, 392; approved in Re Tyler, 149 U. S. 164, 186, 37 L. ed. 689, 696, per Fuller, C. J.

[4] Thayer, J., in Merritt v. Am. Steel Barge Co., 79 Fed. 228, 231.

[5] Mr. Justice Moody in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 53, 52 L. ed. 378, 385.

vails between courts of the same State.[6] Even where the custody of the State court has been acquired through fraud, the Federal court will usually not interfere so long as the former retains its hold upon the property.[7] An objection founded upon this rule does not put the jurisdiction of the court at issue so that the question can be certified immediately to the Supreme Court.[8] It has been held that after the trial of an action at common law it is too late to raise this objection to the jurisdiction.[9] But where the trustee elected by the creditors of an insolvent had failed to claim property until after a levy thereupon under a Federal judgment, on his intervention a decree was entered setting aside the levy, upon his payment of the costs of the same and filing an order of the State court authorizing him to take possession.[10] This doctrine does not prevent the removal to the Federal court, in a proper case, of a suit in which a State court appointed a receiver,[11] or taken property into its possession under a common-law writ;[12] nor a suit to set aside a mortgage, which the mortgagee claims to be a valid lien upon a fund in the possession of a Federal court of bankruptcy.[13] It was recently said by the Supreme Court of the United States, that "the declaration of a lien on the property is a step toward the invasion of its possession, which we have held to be beyond the jurisdiction of the State court."[14] Before that decision, it was

6 O'Mahoney v. Belmont, 62 N. Y. 133, 149; Milwaukee R. R. Co. v. Milwaukee & Minnesota R. R. Co., 20 Wis. 165, 88 Am. Dec. 735.

7 Thayer, J., in Merritt v. American Steel-Barge Co., 79 Fed. 228, 231.

8 Attleborough Nat. Bank v. N. W. Mfg. & C. Co., 28 Fed. 113; Louisville Tr. Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, overruling Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660.

9 Gilman v. Perkins, 7 Fed. 887. See Erwin v. Lowry, 7 How. 172, 12 L. ed. 655; Mo. Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536; *infra*, § 53.

10 Geilinger v. Philippi, 133 U. S. 246, 257, 33 L. ed. 614, 617.

11 In re Iowa & Minn. Constr. Co., 10 Fed. 401. Where, however, all the property of a foreign corporation had been placed in the hands of a receiver appointed by the State court, the Federal court said, that a case instituted by attachment, which had been removed thereto, should be remanded. Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831, 834.

12 Kern v. Huidekoper, 103 U. S. 485, 491, 492, 26 L. ed. 354, 356, 357.

13 Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911.

14 Wabash Railroad Co. v. Adelbert College, 208 U. S. 609, 611, 52 L. ed. 642, 643, s. c., 208 U. S. 38, 52 L. ed 79; City of New Orleans v.

held that the doctrine did not prevent a suit to foreclose a mortgage, or to establish a lien, upon property in a State court's custody;[15] provided that no sale was ordered until the proceedings in the State court were terminated;[16] and that neither the sheriff, nor, without the permission of the court, a State receiver was a necessary party to the suit;[17] that a Federal court may foreclose a mortgage upon property, held by a receiver appointed by a State court, in a suit to which the mortgagee was not a party, and can then determine the claim of the holders of receiver's certificates issued under the order of the State court to a preference over the mortgage;[18] that a State court may foreclose an attorney's lien upon a cause of action after the removal of the case to the Federal court, subsequent to a settlement between the parties;[19] that a State court may institute proceedings to condemn land, pending a suit in equity in a Federal court for an injunction against a trespass upon the same by the respondent in the condemnation proceedings, or, in the alternative, for the payment of its value;[20] that a State court proceedings to condemn land, pending a suit in equity in a Federal court to condemn the property for public purposes;[21] that a proceeding in a State court for a writ of assistance, under a fore-

Howard, C. C. A., 160 Fed. 393, a partition suit. See Security Trust Co. v. Union Trust Co., 134 Fed. 301; Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355.

[15] Wheelwright v. St. Louis, N. O. & O. C. & T. Co., 50 Fed. 709, 711; Gates v. Bucki, 53 Fed. 961, 968; Edwards v. Hill, C. C. A., 59 Fed. 723; Jenks v. Brewster, 96 Fed. 625; holding that where a person, not a party to a suit in a Federal court, had subsequently to the institution of the same begun an action in the State court, to foreclose his lien, to which the Federal plaintiff was one of the defendants, the decree of the State court bound the parties to the same and the purchaser of the property, pending the litigation under the decree of the Federal court. Metropolitan Trust Co. v. Lake Cities El. Ry. Co., 100 Fed. 897. *Contra*, Cochran v. Pittsburg, S. & N. R. Co., 158 Fed. 549; Cohen v. Solomon, 66 Fed. 411; Hardin v. Union Tr. Co. of Philadelphia, Pa., C. C. A., 191 Fed. 152.

[16] Wheelwright v. St. Louis, N. O. & O. C. & T. Co., 50 Fed. 709, 711. But see Erwin v. Lowry, 7 How. 172, 12 L. ed.

[17] Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815.

[18] Metropolitan Trust Co. v. Lake Cities El. Ry. Co., 100 Fed. 897. *Infra*, § 313.

[19] Oishei v. Pennsylvania R. R. Co., 101 App. Div. (N. Y.) 473.

[20] Benjamon v. Brooklyn Union El. R. Co., 120 Fed. 428.

[21] U. S. v. Eisenbeis, C. C. A., 112 Fed. 190.

closure decree of sale, does not operate as a bar to an action of ejectment between the same parties for the same property, brought in a Federal court by the applicant for the writ;[22] that the pendency in the State court, of an action of ejectment, does not prevent a suit in the Federal court, by the defendant against the plaintiff, to quiet the title to the same land;[23] nor an action *in personam* between the same parties involving the same issues, provided that the property is not seized therein.[24] It has been held that the pendency of a suit in a Federal court to foreclose a lien upon timber on certain lands does not prevent an attachment upon the same timber in a subsequent action at law in the State court for a breach of another contract for the sale of part of the same;[25] that property seized and sold by an internal revenue collector, under the statutes of the United States, cannot be replevied from the purchasers by the former owner, under process from the State court, since the remedy for a wrongful seizure, given by the statute, is exclusive.[26] Property in the possession of a statutory receiver, not appointed by the court, such as a receiver of a national bank appointed by a Comptroller of the Currency, is not considered to be in the court's custody.[27] Property is deemed to be in the custody of the court from the time when a suit or action seeking to have it placed there has been begun; either by the levy of a writ in a proceeding *in rem;*[28] or by the filing of a bill praying the appointment of a receiver;[29]

[22] Lamar v. Spalding, C. C. A., 154 Fed. 27.

[23] North Carolina Mining Co. v. Westfeldt, 151 Fed. 290. Where in an action of ejectment in a State court defendants filed a counterclaim alleging that they were in possession and praying a determination of conflicting claims in accordance with the State statutes (Revisal N. C. 1905, § 1589), it was held that complainant could not subsequently sue in equity in the Federal courts for similar relief. Westfeldt v. North Carolina Min. Co., C. C. A., 166 Fed. 706.

[24] Rejall v. Greenhood, 60 Fed. 784; Merritt v. American S. B. Co., 79 Fed. 228; Copeland v. Bruning, C. C. A., 127 Fed. 550. *Infra*, § 57. *Cf.* Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630. But see *infra*, § 177.

[25] Nelson v. Camp, C. C. A., 191 Fed. 712.

[26] Allen v. Sheridan, 145 Fed. 963.

[27] In re Chetwood, 165 U. S. 443, 41 L. ed. 782.

[28] Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028; Heidritter v. Elizabeth Oil-cloth Co., 112 U. S. 294, 28 L. ed. 729; U. S. v. Eisenbeis, C. C. A., 112 Fed. 190.

[29] Farmers' L. & T. Co. v. Lake St. El. R. Co., 177 U. S. 51, 44 L. ed. 667. *Cf.* Humane Bit Co. v. Barnet, 117 Fed. 316.

or by the filing of a bill for the distribution of the assets of a corporation;[30] or, it has been held, by the issue of a restraining order upon the tendering of a bill for filing, upon notice to the defendants, although, because of the absence of some of them, leave to file was not granted until subsequent to the institution of a suit in the State court;[31] or by an adjudication in bankruptcy.[32] It has been held that property is not put into the custody of a State court by the institution of a suit to establish and enforce a lien thereupon, when no actual possession has been taken;[33] nor by the filing of a bill, which does not pray for a receiver, when a receiver is appointed by another court before the first court is asked to make such an appointment.[34] In personal actions, the priority of a suit is ordinarily determined by the time when the parties are served with process and not by the date of the filing of any papers in the same.[35] Property continues in the custody of a court until the cause is practically terminated, or the custody finally abandoned; although, it has been held, that a formal order of termination is not indispensable.[36] When a receiver, appointed by a Federal court, has been discharged upon the filing of a bond by a defendant, the Federal court abandons its custody of the property and a State court may appoint a receiver thereof;[37] and it is improper for the District Court of the United States to vacate its order of

[30] Louisville T. Co. v. Knott, C. C. A., 130 Fed. 820.

[31] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220.

[32] White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183.

[33] Compton v. Jesup, 68 Fed. 263, 283; Morrill v. Am. Reserve Bond Co., 151 Fed. 305. See Jacob Tome Institute v. Whitcomb, C. C. A., 160 Fed. 835. See Rodgers v. Pitt, 96 Fed. 668, 673. But where the State courts had held that, under its statutes, the filing of a petition was the institution of the suit, it was held that the filing of a petition for partition precluded a subsequent suit in the Federal court prior to the service of process. Mound City Co. v. Castleman, C. C. A., 187 Fed. 921, affirming 177 Fed. 510.

[34] Knott v. Evening Post Co., 124 Fed. 342.

[35] Benoist v. Smith, 191 Fed. 514.

[36] Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Andrews v. Smith, 5 Fed. 833; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; Foster v. Lebanon Springs R. Co., 100 Fed. 543. But see Shields v. Coleman, 157 U. S. 168, 181, 39 L. ed. 660, 665; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536.

[37] Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. But see Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197; § 55 *infra*.

discharge and claim possession by virtue of its prior receivership;[38] but where, before a receiver appointed by a State court had taken possession, an appeal accompanied by a *supersedeas* staying proceedings was taken from a State court of review, which subsequently affirmed the order, a receiver appointed by a Federal court pending the appeal was directed to surrender his possession to the State receiver.[39] The discharge of a Federal receivership, before the appointment of a State receiver, was held to validate the latter; although made in a suit sustained during the pendency of the Federal receivership.[40] It has been held that a State sheriff may seize property while still in the possession of the United States marshal, after an order by the Federal court directing its return to its owner.[41] Where the Federal court, in its decree of foreclosure and sale, reserved, for future adjudication, all questions arising under the pleadings or proceedings not therein disposed of or determined; it was held, that a State court had no power to establish, or to foreclose, a lien upon the property in the hands of a purchaser at the foreclosure sale.[42] But not when there is no such reservation; even, it has been held, when the decree required the purchaser to assume the obligation that the lien secured.[43] It has been held that a State court may take jurisdiction of a suit against the purchaser at a foreclosure sale, to enforce his liability to pay a debt of the mortgagor, which he assumed as part of the consideration.[44] It has been held that comity requires a State court to be bound by the Federal court's determination, as to when the latter's possession and control of property, of

[38] Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. But see Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, § 55, *infra*.

[39] Texas v. Palmer, C. C. A., 22 L.R.A.(N.S.) 316, 158 Fed. 705; Aff'd. Palmer v. Texas, 212 U. S. 118.

[40] Liggett v. Glenn, 51 Fed. 381.

[41] Daniels v. Lazarus, 65 Fed. 718; Lazarus v. McCarthy, 32 N. Y. Supp. 833. But see *infra*, § 56.

[42] Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379; s. c., 208 U. S. 609, 52 L. ed. 642; Fidelity Insurance Trust & Safe-Deposit Co. v. Norfolk & W. R. Co., 88 Fed. 815; Taylor v. Norfolk & O. V. Ry. Co., C. C. A., 162 Fed. 452; Lang v. Choctaw, Oklahoma & Gulf R. Co., C. C. A., 160 Fed. 355.

[43] Tr. Co. of America v. Norfolk & S. Ry. Co., 183 Fed. 803.

[44] Guardian Trust Co. v. Kansas City Southern Ry. Co., C. C. A., 146 Fed. 337. But see Fidelity Insurance, Trust & Safe-Deposit Co. v. Norfolk & W. R. Co., 88 Fed. 815.

which it first acquired jurisdiction, ceases.[45] This doctrine does not prevent the filing of a bill to set aside,[46] or stay,[47] proceedings under a judgment or decree of a State court; nor, it has been held, a bill to enforce a decree of a State court pending an appeal therefrom which does not operate as a *supersedeas;*[48] nor does the doctrine apply to a case where the Federal courts exercise superior jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.[49] Where a Federal court has appointed a receiver, in a case where a receiver was previously appointed by a State court, the proper remedy is an application by the State receiver, to the Federal court, for the delivery of the possession of the property to the applicant.[50] It has been said that where a State court has, by proper process, secured the custody or dominion of specific property, which it is one of the objects of a subsequent suit in the Federal court between the same parties to subject to its decree, the latter suit should not be stayed or dismissed, but should proceed as far as may be without creating a conflict concerning the possession or disposition of the property, and that then, if need be, it should be stayed until the proceedings in the State court have been completed or the time for their termination has elapsed.[51]

[45] Swinerton v. Oregon Pac. R. Co., 123 Cal. 417, 56 Pac. 40. So held of a Federal court, Hall v. Ames, 182 Fed. 1008.

[46] Gaines v. Fuentes, 92 U. S. 10, 23 L. ed. 524; Barrow v. Hunton, 99 U. S. 80, 83, 25 L. ed. 407, 408; Arrowsmith v. Gleason, 129 U. S. 86, 32 L. ed. 630; Marshall v. Holmes, 141 U. S. 589, 35 L. ed. 870; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52; Sahlgard v. Kennedy, 2 Fed. 295; Simon v. Southern Ry. Co., C. C. A., 195 Fed. 56. So held of a decree of naturalization and certificate of citizenship. U. S. v. Plaistow, 189 Fed. 1006.

[47] Kern v. Huidekoper, 103 U. S. 485, 491, 492, 26 L. ed. 354, 356, 357; In re Iowa & Minnesota Construction Co., 10 Fed. 401. But see Central Nat. Bank v. Stevens, 169 U. S. 432, 42 L. ed. 807; Cornue v. Ingersoll, C. C. A., 176 Fed. 194.

[48] Baltimore & O. R. Co. v. Wabash R. Co., C. C. A., 119 Fed. 678.

[49] Tefft v. Sterberg, 40 Fed. 2, 6, per Speer, J., citing Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390. But see *infra*, § 59.

[50] Texas v. Palmer, C. C. A., 22 L.R.A.(N.S.) 316, 158 Fed. 705; aff'd Palmer v. Texas, 212 U. S. 118. Waters-P. S. Oil Co. v. Texas, 47 Tex. Civ. App. 162, 103 S. W. 836; State v. Port Royal & Augusta R. R. Co., 45 S. C. 470, 23 S. E. 363; People v. New York City Ry. Co., 57 Misc. (N. Y.) 114.

[51] Mound City Co. v. Castleman, C. C. A., 187 Fed. 921.

§ 53. Property covered by insolvent assignments. It has been held; that the possession of an assignee appointed by an insolvent in a voluntary assignment is not the possession of a State court, although in pursuance of a State statute he has filed a bond and a petition for the settlement of his accounts, praying also for instructions concerning his administration, and that the Federal court consequently could appoint a receiver of property thus assigned;[1] that where a State court has, by docketing the proceeding, taken possession of property covered by an insolvent's assignment, a Federal court may entertain a bill to establish a claim against it, but it may not attempt by process against the property to enforce such claim after it has been established,[2] nor appoint a receiver,[3] and that a vessel in the possession of an assignee, appointed by a voluntary assignment under the insolvent law of Minnesota, cannot be taken from him by a marshal of the United States upon a libel *in rem* to enforce a claim against the insolvent.[4] Where a State statute provided, that, on the making by a judgment debtor of a general assignment for the benefit of creditors within ten days after the levy of an execution on his property, such levy should be dissolved and the property turned over to the assignee; it was held, that the same applied to a levy under a judgment of the Circuit Court of the United States, and that the assignee might apply to the Federal court for the release of the levy by a proceeding in the nature of a supplemental bill in equity.[5] Where the trustee, under an insolvent assignment, had failed to claim property until after a levy thereupon under a judgment of the Federal court; on his intervention in the Circuit Court of the United

§ 53. [1] Powers et al. v. Blue Grass B. & L. Ass'n 86 Fed. 705; under Kentucky statute; Watson v. Bettman, 88 Fed. 825; under New York statute. *Cf.* Adler v. Ecker, 2 Fed. 126; The James Roy, 59 Fed. 784; George T. Smith, etc., Co. v. McGroarty, 136 U. S. 237; Swofford Bros. D. G. Co. v. Mills, 86 Fed. 556; under Wyoming statute, sustaining an attachment by the Federal court: Peale v. Phipps, 14 How. 368, 14 L. ed. 459. *Contra*, Val. Blatz Brewing Co. v. Walsh, 84 Fed. 5; under Minnesota statute.

[2] Edwards v. Hill, C. C. A., 59 Fed. 723, 726; under Kansas statute.

[3] Geilinger v. Philippi, 133 U. S. 246, 257, 33 L. ed. 614, 617; under Louisiana statute; Val. Blatz Brewing Co. v. Walsh, 84 Fed. 5; under Minnesota statute.

[4] The J. G. Chapman, 62 Fed. 939.

[5] Brochon v. Wilson, C. C. A., 91 Fed. 617; under Wisconsin statute.

States, a decree was entered setting aside the levy, upon his payment of the costs thereof and filing an order of the State court authorizing him to take possession.[6]

§ 54. Property in the custody of State courts of probate. A Federal court cannot direct the distribution of all the assets held by an executor or administrator, at least so far as to affect the rights of the creditors, legatees or next of kin, who are citizens of the same State as the defendants, and who have no right to seek the Federal jurisdiction.[1] It has been held that a Federal court of equity cannot entertain a bill by a legatee, to compel an accounting by the surviving partner, and a payment of the balance due by him to the executors for distribution, when the executors and the survivor are citizens of the same state;[2] unless an executor is the surviving partner.[3] Nor issue an execution against the estate of a decedent;[4] nor compel the repayment, by a legatee, of a surcharge which he has received under a decision of a State orphans' court;[5] nor entertain a bill to set aside a sale of stocks, made by executors, and to take the proceeds out of their possession;[6] nor a bill by an unsecured creditor of a decedent to compel an accounting by the executor, when a previous suit, in which the complainant was not a party, had been brought for an accounting by such executor;[7] nor to compel an executor to file a bond,[8] nor to require him to deliver funds to an administrator appointed in another State;[9] nor, while the administration of the State court of probate is pending, a bill by the surviving husband of a decedent or his grantee against her administrator, to quiet the title to the husband's share of her separate estate:[10] nor a bill to prevent[11] or to set

6 Geilinger v. Philippi, 133 U. S. 246, 257, 33 L. ed. 614, 617; under Louisiana statute.

§ 54. 1 Byers v. McAuley, 149 U. S. 608, 47 L. ed. 867. *Cf.* Hale v. Tyler, 115 Fed. 833, 839.

2 Moore v. Fidelity Trust Co., 134 Fed. 489; s. c., C. C. A., 138 Fed. 1.

3 Am. Baptist Home Mission Society v. Stewart, 192 Fed. 976.

4 Williams v. Benedict, 8 How. 107, 112, 12 L. ed. 1007, 1008; Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536.

5 Chandler v. Pomeroy, 87 Fed. 262, 266.

6 Jordan v. Taylor, 98 Fed. 643.

7 Thiel Detective Service Co. v. McClure, 130 Fed. 55.

8 Field v. Camp, 193 Fed. 160.

9 Watkins v. Eaton, C. C. A., 183 Fed. 384.

10 Thorpe v. Sampson, 84 Fed. 63.

11 Miller v. Weston, C. C. A., 199 Fed. 104.

aside the probate of a will;[12] unless the State law authorizes such a bill to be filed in a proceeding *inter partes,* which is not a mere continuation of the probate proceedings.[13] But, after a State court of probate has begun the administration of the assets of a decedent, a Federal court may establish a debt against the estate,[14] and direct the payment, by the personal representative or his sureties, of such debt,[15] or of a legacy, or of a distributive share;[16] at least where the complainant does not seek

[12] Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Farrell v. O'Brien, 199 U. S. 89, 110, 50 L. ed. 101, 111; Oakley v. Taylor, 64 Fed. 245, under Missouri statute. Stead v. Curtis, C. C. A., 191 Fed. 529, under California statute. The orders and judgments of probate courts in the due and orderly administration of estates are conclusive upon the Federal courts. Johnson v. Waters, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. ed. 547; Newberry v. Wilkinson, C. C. A., 199 Fed. 673, 680. Where the probate court at the place of domicile of the testatrix admitted to probate a will, but rejected a codicil for want of testamentary capacity, it was held that this decision must be followed by the Federal court in the northern district of New York, although the Circuit Court of New York had admitted the codicil to probate. Higgins v. Eaton, C. C. A., 183 Fed. 388, reversing 178 Fed. 153.

[13] Broderick's Will, 21 Wall. 503, 519, 22 L. ed. 599, 605; Farrell v. O'Brien, 199 U. S. 89, 110, 50 L. ed. 101, 111; holding that this cannot be done under the Washington statute; Richardson v. Green, C. C. A., 61 Fed. 423; s. c., 159 U. S. 264, 40 L. ed. 142 (Oregon statute); Williams v. Crabb, C. C. A., 59 L.R.A. 425, 117 Fed. 193, 204 (Illinois statute); Wart v. Wart, 117 Fed. 766 (Iowa statute); Sawyer v. White, C. C. A., 122 Fed. 223 (Missouri statute); Pulver v. Leonard, 176 Fed. 586, under Minnesota statute. See *infra,* §§ 76, 82.

[14] Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927; Schurmeier v. Connecticut Mut. Life Ins. Co., C. C. A., 171 Fed. 1.

[15] Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927. See also Erwin v. Lowry, 7 How. 172, 12 L. ed. 655.

[16] Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867; Brendel v. Church, 82 Fed. 262; Waterman v. Canal-Louisiana Bank & Tr. Co., 215 U. S. 33, 54 L. ed. 80; Pulver v. Leonard, 176 Fed. 586; Order of St. Benedict of New Jersey v. Steinhauser, 179 Fed. 137; Higgins v. Eaton, C. C. A., 183 Fed. 388, reversing 178 Fed. 153; Am. Baptist Home Mission Society v. Stewart, 192 Fed. 976. As to the effect upon such a proceeding of a previous intervention in the State court by the State claiming an *escheat.* McClellan v. Carland, 217 U. S. 268, 54 L. ed. 762; S. C., C. C. A., 187 Fed. 915. See, also, Barker v. Eastman, 192 Fed. 659.

to establish a claim that he might have made in the probate court,[17] and it may thus or otherwise adjudicate upon the construction of a will,[18] and compel an accounting by an executor or administrator;[19] although, in one such case, the court, after declaring the rights of the parties by its decree, refused to take jurisdiction of an accounting and left that matter to be determined by the appropriate State tribunal.[20] It may entertain a bill in equity against testamentary trustees for an accounting, after the administration of the personal estate by the executors has been terminated, although the State statute gives the probate court jurisdiction over the accounts of testamentary trustees; provided that the suit in the Federal court was begun prior to an application to the probate court for an account.[21] In such a suit, the Federal court may direct a final distribution and settlement of the trust.[22] It has been held that the Federal court may fix the compensation of the trustees; and that it is not bound by orders of the State probate court fixing such compensation, which were made after the bill in the Federal court was filed.[23] It has been held: that a Federal court may entertain a bill in equity to surcharge, correct and set aside, a settlement of the accounts of administrators, which has been confirmed by a decree of the proper State court;[24] to set aside a fraudulent transfer of property, made by an administratrix with the sanction of the State probate court;[25] to set aside a fraudulent sale of land, made by the decedent in his lifetime, although the State probate court has authority to grant a license

[17] McPherson v. Mississippi Valley Tr. Co., C. C. A., 122 Fed. 367.

[18] Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867; Toms v. Owen, 52 Fed. 417; Wood v. Paine, 66 Fed. 807; Waterman v. Canal-Louisiana Bank & T. Co., 215 U. S. 33, 54 L. ed. 80; Spencer v. Watkins, C. C. A., 169 Fed. 579.

[19] Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Hale v. Tyler, 115 Fed. 833, 839. See Comstock v. Herron, 55 Fed. 803. Newberry v. Wilkinson, C. C. A., 199 Fed. 673. A Federal court may take jurisdiction of a suit by the foreign guardian of an incompetent to compel an accounting by a guardian residing within the district. Pulver v. Leonard, 176 Fed. 586.

[20] Crocker v. Oakes, 117 Fed. 363.

[21] Herron v. Comstock, C. C. A., 139 Fed. 370.

[22] Herron v. Comstock, C. C. A., 139 Fed. 370.

[23] Herron v. Comstock, C. C. A., 139 Fed. 370.

[24] Bertha Zinc & Mineral Co. Vaughn, 88 Fed. 566.

[25] Central Nat. Bank v. Fitzgerald, 94 Fed. 16.

to sell the same and thus authorize the administrator to bring a suit for the same purpose, when no such license was granted previous to the filing of the bill;[26] to set aside a release obtained by an administrator or guardian by fraud;[27] to set aside an election obtained from a widow through fraud;[28] at the suit of a creditor to enjoin an administrator from paying over the money, or distributing the property of the estate, to others joined with him as parties defendant, although the Federal court cannot ascertain the amount of unpaid claims nor whether the estate is in a condition for final distribution;[29] to enjoin an ancillary administrator from transmitting the assets to the court of original administration until a claim of a creditor has been determined;[30] after the determination by the State court is complete, to subject to the payment of a debt of the decedent, property in the hands of a distributee;[31] a bill to enforce an attachment on the estate of the decedent, levied by the Federal court before his death, when the State statute authorizes attachments and executions to be levied upon equitable interests in real estate;[32] to sell land for the benefit of a creditor of the estate, when the administratrix refuses to institute a proceeding for that purpose in the proper State court under statutory authority, although the administration is still pending in the State court undetermined;[33] to compel specific performance, by the heirs and administrators, of a contract by the decedent in relation to property of the decedent, which is in the process of administration in the State court;[34] to compel an executor to pay an assessment levied after the decedent's death upon national bank stock, which he holds;[35] to appoint a receiver of the decedent's assets within the district, where the

[26] Hale v. Tyler, 115 Fed. 833.

[27] Pulver v. Leonard, 176 Fed. 586.

[28] Eddy v. Eddy, C. C. A., 168 Fed. 590.

[29] Davis v. Davis, 89 Fed. 532.

[30] Ingersoll v. Coram, 132 Fed. 168, 172; aff'd 211 U. S. 335.

[31] Hale v. Coffin, 114 Fed. 567.

[32] Lant v. Manley, C. C. A., 75 Fed. 627. See Lant v. Kinne, C. C. A., 75 Fed. 636.

[33] Brun v. Mann, C. C. A., 12 L.R.A.(N.S.) 154, 151 Fed. 145.

[34] Davis v. Davis, 89 Fed. 532.

[35] In re Connaway, 178 U. S. 421, 44 L. ed. 1134; Wickham v. Hull, 60 Fed. 326; Brown v. Ellis, 86 Fed. 357.

executors disagree and can not act together;[36] and when no temporary administrator has been appointed, pending a conflict in the court of probate concerning the right to administration,[37] the occupation of land therein included by the widow after her quarantine has expired under a claim of title by devise does not take away such jurisdiction;[38] at the suit of a minority stockholder, to enjoin one of two executors from voting upon a majority of the stock in the corporation pending litigation in the State court, which has enjoined the other executor from voting thereupon.[39] The property of a debtor taken into the custody of a Federal court by seizure under process issued under its judgment remains under its control to be applied in satisfaction thereof, notwithstanding the death or insolvency of the judgment debtor and the institution of proceedings in a State court to administer his estate, and irrespective of subsequent State legislation.[40]

§ 55. Property in the custody of receivers. The appointment of a receiver by a court,[1] or the filing there, of a bill praying for the appointment of a receiver,[2] or perhaps the present-

[36] Ball v. Topkins, 41 Fed. 486. See *infra*, § 302.

[37] Underground El. Rys. Co. of London v. Owsley, 169 Fed. 671; s. c., C. C. A., 176 Fed. 26.

[38] Underground El. Rys. Co. of London v. Owsley, 169 Fed. 671; s. c., C. C. A., 176 Fed. 26.

[39] Villamil v. Hirsch, 138 Fed. 690. As a condition of granting the injunction, the court enjoined the holding of a stockholders' meeting until the dispute between the executors had been decided by the state court. Villamil v. Hirsch, 143 Fed. 654.

[40] Rio Grande R. Co. v. Gomila, 132 U. S. 478, 481, 33 L. ed. 400, 401; Leadville Coal Co. v. McCreery, 141 U. S. 475, 35 L. ed. 824; Straine v. Bradford Sav. B. & T. Co., 88 Fed. 571.

§ 55. [1] Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660; Texas v. Palmer, C. C. A., 22 L.R.A.(N.S.) 316, 158 Fed. 705, aff'd Palmer v. Texas, 212 U. S. 118; Garner v. Southern Mut. Building & Loan Ass'n, C. C. A., 84 Fed. 3, 28 C. C. A. 381; Lancaster v. Asheville St. Ry. Co., 90 Fed. 129; Sullivan v. Algrem, C. C. A., 160 Fed. 366; Stirling v. Seattle, R. & S. Ry. Co., 198 Fed. 913.

[2] Farmers' Loan & Tr. Co. v. Lake Street El. R. Co., 177 U. S. 51, 44 L. ed. 667; Appleton Water Works Co. v. Central Trust Co., C. C. A., 93 Fed. 286; Holland Trust Co. v. International Bridge & Tramway Co., C. C. A., 85 Fed. 865. See Palestine Water & Power Co. v. Palestine, 91 Tex. 540, 44 S. W. 814, 40 L.R.A. 203; affirming 41 S. W. 659. *Contra*, De La Vergne Refrigerating Mach. Co. v. Palmetto Brewing Co., 72 Fed. 579; where the Federal court appointed a receiver in a

ment to the court, of a bill praying a receiver and the issue of a restraining order or other order thereupon,[3] prevents the appointment of a receiver of the same property by a court of co-ordinate jurisdiction; except perhaps when the first suit is brought by creditors, secured or unsecured, or stockholders, and the second is instituted for the dissolution of the corporation, which is not prayed in the first suit. In such a case, it has been held that the prior appointment of a receiver by the Federal court will not prevent the appointment of one for the same property by the State court, in an action to dissolve the corporation; but that such receiver should apply to the State court for the return of the property to him.[4] Upon such an application by temporary receivers appointed in a dissolution suit, it was held, that the motion should be denied, without prejudice to its renewal in case their appointment should be made permanent.[5] The fact that the first receivership was based upon the fraud of officers and directors and the second application upon the ground of insolvency, does not affect the rule.[6] It has been held that a receiver appointed by a Federal court of equity will not be ordered to take possession of property, upon which a State court has levied an attachment,[7] or other process,[8] before his appointment was prayed. Where a State court had attached a debt, before the court of another State had appointed the receiver of the creditor, the Federal court directed that judgment be entered against the receiver in an action by him to collect

foreclosure suit, after a rule to show cause in a State court why a receiver should not be appointed upon a stockholders' bill, and refused to deliver the property to the receiver subsequently appointed by the State court.

[3] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220.

[4] State v. Port Royal & Augusta R. Co., 45 S. C. 470, 23 S. E. 363, 386; Louisville, New Albany & Chicago R. R. Co. v. Cauble, 46 Ind. 277, 280; People v. New York City Ry. Co., 57 Misc. (N. Y.) 114; People v. Hasbrouck, 57 Misc. (N. Y.) 130; St. Louis Car Co. v. Stillwater R. Co., 53 Minn. 129. See City Water Co. v. Texas, 88 Tex. 600, 604; Alderson Receivers, § 20.

[5] Pennsylvania Steel Co. v. New York City Ry. Co. (Lacombe, J., S. D. N. Y.), N. Y. L. J., February 4, 1908. But see Robinson v. Mutual Reserve Life Ins. Co., 162 Fed. 794.

[6] Stirling v. Seattle, R. & S. Ry. Co., 198 Fed. 913.

[7] Southern B. & T. Co. v. Folsom, C. C. A., 75 Fed. 929; Hale v. Bugg, 82 Fed. 33; Dodds v. Palmer Mountain Tunnel Co., 188 Fed. 447.

[8] Lake Bisteneau Lumber Co. v. Mimms, 22 So. 730, 49 La. Ann. 1283.

the debt, unless he should consent to a stay of proceedings until the State court had acted upon the matter.[9] It has been held that the entire property of a corporation is not in the custody of a court that has appointed a receiver over the assets of another corporation, which owns a majority of its stock and operates its railroad under a lease; and that consequently, a State court may appoint a receiver of the lessor, after the appointment by a Federal court of a receiver of the lessee and stockholder;[10] but this rule will not apply if the Federal court has extended the receivership to the interest of the lessor in the property.[11] A stipulation staying proceedings in the Federal court, after a motion for a receiver has been made, does not justify the subsequent appointment of a receiver by a State court.[12] Where, after the appointment of a receiver, the Federal court accepted a bond in lieu of the property and discharged the receiver, it was held that the State court might appoint a receiver; and that the Federal court could not subsequently appoint another receiver of its own to take the property from the possession of the State receiver;[13] but an appeal to a State court of review from the order appointing a receiver, and the filing of a *supersedeas* bond, which stays the proceedings, before the receiver has taken possession, does not authorize the appointment of a receiver by the Federal court; and such Federal receiver must surrender the property to the State receiver after the State order of appointment has been affirmed; although such appointment was in aid of a decree, an appeal from which, accompanied by a *supersedeas,* is still pending in the State court of review.[14] It has been held that the appointment by the Federal court of a receiver of the assets of a lessor does not oust the State court of jurisdiction to enjoin the directors from amending the lease[15]

[9] Avery v. Boston Safe Deposit & Trust Co., 72 Fed. 700.

[10] Central R. & B. Co. v. Farmers' L. & Tr. Co., 56 Fed. 357.

[11] Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

[12] McKechney v. Weir, C. C. A., 118 Fed 805.

[13] Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660. But see Interstate Ry. Co. v. Philadelphia, B. & T. St. Ry. Co., 164 Fed. 770.

[14] Texas v. Palmer, C. C. A., 22 L.R.A.(N.S.) 316, 158 Fed. 705: aff'd. Palmer v. Texas, 212 U. S. 118, 53 L.ed. 435; Sullivan v. Algrem, C. C. A., 160 Fed. 366; Stirling v. Seattle, R. & S. Ry. Co., 198 Fed. 913.

[15] Guaranty Trust Co. v. Northern Chicago St. Ry. Co., C. C. A., 130 Fed. 801.

and that after the Federal court has acquired jurisdiction of a bill praying the removal of the trustee of a corporate mortgage, the appointment of another and the appointment of a receiver of the mortgaged property pending the suit, the State court cannot entertain proceedings for the appointment of a new trustee in accordance with the deed of trust.[16] After the appointment of a receiver and until the termination of his receivership, his removal or discharge, no court, but that which appointted him, except in cases of bankruptcy, can interfere with the property placed in his custody.[17] The unauthorized appearance of the Federal receiver in a State court does not divest the Federal court of its exclusive jurisdiction in this respect.[18] A receiver appointed by a State court cannot, except possibly in a suit for the infringement of a patent, be sued without the permission of his court.[19] And if he refuses to sue upon a claim belonging to his estate, no person interested can bring a suit to collect the same without his joinder as a defendant by the permission of such court.[20] Formerly a Federal receiver could not be sued without the permission of his court.[21] The Judiciary Act of 1887 abrogated this rule:[22] but a judgment against him cannot be enforced without the permission of the Federal court.[23] It has been held: that when a receiver has been appointed of the property of a corporation, its mortgagee cannot without permission of the court which made such appointment take proceedings to foreclose a mortgage thereupon because of a subsequent default;[24] that the appointment by a State court of a receiver of a corporation pending a suit in a Federal court to set aside a chattel mortgage which it had

16 State Nat. Bank v. Syndicate Co., 178 Fed. 359.

17 In re Tyler, 149 U. S. 164, 37 L. ed. 689; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; Security Trust Co. v. Union Trust Co., 134 Fed. 301.

18 Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96, 111.

19 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; Rejall v. Greenhood, 60 Fed. 784; Ross v. Heckman, 84 Fed. 6. But see *infra*, § 314.

20 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; *infra*, § 314.

21 Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672.

22 25 St. at L. 866, § 3, p. 436; *infra*, § 314.

23 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 311, re-enacted in Jud. Code, § 66, 36 St. at L. 1087; *infra*, § 314.

24 Slade v. Massachusetts Coal & Power Co., 188 Fed. 369.

fraudulently obtained was no bar to such Federal suit; [25] that a Federal court may foreclose a mortgage upon property held by a receiver appointed by a State court in a suit to which the mortgagee was not a party; and that in such foreclosure suit the Federal court can determine the claim of the holders of receivers' certificates issued under the order of the State court to a preference over the mortgage,[26] and that where a suit was brought, in a Federal court, to foreclose a mortgage, prior to the institution of a suit in a State court in which a receiver was appointed; the Federal court might decree the foreclosure sale, notwithstanding the possession of such receiver.[27] It has been held: that upon a bill to set aside the decree of a Federal court, as fraudulent, a State court has no jurisdiction to review the acts of receivers appointed by the Federal court before such decree.[28] Property in the possession of a statutory receiver not appointed by a court is not usually considered to be in the court's custody.[29] Where the receiver of a national bank appointed by the Comptroller of the Currency refuses to sue to collect a cause of action due the bank, one of the stockholders may sue in a State court to collect such assets on behalf of the bank, and should make the bank and its receiver parties defendant.[30] After the appointment by the Comptroller of the receiver of a bank, the State court may levy a writ of attachment against the bank and the receiver as garnishees. The State court then has jurisdiction to enter a judgment establishing the claim, but not to order the receiver to make a payment out of the assets of the bank. It is the duty of the receiver upon the service of the writ to report the facts to the Comptroller, and it then becomes the duty of the Comptroller to hold any funds coming to his hands through the Treasurer as the proceeds of the assets subject to any rights that have been adjudicated by the State court.[31] In a proper case, an injunction may be granted to enjoin such a

[25] Sims v. United Wireless Tel. Co., 179 Fed. 540.

[26] Metropolitan Tr. Co. v. Lake Cities El. Ry. Co., 100 Fed. 897. But see Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379; quoted, *supra*, § 52.

[27] Bridgeport El. & Ice Co. v. Meader, C. C. A., 72 Fed. 115.

[28] Kurtz v. Philadelphia & R. R. Co., 40 Atl. 988, 187 Pa. St. 59.

[29] In re Chetwood, 165 U. S. 443, 41 L. ed. 782.

[30] Ibid.

[31] Earle v. Conway, 178 U. S. 456, 44 L. ed. 1149; Earle v. Pennsylvania, 178 U. S. 449, 44 L. ed. 1146.

receiver from transmitting the assets to the Comptroller of the Currency.[32]

The appointment of a receiver or trustee by a Court of Bankruptcy in a case of which it has jurisdiction supersedes the authority of a receiver appointed by a State court although he was previously in possession of the property; but comity requires that, except in an extraordinary case, the receiver in bankruptcy should apply to the State court for an order directing the delivery of possession to him before he institutes other proceedings for the same.[33]

A suit, in which a State court has appointed a receiver, may be removed to the Federal court.[34] Where a Federal court has appointed a receiver in a case where a receiver was previously appointd by a State court, the proper remedy is an application by the State receiver, to the Federal court, for the delivery of the possession of the property to the applicant.[35]

§ 56. Controversies between State sheriffs and United States marshals; and those arising out of attachments. garnishee process and executions. A court, which, through its officers, has levied upon property under a common-law writ, retains the exclusive custody of the same until it abandons it.[1] This rule applies to a judgment[2] and a fund in

32 American Can Co. v. Williams, C. C. A., 153 Fed. 882.

33 In re Watts and Sachs, 190 U. S. 1, 27, 47 L. ed. 933, 941; *infra*, § 59.

34 In re Iowa & Minnesota Construction Co., 10 Fed. 401. Where, however, all the property of a foreign corporation had been placed in the hands of a receiver appointed by the State court, the Federal court said, that a case instituted by attachment which had been removed thereto, should be remanded. Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831, 834.

35 Texas v. Palmer, C. C. A., 22 L.R.A.(N.S.) 316, 158 Fed. 705; Waters-P. Oil Co. v. Texas, 47 Tex. Civ. App. 162, 103 S. W. 836; State v. Port Royal & Augusta R. R. Co., 45 S. C. 470, 23 S. E. 363; People v. New York City Ry. Co., 57 Misc. (N. Y.) 114.

§ 56. 1 Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Summers v. White, C. C. A., 71 Fed. 106; De Galard v. Safe Deposit & Trust Co., 196 Fed. 981, a Federal suit in equity to obtain possession of bonds previously attached under process of a State court. When the sheriff held property under summary proceedings for a foreclosure under the Georgia statute, it was held to be in the custody of a state court. Tefft v. Sternberg, 5 L.R.A. 221, 40 Fed. 2.

2 Menees v. Matthews, 197 Fed.

court[3] which are not subject to attachment[4] or garnishee process,[5] by any other court until the fund is distributed. The entry of a final decree or order for the distribution, is not a relinquishment of the jurisdiction of the court;[6] and checks prepared by the clerk of the court for mailing, in accordance with such an order, cannot be attached or made subject to garnishee process.[7] It has been held, however, that the State sheriff may seize property, while still in the possession of the United States marshal, after an order by the Federal court directing its return to its owner;[8] that where the marshal, after levy under a writ of replevin, permitted the plaintiff's agents to pack the goods, to load them into a car, and to procure a shipping receipt and bill of lading for the same, these acts constituted a delivery to the plaintiff and a State sheriff might subsequently levy upon them under a writ of attachment issued by a State court;[9] that, where a State sheriff had made no valid levy upon property by taking possession of the same, but merely had it pointed out to him, that did not prevent a subsequent seizure thereof by a marshal under process from a United States court of admiralty.[10] In the State of New York, where a warrant of attachment, issued by a Circuit Court of the United States, has been duly filed in the office of the clerk of the court, in the same State, but in a different district from that where the writ was issued; the State court will not grant an injunction against the sale of the same, although the validity of the levy is contested; but will leave that matter for determination by the Federal courts.[11] It has been

633; Mack v. Winslow, C. C. A., 59 Fed. 316, 319, 8 C. C. A. 134; and cases cited.

[3] Corbitt v. Farmers' Bank of Delaware, 114 Fed. 602.

[4] Ibid.

[5] Mack v. Winslow, C. C. A., 59 Fed. 316, 319, 8 C. C. A., 134; Menees v. Matthews, 197 Fed. 633; and cases cited; Swinerton v. Oregon Pac. R. Co. 123 Cal. 417, 56 Pac. 40. In Menees v. Matthews, 197 Fed. 633, the Federal court refused to stay an execution on its judgment because the circumstances tended to show collusion between the garnisher and the judgment debtors.

[6] Corbitt v. Farmers' Bank of Delaware, 114 Fed. 602.

[7] Swinerton v. Oregon Pac. R. Co. 123 Cal. 417, 56 Pac. 40.

[8] Daniels v. Lazarus, 65 Fed. 718; Lazarus v. McCarthy, 32 N. Y. Supp. 833.

[9] Animarium Co. v. Bright, 82 Fed. 197.

[10] Fountain v. 624 Pieces of Timber, 140 Fed. 381.

[11] Beardslee v. Ingraham, 183 N. Y. 411, 3 L.R.A.(N.S.) 1073. Previous to this decision, the Federal

held: that after the levy upon land of an attachment issued by a State court of Tennessee, the Federal court cannot appoint a receiver of the same in a suit subsequently begun.[12] In the Southern District of California, it was held: that the levy of an attachment upon real estate gives to the court neither actual, nor constructive, possession thereof, but merely creates a lien upon the same; that it can consequently be taken into the possession of a receiver of a Federal court subesquently appointed; and that where the property is not ample to meet all the claims against it, the Federal court will not permit its sale under execution before the title is acquired by its own decree.[13] Where a State statute provides for successive attachments of the same property, a prior attachment in a State court affords no ground for the discharge of an attachment in a Federal court.[14] Otherwise, a Federal court will not appoint a receiver of property held by a sheriff under a common-law writ, levied before the receiver's appointment was prayed.[15] A writ of replevin, issued by a State court, to take property within the possession of a marshal of the United States,[16] and an injunction interfering with the marshal's control of the same,[17] are void, and a case of the latter character may be removed to the District Court of the United States. The Federal court may, however, entertain a suit against a State sheriff for damages caused by any legal levy.[18] The custody of property by a Federal court, under a levy by attachment, does not prevent the State courts from subsequently deciding the title to the same in an interpleader suit; and it has been held, that the decision therein will be binding upon the District Court of the United States.[19] The levy, by a State court, upon land in the possession of a person not a party

court had denied an injunction against the prosecution, by State receivers, of an action to enjoin the marshal's sale. Ingraham v. National Salt Co., 139 Fed. 684. *Cf.* Hale v. Bugg, 82 Fed. 33.

[12] Southern Bank & Tr. Co. v. Folsom, C. C. A., 75 Fed. 929.

[13] In re Hall & Stilson Co., 73 Fed. 527.

[14] D. E. Loewe & Co. v. Lawlor, 130 Fed. 633.

[15] Southern B. & T. Co. v. Folsom, C. C. A., 75 Fed. 929; Dodds v. Palmer Mountain Tunnel Co., 188 Fed. 447.

[16] Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Summers v. White, C. C. A., 71 Fed. 106.

[17] Frank v. Leopold & Feron Co., 169 Fed. 922.

[18] Porter v. Davidson, 62 Fed. 626.

[19] Montgomery v. McDermott, 87 Fed. 374.

to the suit, will not prevent him from suing in the Federal court, to cancel the deed subsequently given to the purchaser at the execution sale; nor from obtaining, from such court, an injunction against the sale.[20] In a proper case, a suit may be removed to a Federal court, notwithstanding the fact that a State court has previously therein taken property into its possession under a common-law writ.[21]

Where there is a dispute between the State sheriff and the United States marshal as to the right to posesssion, the proper remedy is ordinarily a petition of intervention *pro interesse suo* by the sheriff in the Federal action.[22] It has been held that an original bill for an injunction will not lie.[23] But an ancillary bill has been sustained in such a case, and it was said that in some cases a summary motion might be granted according to the circumstances.[24] In order to preserve his right to a priority, it seems that the proper course is for the sheriff to serve upon the marshal as garnishee a notice of his writ.[25] A writ of replevin issued by a State court in such a case is void.[26] Although, it has been held, that proceedings in the State court, under an execution against the defendant's property, cannot be enjoined by the Federal court; when the sheriff has levied upon property not owned by the defendant judgment debtor, such an injunction was issued.[27] A State court cannot levy an attachment or garnishee process against a debt pending an action in a Federal court to collect the same.[28] Where the Federal court had attached a bank deposit, which was claimed by others not parties

[20] Provident Life & Trust Co. v. Mills, 91 Fed. 435.

[21] Kern v. Huidekoper, 103 U. S. 485, 491, 492, 26 L. ed. 354, 356, 357.

[22] Pickett v. Tiler & S. Co., 40 Fed. 313; Gambel v. Pitkin, 124 U. S. 131, 31 L. ed. 374. See Freeman v. Howe, 24 How. 450, 16 L. ed. 749; People's Bank v. Calhoun, 102 U. S. 256, 26 L. ed. 101; Beckett v. Sheriff of Hartford Co., 21 Fed. 32.

[23] Pickett v. Tiler & S. Co., 40 Fed. 313.

[24] Krippendorf v. Hyde, 110 U. S. 276, 287, 28 L. ed. 145, 149, per Matthews, J. See Porter v. Davidson, 62 Fed. 626.

[25] Gambel v. Pitkin, 124 U. S. 131, 31 L. ed. 374.

[26] Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Summers v. White, C. C. A., 71 Fed. 106.

[27] Provident Life & Trust Co. v. Mills, 91 Fed. 435.

[28] Wallace v. McConnell, 13 Pet. 136, 10 L. ed. 95; Rosenstein v. Tarr, 51 Fed. 368; Mack v. Winslow, 59 Fed. 316; Ohio R. Co. v. Fisher, C. C. A., 115 Fed. 929

to the suit, and an action against the bank for its recovery had been instituted by one of them in a State court, it was held, that the plaintiff in the Federal court must appear in the State court and submit his rights to adjudication there for the protection of the bank; and that otherwise, his attachment should be denied.[29] Banruptcy cases are an exception to this rule.[30]

§ 57. Effect of jurisdiction of another court over same cause of action. The doctrine does not prevent an action *in personam* between the same parties involving the same issues; provided that the property is not seized therein.[1] Where suits are pending in a State and a Federal court, to enforce the same cause of action, the usual practice is to stay proceedings in the court where the second case was begun until the first is determined; not to dismiss the second suit.[2] A plea in abatement not in such a case was sustained; [3] but a bill against an administrator, which sought to interfere with assets in the custody of a State court of probate, was held to be demurrable.[4] Where bills to enjoin the enforcement of a State statute had been previously presented to the Federal court, upon notice of an application to file the same, and restraining orders issued, but leave to file postponed because of the absence of one of the defendant's counsel; it was held: that these proceedings took precedence of subsequent suits in the State courts to enforce the statute; and that such subsequent suits by the defendants to the former bills might be enjoined;[5] but where the Federal court had enjoined the enforcement of a State statute reducing the price of gas pending an adjudication concerning its validity in the suit there instituted, a State court held that it had power to enjoin the gas company from cutting off the supply of gas to a consumer for his refusal to pay the original price.[6] It has been held that

[29] U. S. v. Neeley, 146 Fed. 763.

[30] *Infra*, § 59.

§ 57. [1] Porter v. Davidson, 62 Fed. 626; Rejall v. Greenhood, 60 Fed. 784; Merritt v. American S. B. Co., 79 Fed. 228; Copeland v. Bruning, C. C. A., 127 Fed. 550. *Cf.* Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630. But see *infra*, § 177.

[2] Zimmerman v. SoRelle, 80 Fed. 417; Hughes v. Green, C. C. A., 84 Fed. 833; *infra*, § 177. See U. S. v. Belknap, 73 Fed. 19.

[3] See *infra*, § 177.

[4] Lant v. Manley, 71 Fed. 7; reversed on another point, s. c., C. C. A., 75 Fed. 627.

[5] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220.

[6] Richman v. Consol. Gas. Co., 186 N. Y. 209. The Court of Appeals

the pendency in a Federal court of a suit by a gas company against a city to set aside, as an impairment of the contract made by its franchise, an ordinance regulating the pressure in complainant's mains, does not justify an injunction against a subsequent suit by the city against the company in a State court for an accounting under the original ordinance granting the franchise, upon the ground that the contract rates charged were excessive because of insufficient pressure, although such second suit prays an injunction against the further collection of such rates.[7] Where a suit by one riparian owner against another to enjoin interference with the complainant's use of water, had been first brought in a Federal court, a subsequent suit in a State court in a different State, when brought by a privy of the defendant against the complainant to the first suit, was held to be rightfully enjoined.[8] Similar rules should usually be followed by the Federal courts when the State courts have first acquired jurisdiction of such suits for injunctions;[9] but it seems that they are not bound to do so.[10] It was held that a decree of a State court *in personam*, restraining a water company from refusing to furnish water to the city on certain conditions, did not prevent a subsequent suit in the Federal court by a person in privity with the former defendant to enjoin the city from preventing his removing the plant.[11] Where a bill was filed by a Federal court to remove a trustee, have another appointed in his place, or, in the alternative, for the appointment of a receiver and a cancellation of certain fraudulent bonds secured by the trust deed; it was held that the State court was not bound to recognize any subsequent order in proceedings afterwards brought in the State court for the appointment of a new trustee, in accordance with the deed of trust.[12] A State court cannot levy an attachment or garnishee process, against a debt, pending

intimated that the State court of original jurisdiction should stay the trial until the determination in the Federal court of the issues there raised.

7 Kansas City Gas Co. v. Kansas City, 198 Fed. 500.

8 Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. ed. 1032.

9 People's Gaslight & Coke Co. v. City of Chicago, 192 Fed. 398; Moss & Co. v. McCarthy, 191 Fed. 202.

10 People's Gaslight & Coke Co. v. City of Chicago, 192 Fed. 398.

11 Laighton v. City of Carthage, Mo., 175 Fed. 145.

12 State Nat. Bank v. Syndicate Co., 178 Fed. 359.

an action in a Federal court to collect the same.[13] It has been held: that the pendency of a suit in a State court in another district, in which a trustee has been enjoined from beginning a foreclosure suit, does not affect the jurisdiction of a Federal court to foreclose the mortgage on the property in both States, at the suit of a majority of the bondholders.[14] It has been held: that the pendency of a suit in the Federal court to foreclose a lien, in which no receiver is appointed, does not affect the jurisdiction of a State court to entertain a suit for the foreclosure of a mortgage on the same property, when the mortgagee was not a party to the suit in the Federal court; and that the decree in the Federal court does not bind the mortgagee, nor affect the rights of a purchaser at the foreclosure sale.[15]

§ 58. Effect of the custody, by another court, of the person of an accused in criminal proceedings, or otherwise. This doctrine applies, to a limited extent, to the custody of a person in a criminal case.[1] Thus, the Federal courts ordinarily refuse to discharge by *habeas corpus* before his trial, and even in some cases, before he has exhausted his remedy by writ or appeal, after conviction, a prisoner held under indictment by a State court.[2] So, where the marshal had seized under a charge of a crime against the United States a prisoner held by the sheriff under a charge of a violation of the State criminal law, the Federal court upon a plea in abatement sustained the indictment found by its own grand jury, but ordered that the accused be returned to the State authorities.[3] Conversely, a State court has no power to release by *habeas corpus* a prisoner held under the process of a court of the United States.[4] The acts of Con-

[13] Wallace v. McConnell, 13 Pet. 136, 10 L. ed. 95; Rosenstein v. Tarr, 51 Fed. 368; Mack v. Winslow, 59 Fed. 316.

[14] Woodbury v. Alleghany & K. R. Co., 72 Fed. 371.

[15] National Foundry & Pipe Works v. Oconto City Water Supply Co., C. C. A., 113 Fed. 793. See National Foundry & Pipe Works v. Oconto Water Supply Co., 183 U. S. 216, 46 L. ed. 157.

§ 58. [1] Harkrader v. Wadley, 172 U. S. 148, 164, 43 L. ed. 399, 404, per Shiras, J., citing Ex parte Crouch, 112 U. S. 178, 28 L. ed. 690.

[2] Ex parte Royall, 117 U. S. 241, 254, 29 L. ed. 868, 872; §§ 461, 466, *infra*.

[3] U. S. v. Wells, 11 Am. Law Reg. (N. S.) 424; s. c., Fed. Cases No. 16,665.

[4] Ableman v. Booth, 21 How. 506, 16 L. ed. 169. See Tarble's Case, 13 Wall. 397, 20 L. ed. 597; Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542. In the Matter of Spangler, 11 Mich. 298.

gress, however, authorize in certain cases the removal of criminal proceedings from a State to a Federal court.[5] And where an officer of the United States is arrested by State process, because of an act done in pursuance of his official duty, the Federal courts will usually interfere, by *habeas corpus,* to protect him.[6] It has been held that an application for the removal of a criminal from one Federal district to another will be denied if the accused was in the custody of the State court before the Federal court obtained jurisdiction.[7] The same rule applies when he is, at that time, in the custody of a court of the United States, in the district from which it is sought to remove him;[8] unless such court relinquishes its jurisdiction, which it may do with the consent of the government; and if it does so, the accused will be removed.[9] Where the first court declines to relinquish its jurisdiction, it has been held that the practice is for the marshal to hold, but not to execute, the second warrant, until it is determined whether the accused shall be held under that first issued.[10] It has been said: "that the sovereignty, where jurisdiction first attaches, may yield it; and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him."[11] Where a proceeding to determine the sanity of an alleged lunatic had been brought in a State court, between citizens of different States, the Federal court refused, pending the determination thereof, to review the right of his custody upon a writ of habeas corpus.[12] "Where one commences a criminal proceeding, who is already a party to a suit then pending in equity, if the criminal proceedings are brought to enforce the

[5] U. S. R. S., §§ 641, 643; 18 St. at L., p. 401; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648. See §§ 537, 550, 551, *infra.*

[6] In re Neagle, 135 U. S. 1, 34 L. ed. 55; Ohio v. Thomas, 173 U. S. 276, 285, 43 L. ed. 699, 702; Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846; Anderson v. Elliott, C. C. A., 101 Fed. 609; In re Turner, 119 Fed. 231; West Virginia v. Laing, C. C. A., 133 Fed. 887. See § 461, *infra.*

[7] *Re* James, 18 Fed. 853; U. S. v. Corrie, 23 L. Rep. 145; U. S. v. Burr, 2 Burr's Trial, 455. See *Re* Johnson, 167 U. S. 120, 42 L. ed. 103.

[8] *Re* Johnson, 167 U. S. 120, 124, 42 L. ed. 103, 104.

[9] Beavers v. Haubert, 198 U. S. 77, 49 L. ed. 950; *Re* Beavers, 125 Fed. 988; Peckham v. Henkel, 166 Fed. 627.

[10] *Re* Beavers, 125 Fed. 988.

[11] Beavers v. Haubert, 198 U. S. 77, 85, 49 L. ed. 950, 953.

[12] Hoadley v. Chase, 126 Fed. 818.

same rights that are in issue before that court, the latter may enjoin such criminal proceedings."[13] When an indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter, having first obtained jurisdiction over the subject matter, has the right to hold and maintain such jurisdiction to the exclusion of all other courts, until its duty is fully performed; but it cannot interfere where the proceedings were pending in the State court before the jurisdiction of the Federal court was sought *ex parte*.[14]

§ 59. Effect of the custody of property by the State court, where the Federal courts exercise jurisdiction under the Constitution and laws of the United States. The rule does not apply where the Federal courts exercise superior jurisdiction, for the purpose of enforcing the supremacy of the Constitution and laws of the United States.[1] The institution of a proceeding in bankruptcy gives jurisdiction to the District Court of the United States in certain cases to seize property taken into the custody of a State court, within four months before the filing of the petition.[2] The possession of the property of a corporation by receivers appointed by a State court does not affect the jurisdiction of a District Court of the United States to adjudicate that corporation a bankrupt; nor it has been held deprive the directors of any power which they may possess to make a written admission of its inability to pay its debts and its willingness to be adjudicated a bankrupt, so as to support involuntary proceedings in bankruptcy.[3] After an adjudication of bankruptcy, the appoint-

[13] Ex parte Young, 209 U. S. 123, 162, 52 L. ed. 714, 730.

[14] Ibid.

§ 59. [1] Tefft v. Sternberg, 5 L.R.A. 221, 40 Fed. 2, 6, per Speer, J.; citing Covell v. Hyman, 111 U. S. 176, 28 L. ed. 390.

[2] 30 St. at L., p. 564; In re Macon S. D. & L. Co., 112 Fed. 323, 333; Carling v. Seymour Lumber Co., C. C. A., 113 Fed. 483; In re Tune, 115 Fed. 906; Re English, C. C. A., 127 Fed. 940; In re Moench & Sons' Co., C. C. A., 130 Fed. 685. See §§ 609, 635, *infra*.

[3] In re Moench & Sons' Co., C. C. A., 130 Fed. 685; *Re* Electric Supply Co., 175 Fed. 612. Otherwise when enjoined. *Re* Hudson River El. R. Co., 173 Fed. 934. See *infra* §§ 625, 626.

ment of a receiver[4] or trustee[5] by the bankruptcy court supersedes the authority of a receiver previously appointed by a State court because of insolvency, although the latter is in possession of the property, but comity requires that, except in an extraordinary case, the officer of the bankruptcy court should apply to the State court for an order for the delivery or possession to him before he institutes another proceeding for the same.[6] It has been held that, before adjudication at least, the Federal court should not appoint a receiver when a receiver appointed by a State court is already in possession;[7] and in the county of New York it is the practice of the Supreme Court, in such a case, to instruct its receiver to apply to the Federal court to set aside the appointment there made and to appeal if such application be denied.[8] The filing of a suit in equity in the District Court of the United States by a trustee in bankruptcy, to set aside as fraudulent a conveyance of mortgaged premises by the bankrupt and an interlocutory judgment in his favor therein, was held to be no ground for vacating an order appointing a receiver of the mortgaged premises in a suit of foreclosure subsequently brought in the State court.[9] A District Court of the United States will enjoin a suit in a State court, begun subsequent to an adjudication of bankruptcy, to take possession of property held by the bankrupt or his trustee.[10] The rule as to proceedings in admiralty is not so clear. It has been held: that the appointment of a State receiver, who had not filed the statutory bond, nor taken possession, was no bar to the seizure of a boat by the marshal under process in ad-

[4] *Re* J. W. Zeigler Co., 189 Fed. 259. In that case, the court refused to punish the State receiver for refusal to deliver possession of the property to the receiver in bankruptcy when he acted under the advice of counsel. See In re Watts and Sachs, 190 U. S. 1, 27, 47 L. ed. 933, 941.

[5] *Re* Hecox, C. C. A., 164 Fed. 823.

[6] Re Watts and Sachs, 190 U. S. 1, 27; Re Hecox, C. C. A., 164 Fed. 823.

[7] *Re* Spalding, C. C. A., Second Ct., May 1905, reported in *Re* Oakland Lumber Co., C. C. A., 174 Fed. 634, 637; *Re* Desrochers, 183 Fed. 991; *Re* Standard Cordage Co., 184 Fed. 156. So held when an assignee in insolvency was in possession, *Re* Rosenthal, 144 Fed. 548, 549.

[8] People v. P. V. Rovnianek & Co., N. Y. L. J. Jan'y. 12, 1911.

[9] Mutual Life Ins. Co. v. Fleischman, 149 App. Div. (N. Y.) 23.

[10] White v. Schloerb, 178 U. S. 542, 44 L. ed. 1183.

miralty.[11] That a vessel can be seized by the marshal under a libel in admiralty, to enforce a lien that arose for repairs before the appointment of the receiver, when the seizure is made after such appointment; but before the receiver has taken actual possession or notified the master, or any person on board the vessel, that he has been appointed;[12] but that a tug, attached under process of a State court and delivered by the sheriff to a receiver appointed by said court, cannot be taken from him by a marshal of the United States in proceedings in admiralty upon claims that arose against the tug before his appointment.[13] That, upon a similar claim, a marshal cannot take property from the hands of an assignee under the insolvency law of Minnesota.[14] That a vessel in the possession of receivers, appointed by a Circuit Court of the United States, is not, without the permission of that court, subject to seizure on process in admiralty from the District Court for the same district, in a suit *in rem* to enforce a judgment which arose prior to the receivership.[15] And that a vessel operated by a State receiver can be seized in another State by the District Court of the United States, upon a libel in admiralty to enforce a claim that arose during his management of the vessel.[16]

§ 60. Property in the custody of another Federal court. The different District Courts of the United States, acting upon the principle of judicial comity, usually, when property has been taken into the custody of another District Court, or when proceedings have been instituted therein for such a purpose, refuse to interfere with the same. Thus, where proceedings to cancel a mortgage had been instituted in one district, the Federal Court of another district stayed proceedings upon a bill therein filed for the foreclosure of such mortgage until the determination of the first suit.[1] So, where a receiver has been appointed to take possession of certain property, such as a railroad, which is situated in several districts, it is the usual prac-

11 Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981.

12 The Lotta, 65 Fed. 319.

13 The E. L. Cain, 45 Fed. 367.

14 The J. G. Chapman, 62 Fed. 939.

15 The Jonas H. French, 119 Fed. 462.

16 The Willamette Valley, C. C. A., 66 Fed. 565; s. c., Chandler v. The Willamette Valley, 63 Fed. 130.

§ 60. 1 Hurd v. Moiles, 28 Fed. 897.

tice for the District Courts in the other districts to appoint the same person as ancillary receiver of the property within their territorial jurisdiction;[2] to treat the court in which the proceedings were first instituted as that of primary jurisdiction and of principal decree, and to make the administration of the property in the latter court ancillary thereto.[3] Accordingly, the court of ancillary jurisdiction refused to direct the payment of a judgment against the corporation recovered in a State court within its district where an account of the funds in its receiver's hands was necessary, and referred the petitioner to the court of primary jurisdiction for relief.[4] This rule however, is largely within the discretion of each District Court, and cases have arisen in which each court has administered the assets within its jurisdiction independently of the administration of the court of primary jurisdiction.[5]

Where the trustees of a second mortgage on a railroad had begun a foreclosure suit, making the trustee of the first mortgage a party, and receivers had been appointed and taken possession, it was held that the first mortgagee should not be allowed to bring an independent foreclosure suit, but must seek the relief he wished in the suit instituted by the second mortgagee.[6] Where the evidence, affecting the decision of an application made to one of the courts of ancillary jurisdiction, was within the custody of another court of ancillary jurisdiction; the former denied the motion, without prejudice to an application to the latter.[7] Where a controversy arose out of transactions in the ancillary jurisdiction, it was held: that that court should determine the same.[8] That where a Federal Court in another

[2] Williams v. Hintermeister, 26 Fed. 889; Parsons v. Charter Oak L. I. Co., 31 Fed. 305; *infra*, § 304.

[3] Farmers' L. & T. Co. v. Northern Pac. Ry. Co., 72 Fed. 26, 30, 31; Clyde v. Richmond & D. R. Co., 65 Fed. 336.

[4] Central T. Co. v. East Tenn., Va. & G. R. Co., 30 Fed. 805.

[5] The Wabash Cases: Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Central T. Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618; U. S. T. Co. v. Wabash, St. L. & P. Ry. Co., 42 Fed. 343. See also Mercantile T. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Central T. Co. v. East Tenn., Va. & G. Ry. Co., 69 Fed. 658; N. Y. Security & T. Co. v. Equitable Mtg. Co., 71 Fed. 556; Reynolds v. Stockton, 140 U. S. 254, 272, 35 L. ed. 464; *infra*, § 304.

[6] Mercantile Tr. Co. v. Atlantic & P. R. Co., 70 Fed. 518.

[7] Bowker v. Haight & Freese Co., 140 Fed. 797.

[8] Jones v. Central Trust Co., C. C. A., 73 Fed. 568.

district, in a suit between other parties, had refused an injunction against a railroad merger and consolidation, the motion, for substantially the same relief, should be denied.[9] It was held: that a Circuit Court of the United States could, upon a creditor's bill, appoint a receiver of the assets of a foreign corporation, when a petition in bankruptcy was previously pending in the district of the defendant's domicile, which was subsequently followed by an adjudication;[10] that a District Court of the United States could not, by process in admiralty, without the consent of the Circuit Court of the United States in the same district, take property fro mthe possession of a receiver appointed by the latter to apply to a claim that arose before the appointment of such receiver;[11] that a Federal Court which had, through its receiver, sold vessels subject to maritime liens and liens under the State laws for supplies, had no jurisdiction to determine and enforce the same, but that those matters belonged exclusively to the District Court in admiralty;[12] and that a District Court in admiralty might, in distributing the proceeds of a sale, grant a priority to the claims of a receiver in bankruptcy who is not a party to the admiralty proceedings.[13]

§ 61. Limitations upon jurisdiction by residence. The Judicial Code provides: "§ 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

"§ 52. When a State contains more than one district, every

9 Dady v. Georgia & A. Ry., 112 Fed. 838, 840.

10 Cruchet v. Red Rover Min. Co., 155 Fed. 486.

11 The Jones H. French, 119 Fed. 462.

12 Hudson v. New York & A. Transp. Co., 175 Fed. 519.

13 Hudson Oil & Supply Co. v. Booraem, 216 U. S. 604; S. C.; The Falcon, C. C. A., 177 Fed. 916.

suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marhsal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."[1]

"§ 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section.[2] All prosecutions for crimes or offenses shall he had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the District court of the United States such removal shall be to the United States District court in the

§ 61. [1] 36 St. at L. 1087.

[2] It has been *held* that where defendants reside in different districts of the same State, an injunction may be served there in another district from that in which the court sits. Babbitt v. Burgess, 2 Dillon, 169, Fed. Cas. No. 693.

division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States District Court in such division.

"§ 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

"§ 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.[3]" A suit by a creditor of a railroad company to have its property, situated in different Federal districts of the same State, administered for the benefit of all creditors, is one of a local nature, which may be brought in either of such districts.[4] It has been said that the appointment of a receiver therein is an equitable attachment of all property of the defendant within the State.[5] Section fifty-six provides that where a receiver is appointed over land or other property of a fixed character, which lies within the district for which such court is constituted."[3] A suit issue and be executed in any district of the circuit, in the same manner and to the same extent as if the property were wholly within the same district.[6] The whole section is quoted and discussed in the chapter on "Receivers."[7] The Judicial Code further provides: "§ 48. In suits brought for the infringement of letters patent the District courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular

[3] 36 St. at L. 1087.

[4] Horn v. Pere Marquette R. Co., 151 Fed. Cas. 626, 627.

[5] Ibid.

[6] 36 St. at L. 1087.

[7] *Infra*, § 306.

and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."[8] This section is discussed in the succeeding section. The Copyright Act of March 4, 1909, provides: "That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found.[9] "Every applicant for registration of a trademark or for renewal of registration of a trademark, who is not domiciled within the United States, shall, before the issuance of the certificate of registration, as hereinafter provided for, designate, by a notice in writing, filed in the Patent Office, some person residing within the United States on whom process or notice of proceedings affecting the right of ownership of the trade-mark of which such applicant may claim to be the owner, brought under the provisions of this Act or under other laws of the United States, may be served, with the same force and effect as if served upon the applicant or registrant in person. For the purposes of this Act it shall be deemed sufficient to serve such notice upon such applicant, registrant or representative by leaving a copy of such process or notice addressed to him at the last address of which the Commissioner of Patents has been notified."[10] In proceedings in equity to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands, "it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure."[11]

"§ 57. When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where

[8] 36 St. at L. 1087.

[9] 35 St. at L. 1075, § 35, Pierce Fed. Code (Supp.) § 1589.

[10] Act of February 20, 1905, 33 St. at L. 724, § 3, 10 Fed. St. Ann. 408, Comp. St. Supp. 667, Pierce Fed. Code, § 8809.

[11] Jud. Code, § 24, subd. 21, 36 St. at L. 1087.

such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be, or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." [12]

"§ 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

[12] 36 St. at L. 1087. See § 166, *infra.*

"§ 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district court where the offender is found, or into which he is first brought.

§ 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

§ 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

§ 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

§ 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized was brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

§ 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

§ 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or

conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district." [13]

The Judicial Code further provides: "§ 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located." [14]

In suits by the United States for injunctions, under the "Act to protect trade and commerce against unlawful restraints and monopolies," whenever it appears to the court before which the proceeding is pending that the ends of justice require that other parties shall be brought in, they may be summoned whether they reside in the district or not.[15]

Prosecutions for the offense of unlawful discrimination in the transportation of property in interstate or foreign commerce or for acts therewith connected are prosecuted in the district in which the violation of the law was committed or in any district through which the transportation was conducted.[16] The statute regulating the liability of employers to their employees for injuries in their service, as amended April 5, 1910, provided: "Under this act an action may be brought in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." [17] The Judicial Code provides:

[13] Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found; a collector cannot, by carrying them into another district and there making the formal seizure confer jurisdiction of the proceeding on the court in such district. U. S. v. Larkin, C. C. A., 153 Fed. 113. See U. S. v. Whitcomb M. R. Co., 45 Fed. 89.

[14] 36 St. at L. 1087.

[15] Act of July 2, 1890, 26 St. at L. 209, § 5; U. S. v. Standard Oil Co. of New Jersey, 152 Fed. 290.

[16] Act of June 29, 1906, 34 St. at L. 584, 588.

[17] 36 St. at L. 291.

"That no case arising under an act entitled 'An Act relating to the liability of common carriers by raidroad to their employees in certain cases,' approved April twenty second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States."[18] Whether the District Courts can take original jurisdiction of suits under that statute in any other district from that in which the defendant is an inhabitant, is a question that is undecided.[19]

Prior to the Judicial Code, it was held that the sections of the Revised Statutes limiting the jurisdiction, because of the residence of the parties, did not affect the jurisdiction in admiralty.[20] Courts of admiralty have jurisdiction in proceedings in *rem* wherever the property is seized and in proceedings in *personam* wherever the person is served with process.[21] The sections of the Judicial Code previously quoted preserve this general jurisdiction of courts of admiralty over certain proceedings in *rem*.[22] Whether such jurisdiction remains otherwise the same as before the enactment of this Code, has not been decided.

Courts of bankruptcy are not affected by these sections. Such may "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent juris-

18 § 28, 36 St. at L. 1087.

19 Under the former practice, they could not. Cound v. Atchison, T. & S. F. Ry. Co., 173 Fed. 527; Smith v. Detroit & T. S. L. R. Co., 175 Fed. 506; Whittaker v. Illinois Cent. R. Co., 176 Fed. 130; Newell v. Baltimore & O. R. Co., 181 Fed. 698.

20 *Re* Louisville Underwriters, 134 U. S. 488, 33 L. ed. 991.

21 Ibid. It has been held: that the exception of suits "of a local character" directs, by implication, that such a suit must be brought in the division where the thing or property proceeded against happens to be situated; that a libel in admiralty is a suit of a local nature, and consequently must be prosecuted in the division where the vessel is seized, although her home port is in another division. The Williamette, 53 Fed. 602.

22 Jud. Code, §§ 45, 46, 47, 36 St. at L. 1087.

diction without the United States and have property within their jurisdictions,"[23] and "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."[24] The extent to which jurisdiction in suits by aliens is affected by the residence of the parties, is discussed in a previous section.[25]

It has been held: that a suit by the United States, unless the statute authorizing the same otherwise provides, can be brought only in the district of which the defendant is an inhabitant;[27] and that even when an individual is surety upon a bail bond filed in a Federal court in another State, his liability cannot be established, except by proceedings in his own State and district.[28] The Act of August 13, 1894, which directs the filing of bonds by contractors upon public works of the United States, for the security of laborers and material men, provides that the suit upon such bond be brought "in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit and not elsewhere."[29] Before the Judicial Code, it was held that this authorized the Federal court in such district to obtain jurisdiction of the persons of non-resident defendants through the service upon them of its process in whatever district they might be found.[30] The effect of the enactment of the Judicial Code upon the jurisdiction thereby granted

[23] 30 St. at L. 544, § 2. See *infra*, Chapter on "Bankruptcy."

[24] Ibid., as amended 36 St. at L. 838. See *infra*, § 612.

[25] *Supra*, § 45.

[26] Lederer v. Rankin, 90 Fed. 449; Lederer v. Ferris, 149 Fed 250. *Contra*, Fraser v. Barrie, 105 Fed. 787.

[27] U. S. v. No. Pac. R. Co., C. C. A., 134 Fed. 715; Kirk v. U. S., C. C. A., 137 Fed. 753; affirmed 199 U. S. 607.

[28] Kirk v. U. S., C. C. A., 137 Fed. 753; affirmed 199 U. S. 607, 50 L. ed. 331.

[29] 28 St. at L. 278, amended 33 St. at L. 811. It was held that this applied only to suits by claimants for labor or material supplied to the contractor and not to one brought by the Government for its own benefit. U. S. v. McGee, 171 Fed. 209.

[30] U. S. v. Congress Construction Co., 222 U. S. 199. See, also, U. S. v. Schofield Co., 182 Fed. 240.

has not yet been decided. A former statute further provided: "That any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond, or undertaing was made or guaranteed, or in the district in which the principal office of such company is located. And for the purposes of this Act such recognizance, stiuplation, bond, or undertaking shall be treated as made or guaranteed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond, or undertaking resided when it was made or guaranteed."[31] How far this now applies is also an open question.

In a suit within the exclusive jurisdiction of the courts of the United States, the action must be brought in the district of the defendants' residence.[32] Where the jurisdiction depends upon the existence of a Federal question and is concurrent with that of the State courts, the defendant must, unless a statute otherwise prescribes, be sued in the district which he inhabits;[33] but where it depends upon citizenship in different States, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served.[34] Since the permission to sue in the district of either

[31] 28 St. at L. 279.

[32] Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, 54 L. ed. 300; affirming Atlantic Coast Line R. Co. v. Macon Grocery Co., C. C. A., 166 Fed. 206; Sunderland Bros. v. Chicago, R. I. & P. Ry. Co., 158 Fed. 877; Memphis Oil Co. v. Illinois Cent. R. Co., 164 Fed. 290; Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co., 171 Fed. 589. *Contra*, Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n., C. C. A., 9th Ct., 165 Fed. 1, 9, and cases cited.

[33] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 43, 33 L. ed. 834; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 385, 386; In re Keasbey & Mattison Co., 160 U. S. 221; Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 54 L. ed. 300.

[34] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833; Pitkin Min. Co. v. Markell, 33 Fed. 386; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 385, 386; Fales v. Chicago, M. & St. P. Ry. Co., 32 Fed. 673; Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Gavin v. Vance, 33 Fed. 84; W. U. Tel. Co. v. Brown, 32 Fed. 337; Macon Grocery Co. v. Atlantic

the plaintiff or the defendant is limited to cases "where the jurisdiction is founded only on the fact that the action is between citizens of different States," where the plaintiff's pleading shows both such a difference of citizenship and that the controversy arises under the Constitution or laws of the United States; the suit must be brought in the district of the defendant's habitation,[35] unless the case falls within one of the express statutory exceptions. It has been held that where a count under a Federal statute, which authories a suit in a district different from that of the residence of either party, is joined with one arising under the common law alone; the suit cannot be maintained in a district in which neither party resides.[36]

Where the jurisdiction depends upon citizenship in different States, the suit may be brought in the district in which either the plaintiff or the defendant resides, provided the defendant can be duly served.[37] When one of the plaintiffs is a resident

Coast Line R. Co., 215 U. S. 501, 54 L. ed. 300; affirming C. C. A., 166 Fed. 206. It was held that a suit in the Circuit Court to enjoin, pending the determination of its reasonableness by the Interstate Commerce Commission, the enforcement of a railroad rate charged to be unlawful as in violation of the interstate commerce law and anti-trust law, arose under the laws of the United States and could only be maintained against a defendant in a State of which it was an inhabitant, Southern Pac. Co. v. Arlington Heights Fruit Co., C. C. A., 191 Fed. 101; and before the enactment of the Judicial Code, that a suit by a shipper against a carrier to compel the receipt and transportation of merchandise between two States did not arise under a law of the United States, and where the requisite difference of citizenship existed might be brought in the district of the residence of either plaintiff or defendant, Danciger v. Wells, Fargo & Co., 154 Fed. 379.

[35] Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co., Powhatan C. & Coke Co. v. Norfolk & Western Ry. Co., 171 Fed. 589; Cound v. Atchison, T. & S. F. Ry. Co., 173 Fed. 527; Smith v. Detroit & T. S. L. R. Co., 175 Fed. 506; Whittaker v. Illinois Cent. R. Co., 176 Fed. 130; Newell v. Baltimore & O. R. Co., 181 Fed. 698.

[36] Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117. See Sunderland Bros. v. Chicago, R. I. & P. Ry. Co., 158 Fed. 877; Atlantic Coast Line R. Co. v. Macon Grocery Co., C. C. A., 166 Fed. 206; Imperial Colliery Co. v. Chesapeake & Ohio Ry. Co., 171 Fed. 589.

[37] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833; Pitkin Min. Co. v. Markell, 33 Fed. 386; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 385, 386; Fales v. Chicago, M. & St. P. Ry. Co., 32 Fed. 673; Short v. Chicago, M. & St. P. Ry. Co., 33 Fed. 114; Gavin v. Vance, 33 Fed.

of the district, and the other plaintiff and the defendant are citizens of different States from those of each other and of the plaintiff, and are both non-residents, the Federal court has no jurisdiction.[38] Where plaintiffs are citizens and residents of different States, and the defendant is a citizen and resident of a third State, the suit may be brought in the district of the defendant's residence.[39] Where the defendants are residents of different States, it has been held that the suit cannot be brought in any district except that of the plaintiff's residence.[40] The defendant cannot remove a case to a district where neither party resides,[41] and if he so attempts, the plaintiff may have the case remanded.[42] It has been held that the assignee of a cause of action, when the jurisdiction is founded upon diversity of citizenship, can sue in the district of which he is a resident or in that of the defendant, irrespective of the district in which the assignor resided.[43] It has been said that "the words 'inhabitant,' 'residence,' and 'resident,' as used in the statute, are synonymous. To hold otherwise is to add confusion."[44] "The word inhabitant in that act was apparently used not in any

84; W. U. Tel. Co. v. Brown, 32 Fed. 337.

[38] Smith v. Lyon, 133 U. S. 315, 33 L. ed. 635, Moffat v. Soley, Fed. Cas. No. 9,688, 2 Paine, 103; Elkhart Nat. Bank v. N. W. G. L. Co., 84 Fed. 76; Hubbard v. Northern Railroad Co., Fed. Cas. No. 6,818, 3 Blatchf. 84, 25 Vt. 715.

[39] Sweeney v. Carter Oil Co., 199 U. S. 252, 50 L. ed. 178.

[40] Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 321, 20 C. C. A. 428, 42 U. S. App. 55. See also Smith v. Lyon, 133 U. S. 315, 33 L. ed. 65; McAulay v. Moody, 185 Fed. 144. *Contra*, Craig v. Cummings, Fed. Cas. No. 3,331, Peters C. C. 431, 2 Washington C. C., 505; Wiggins v European & N. Ry. Co., Fed. Cas. No. 17,626, 1 Hask. 122; Mowrey v. Indianapolis & C. R. Co., Fed. Cas. No. 9,891, 4 Bissell, 78; Rawitzer v. Wyatt, 40 Fed. 609. In Bensinger Self-Adding Cash Register Co. v. National Cash Register Co., 42 Fed. 81, the action was dismissed as to the non-resident, but retained as to the resident, defendant.

[41] *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264; Yellow Aster Min. & Mill. Co. v. Crane Co., C. C. A., 150 Fed. 580; Goldberg, Bowen & Co. v. German Ins. Co., 152 Fed. 831; H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224.

[42] *Ex parte* Wisner, 203 U. S. 449, 51 L. ed. 264; H. J. Decker, Jr., & Co. v. Southern Ry. Co., 189 Fed. 224, 51 L. ed. 264.

[43] Stimson v. United Wrapping Mach. Co., 156 Fed. 298. *Contra*, Waterman v. Chesapeake & O. Ry. Co., 199 Fed. 667.

[44] Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728, 733, Smith McPherson, J.

larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State."[45] The word "inhabitant" seems however, to be more limited than resident.[46] Inhabitancy within the State, which is divided into two districts, is not inhabitancy in both of them.[47]

A corporation chartered by one of the United States cannot have a residence in another State,[48] even where it has, as a condition of doing business therein, filed a stipulation authorizing service of process upon its agents within the State and agreeing not to remove a suit to the Federal court on the ground of difference of citizenship or non-residence.[49] In the absence of any provision in the charter, the principal office and the domicile of a railroad company incorporated by Congress is where the meetings of its stockholders and directors are held, and the records thereof with the registry of its stock are kept, and not where the general administrative offices of the heads of its departments are located.[50] Where a State contains more than one Federal judicial district, a corporation of the State is presumed to be a resident and inhabitant of the district in which it has its principal office, as designated in its certificate or articles of incorporation in accordance with the statutory

45 Gray, J., in Shaw v. Quincy Min. Co., 145 U. S. 444, 447, 36 L. ed. 768, 770.

46 For cases of residence, see King v. U. S., 59 Fed. 9; Rivers v. Bradley, 53 Fed. 305; Reckling v. McKinstry, 185 Fed. 842.

47 Wange v. Public Service Ry. Co., 159 Fed. 189.

48 Shaw v. Quincy Min. Co., 145 U. S. 444, 453, 36 L. ed. 768, 772; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248; Southern Pac. Co. v. Arlington Heights Fruit Co., C. C. A., 191 Fed. 101; Stone v. Chicago, B. & Q. R. Co., 195 Fed. 832. *Contra*, Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728.

49 Southern Pac. Co. v. Denton, 146 U. S. 202, 207, 36 L. ed. 943, 945.

50 Interstate Com. Com. v. Texas & Pac. Ry. Co., 57 Fed. 948, 955; Texas & Pac. Ry. Co. v. Interstate Com. Com., 162 U. S. 197, 204, 40 L. ed. 940, 942. It has been held that the Texas & Pacific Ry. Co. was an inhabitant of Dallas County, Texas, where it maintained an office, which it designated as its general office, and where all the acts of the board of directors in New York were subsequently affirmed at a board meeting, the senior vice-president living in the same county. Matter of Dunn, 212 U. S. 374, 388, 53 L. ed. 558, 564.

requirements.[51] Where a State is divided into several Federal districts, it seems that the district of the residence of a domestic corporation is fixed by the State statute.[52] It is usually either the location of its principal place of business or the personal residence of the party whom it has appointed as its attorney-of-fact, upon whom service of process may be made.[53] Where a domestic corporation failed to comply with the statute of West Virginia,[54] by filing a power of attorney appointing a private individual with authority to accept service of process and with other statutory powers, but had complied with another statute appointing the State auditor its attorney to accept such service; it was held to be liable to suit in either of the Federal districts of the State, by attachment and publication, or by serving process upon the State official in that or the other district.[55]

The limitation as to residence does not apply to defendants who are served, in pursuance of the statute, by publication or without the State or district,[56] even when they are the only defendants.[57] It has been held that the limitation of the jurisdiction to the place of the residence of the parties does not apply to local actions, such as ejectment,[58] or for trespass upon land;[59] that such actions can only be brought in the district

[51] Firestone Tire & Rubber Co. v. Vehicle Equipment Co., 155 Fed. 676.

[52] Lemon v. Imperial Window Glass Co., 199 Fed. 927.

[53] Ibid.

[54] Code W. Va., § 2313.

[55] Lemon v. Imperial Window Glass Co., 199 Fed. 927.

[56] Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201; Carpenter v. Talbot, 33 Fed. 537; Pollitz v. Farmers' L. & Tr. Co., 39 Fed. 707; Ames v. Holderbaum, 42 Fed. 341; U. S. v. Southern Pac. R. Co., 63 Fed. 481; Wheelright v. St. Louis, N. O. & O. Canal Co., 50 Fed. 709; Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208; Howard v. National Telephone Co., 182 Fed. 215, *infra*, § 166. See Kuhn v. Morrison, 75 Fed. 81; but see Detweiler v. Holderbaum (C. C.), 42 Fed. 337.

[57] Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201; Wheelright v. St. Louis, N. O. & O. Canal Co., 50 Fed. 709; U. S. v. Southern Pac. R. Co., 63 Fed. 481; Single v. Scott Paper Mfg. Co., 55 Fed. 553.

[58] Spencer v. Kansas City Stock Yards Co., 56 Fed. 741; Elk Garden Co. v. T. W. Thayer Co., 179 Fed. 556.

[59] Kentucky Coal Lands Co. v. Mineral Development Co., 191 Fed. 899. See Livingston v. Jefferson, 1 Brock 203, 4 Hughes 606, 4 Hall, L. J. 78, 11 Myers' Fed. Dec. 721,

where the land is situated; and that they may there be brought, irrespective of the residence of the parties and without the procurement of an order for the service of process outside the district; provided that the necessary difference of citizenship exists and that the defendant can be found there.[60] The fact that a suit relates to land lying within the jurisdiction does not give jurisdiction to the Federal court when there is no difference of citizenship, nor Federal question involved.[61] Where a suit was brought in a Federal court to recover land in another district, together with the rent of the same; it was held that there was jurisdiction to award judgment for the value of the rents.[62] When there is no Federal question involved, an action begun in the State court between two non-residents by an attachment cannot be removed, although the necessary difference of citizenship exists.[63]

It has been held at circuit that the non-resident defendant alone can object, because the suit is not brought in the proper district.[64] The objection is waived by the joinder of issue,[65] or, it seems, by a general appearance,[66] without raising the

Fed. Case No. 8411; Northern Indiana Ry. Co. v. Michigan Central Ry. Co., 15 How. 233, 14 L. ed. 674; Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913.

60 Spencer v. Kansas City Stock Yards Co., 56 Fed. 741; Kentucky Coal Lands Co. v. Mineral Development Co., 191 Fed. 899.

61 Pooley v. Luco, 72 Fed. 561.

62 Healey v. Humphrey, C. C. A., 81 Fed. 990.

63 George v. Tennessee Coal, Iron & R. Co., 184 Fed. 951.

64 Jewett v. Bradford Sav. Bank & Tr. Co., 45 Fed. 801; Smith v. Atchison, T. & S. F. R. Co., 64 Fed. 1; Freeman v. Am. Surety Co., 116 Fed. 548; Schiffer v. Anderson, C. C. A., 146 Fed. 457; H. J. Decker, Jr. & Co. v. Southern Ry. Co., 189 Fed. 224.

65 Western Loan & Savings Co. v. Butte & Boston Consol. Min. Co., 210 U. S. 368, 52 L. ed. 1101; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1. Where the plaintiff's pleading in an action brought in the Federal court did not refer to the Employers' Liability Act, but the court submitted the case to the jury upon the theory that it was based upon the same; it was held that the failure of the defendant to specify the objection that it could not be sued under such statute in that district was a submission to the jurisdiction. Erie R. Co. v. Kennedy, C. C. A., 191 Fed. 332.

66 St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 603, 36 L. ed. 829, 832; Interior Const. & I. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401; Cen-

same; even when neither of the parties resides within the district and the case was removed from a State court.[67] It has been said that the service of a notice for the taking of depositions, which is entitled in the Federal court, is not such a waiver.[68]

§ 62. Limitation upon jurisdiction in patent cases. The Judicial Code povides: "§ 48. In suits brought for the infringement of letters patent the District courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."[1]

In a suit to enjoin the infringement of a patent, the defendant, when not an alien,[2] may be sued in any district where his

tral Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Fosha v. W. U. Tel. Co., 114 Fed. 701; Occidental Consol. Min. Co. v. Comstock Tunnel Co., 120 Fed. 518; U. S. Consol. Seeded Raisin Co. v. Phœnix Raisin, S. & P. Co., 124 Fed. 234; Philadelphia & Boston Face Brick Co. v. Warford, 123 Fed. 843; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543; Dulles v. H. D. Crippen Mfg. Co. et al., 156 Fed. 706; Bogue v. Chicago, B. & Q. R. Co., 193 Fed. 728. But see Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co., 119 Fed. 942.

[67] Matter of Moore, 209 U. S. 490, 52 L. ed. 904; where it was held that the filing by the plaintiff of an amended answer and his stipulation for a continuance after the removal was an acceptance of the jurisdiction of the Circuit Court. In Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 53 L. ed. 984; it was held that such a waiver was made by a joinder of issue on the merits without such an objection. To a similar effect are the rulings in Western Loan & Sav. Co. v. Butte & Boston Consol. Min. Co., 210 U. S. 368, 52 L. ed. 1101; Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed. 938; Louisville & N. R. Co. v. Fisher, C. C. A., 11 L.R.A. (N.S.) 926, 155 Fed. 68; Proctor Coal Co. v. United States Fidelity & Guaranty Co., 158 Fed. 211.

[68] Hubbard v. Chicago, M. & St. P. Ry. Co., 176 Fed. 994.

§ 62. [1] 36 St. at L. 1087.

[2] United Shoe Machinery Co. v.

infringement occurred, if he has a regularly established place of business there, or else in the district of which he is an inhabitant,[3] but not elsewhere.[4] When the suit is brought in the district of which the defendant is not an inhabitant, he must have a regular and established place of business there, at the time when the suit is brought.[5] Whether that was the case at the time of the commission of the acts of infringement there, is immaterial.[6] It has been held: that a corporation cannot be sued in a district where it has no regular and established place of business, although it has one in another district in the same State, where it is incorporated in the same State and it is charged with an infringement made jointly with other defendants residing in the district where the suit is brought and a claim of damages for conspiracy is joined with the prayer for an injunction and accounting;[7] that where the non-residence of defendant appears in the bill, there must be averments of infringement in the district;[8] but that the phrase, "maintains a regular and established place of business," need not be used where that fact appears from the allegations, and a bill against a corporation and its president and general manager, who is so described, is not insufficient when it avers joint acts of infringement within the district and the maintenance of a regular and established place of business by the corporation there, although it is silent as to the individual defendant's habitation and place of business.[9] The complainant has the burden of proof to establish an infringement within the district and the maintenance by the defendant of a regular established place of busi-

Duplessis Independent Shoe Machinery Co., 133 Fed. 930.

[3] Bowers v. Atlantic G. & P. Co., 104 Fed. 887; Chicago Pneumatic Tool Co. v. Phila. Pneumatic Tool Co., 118 Fed. 852; U. S. Consol. Seeded Raisin Co. v. Phœnix Raisin, S. & P. Co., 124 Fed. 234. But see Noonan v. Chester Park Athletic Club Co., 75 Fed. 334.

[4] Feder v. A. B. Fiedler & Sons, 116 Fed. 378; Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476.

[5] Feder v. A. B. Fiedler & Sons, 116 Fed. 378; Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476.

[6] Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476.

[7] Cheatham El. Switching Device Co. v. Transit Development Co., 191 Fed. 727.

[8] International Wireless Telegraph Co. v. Fessenden, 131 Fed. 491; National El. Signaling Co. v. Telefunken Wireless Telegraph Co., 194 Fed. 893.

[9] Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543.

ness there.[10] It has been held: That it is necessary to prove and allege a complete act of infringement within the district and not merely a threat or an evident purpose of an infringement there.[11] That where the defendant sells the infringing articles at a fixed place within the district and also there assembles different parts of the same, the court there held has jurisdiction.[12] That the contributory act within the jurisdiction must be proved to have resulted in a complete infringement.[13] That proof that salesmen of the defendant exhibited infringing articles within the district and that one of them said that his employer had sold many there, is insufficient to establish the jurisdiction.[14] Proof that the defendant, who has constructed an infringing machine in another State, has assisted in the installation of the same for use by another defendant within the district; is sufficient to support the jurisdiction when it has an established place of business there.[15] Where the defendant denies an allegation of infringement within the district, the issue thereupon is limited to infringement within such district.[16] The provision that service of process may be made upon the agent engaged in conducting the business within the district, is permissive only, and service may be made upon an officer of a corporation who is there found.[17] Under the former statute,

10 Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 541. For another case of defective proof, see Consolidated Rubber Tire Co. v. B. F. Goodrich Co., 195 Fed. 764. It has been held that proof that the label, "New York," were upon infringing articles sold in another State by a corporation with a regular and established place of business in New York, is insufficient to prove that they were manufactured in New York, Rumford Chemical Works v. Egg Baking Powder Co., 145 Fed. 953; and that proof that salesmen of the defendant exhibited infringing articles within the district, together with statements by the salesman that his employer had sold many there, is insufficient to establish the jurisdiction, Gray v. Grinberg, 147 Fed. 732. See also the note to Bailey v. Mosher, 11 C. C. A., 304, 313.

11 Westinghouse El. Co. v. Stanley El. Co., 116 Fed. 641; Gray v. Grinberg, 147 Fed. 732.

12 Am. Stoker Co. v. Underfeed Stoker Co., 182 Fed. 642.

13 Consolidated Rubber Tire Co. v. Republic Rubber Co., 195 Fed. 768.

14 Gray v. Grinberg, 147 Fed. 732. See also the note to Bailey v. Mosher, 11 C. C. A. 304, 313.

15 Edison v. Allis-Chalmers Co., 191 Fed. 837.

16 Gray v. Grinberg, C. C. A., 159 Fed. 138.

17 National El. Signaling Co. v. Telefunken Wireless Telegraph Co., 194 Fed. 893.

it was held that a suit to compel the issue of a patent might be brought in any district where valid service could be made upon the defendant.[18] The pendency of a suit in the district where the defendant is incorporated is no defense to another suit against the same in another district; but, in such a case, the accounting in the latter suit will be limited to infringements within the district.

§ 63. Suits by assignees. "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."[1]

[18] Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co., 181 Fed. 974.

§ 63. [1] Judicial Code, § 24, subd. 1, 36 St. at L. 1087. The former statute extended this limitation upon the jurisdiction to suits "to recover the contents of any promissory note or other chose in action in favor of an assignee," &c. It may be that the omission of the phrase will induce the courts to disregard some of the earlier decisions. It seems, however, that it will be useful for the practitioner here to collect them. "The terms used, 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions." Shoecraft v. Bloxham, 124 U. S. 730, 735, 31 L. ed. 574, 576; affirmed in Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76, 38 L. ed. 358, 360. The phrase "suit to recover the contents of a chose in action" includes suits to recover debts, Utah-Nevada Co. v. De Lamar, 113 Fed. 113, 66 C. C. A. 179; or any claims for damages for breach of contract, an oral contract as well as one in writing, or for torts connected with contract, Bushnell v. Kennedy, 9 Wall. 387, 390, 19 L. ed. 736; Sere v. Pitot, 6 Cranch, 332, 335, 336, 3 L. ed. 240, 241; Sheldon v. Gill, 8 How. 441, 449, 450, 12 L. ed. 1147, 1151; Tredway v. Sanger, 107 U. S. 323, 325, 27 L. ed. 582, 583; Mersman v. Werges, 112 U. S. 139, 143, 28 L. ed. 641, 643; Corbin v. County of Black Hawk, 105 U. S. 659, 665, 666, 26 L. ed. 1136, 1138, 1139. But *not* the right of a corporation to set aside a contract made by its promoters which it had assumed, Commonwealth S. S. Co. v. Am. Shipbuilding Co., 197 Fed. 780; nor a suit by the assignee of a note to recover damages against a public officer for the illegal execution of the same, Indiana v. Glover, 155 U.

The words "if such instrument be payable to bearer and be not made by any corporation" do not limit the comprehensive-

S. 513, 39 L. ed. 243. The phrase also includes suits to foreclose mortgages, Kolze v. Hoadley, 200 U. S. 76, 50 L. ed. 377; Hoadley v. Day, 128 Fed. 302; Ban v. Columbia Southern Ry. Co., 109 Fed. 499 (a lien): although the bill also prays a cancellation of a fraudulent satisfaction thereof, Kolze v. Hoadley, 200 U. S. 76, 50 L. ed. 377. It includes suits to enforce the specific performance of contracts for the delivery of real or personal property, Corbin v. County of Black Hawk, 105 U. S. 659, 665, 26 L. ed. 1136, 1138; Shoecraft v. Bloxham, 124 U. S. 730, 31 L. ed. 574; Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76, 38 L. ed. 358, 360; Jackson & S. Co. v. Pearson, 60 Fed. 113. A suit to quiet title and to cancel tax deeds, where complainant sues as assignee of a mortgage and of a certificate of purchase, in foreclosure proceedings, without having acquired the legal title, Farr v. Hobe-Peters Land Co., C. C. A., 188 Fed. 10, reversing 170 Fed. 644; and to recover upon a contract of insurance with a reformation of the policy, Laird v. Indemnity Mut. M. Co., 44 Fed. 712. To enforce a partner's or agent's right to an accounting, Brown v. Beacom, C. C. A., 174 Fed. 812. The phrase does *not* include Dodge, 16 How. 622, 631, 14 L. ed. 1085, 1088; Buckingham v. Dake, 112 Fed. 258, 50 C. C. A. 492. Or ejectment, Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; Willitt v. Baker, 133 Fed. 937. Or otherwise brought to recover property taken by the defendant before the assignment of the title to the plaintiff, Gest v. Packwood, 39 Fed. 525. Even it has been held where the assignor was a partnership which conveyed its property to a corporation, all the stock of which was divided between the members of the firm. Slaughter v. Mallet Land & Cattle Co., C. C. A., 141 Fed. 282. But see § 46, *supra*. Nor a suit to recover damages for the conversion of personal property, Ambler v. Eppinger, 137 U. S. 480, 34 L. ed. 765. Nor a claim against a railroad company to recover excessive overcharges for freight, Conn v. Chicago, B. & Q. R. Co., 48 Fed. 177. Nor a suit in equity to compel the transfer of stock on the books of a corporation, Jewett v. Bradford S. B. Tr. Co., 45 Fed. 801. Nor, it has been held, a suit by the assignee of a corporate debt to enforce the individual liability of a stockholder, Ballard v. Bell, 1 Mason, 243. But the court refused to entertain a bill for the appointment of the receiver of a corporation filed by a pledgee of its stock whose pledgor was a citizen of the corporation's State, Gorman-Wright Co. v. Wright, 134 Fed. 363, 67 C. C. A. 345. But see Cole v. Phila. & E. Ry. Co., 140 Fed. 944. It has been suggested that the restriction applies only to contracts "which may be properly said to have contents," not to "mere naked rights of action founded on some wrongful act,"—some neglect of duty to which the law attaches damages, such as failure to protest a note; but to "rights of action founded on contracts which contain within themselves some promise or duty to be performed," Barney v. Globe Bank,

ness of the phrase "chose in action."[2] The effect of this clause is to deprive the Circuit Courts of all jurisdiction for the recovery of promissory notes or other choses in action, except (1) suits upon foreign bills of exchange; (2) suits which might have been brought there had no assignment or transfer been made; and (3) suits upon choses in action made by corporations and payable to bearer.[3] A draft drawn in one State and payable in another of the United States is a foreign bill of exchange.[4]

A check is a bill of exchange.[5] A promissory note payable "to the order of ——" is equivalent to a promissory note payable to bearer.[6] A bill of exchange of promissory note drawn to the order of the bearer and by him indorsed in blank is payable to bearer.[7] A bill of exchange or promissory note drawn payable to the order of a specified person and indorsed by him in blank is not a promissory note payable to bearer within the statutory exception.[8] A county warrant payable to a specified person or bearer is equivalent to one payable to bearer.[9] A city,[10] county,[11] incorporated town,[12] or township,[13] is held

5 Blatch. 107. See, however, Bushnell v. Kennedy, 9 Wall. 387, 391, 19 L. ed. 736, 738; Ambler v. Eppinger, 137 U. S. 480, 483, 34 L. ed. 765, 766.

2 Mexican Nat. R. Co. v. Davison, 157 U. S. 201, 206, 207, 39 L. ed. 672, 674, 675.

3 Newgass v. New Orleans, 33 Fed. 196; New Orleans v. Quinlan, 173 U. S. 191, 43 L. ed. 664.

4 Buckner v. Finley, 2 Pet. 586, 7 L. ed. 528.

5 Bull v. Bank of Kasson, 123 U. S. 105, 31 L. ed. 97.

6 Steel v. Rathburn, 42 Fed. 390; Lyon County v. Keene Five Cent Sav. Bank, 100 Fed. 337, 40 C. C. A. 391; affirming 97 Fed. 159; Reynolds v. Lyon County, Iowa, 97 Fed. 155.

7 Bank of British N. A. v. Barling, 46 Fed. 357; s. c. in C. C. A., 56 Fed. 260; Jones v. Shapero, 57 Fed. 457; Thomson v. Town of Elton, 100 Fed. 145.

8 Thomson v. Town of Elton, 100 Fed. 145.

9 Gratiot County v. Aylesworth, 159 U. S. 250, 40 L. ed. 146; Thompson v. Searcy County, C. C. A., 57 Fed. 1030; Jerome v. Rio Grande County Comm'rs, 18 Fed. 873.

10 New Orleans v. Quinlan, 173 U. S. 191, 43 L. ed. 664; affirming 92 Fed. 695.

11 Leake County Comm'rs v. Dudley, 173 U. S. 243, 43 L. ed. 684; Gratiot County v. Aylesworth, 159 U. S. 250, 40 L. ed. 146; Jerome v. Rio Grante County Comm'rs, 18 Fed. 873; Rollins v. Chaffee County, 34 Fed. 91; Wilson v. Knox County, 43 Fed. 481; Thompson v. Searcy County, C. C. A., 57 Fed. 1030; Board of Comm'rs of Kearny County v. Irvine, C. C. A., 126 Fed. 689.

to be a corporation, and the holder of its bonds, warrants, drain orders or other written obligations payable to bearer can sue in a Federal court in a proper case irrespective of the citizenship of any previous holder. The assignee of a city warrant payable to the order of a specified person and indorsed by have had no jurisdiction of a suit by his assignor,[14] but if his assignor might have sued there the assignee may do so, provided that the requisite diversity of citizenship exists.[15] Jurisdiction over a suit upon coupons, executed by a municipal corporation payable to bearer, depends upon the status of the owner of the same,[16] although they are cut from bonds payable to persons who are citizens of defendant's State.[17] The acceptance by a city of an order by a contractor directing the payment to a third person of part of the contract price was held to constitute a new contract between the city and the payee, and not to be the assignment of the original contract.[18] When his citizenship differs from that of defendant, the original beneficial owner can sue in the Federal courts upon a note, although an original but nominal payee, by reason of citizenship, could not.[19] The holder of a promissory note payable to bearer, which is secured by a mortgage, may foreclose in a Federal court in a case where the original holder could not.[20] Not, however, where the note is void and the mortgage valid.[21] The fact that a note payable to bearer and secured by a mortgage is overdue when it is as-

[12] A New York town, Andes v. Ely, 158 U. S. 312, 39 L. ed. 996.

[13] An Ohio township, Loeb v. Trustees of Columbia Tp., 91 Fed. 37.

[14] Cloud v. City of Sumas, 52 Fed. 177; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, Seymour v. Farmers' L. & Tr. Co., C. C. A., 128 Fed. 907.

[15] Emsheimer v. New Orleans, 186 U. S. 33, 46 L. ed. 1042.

[16] Reynolds v. Lyon County, 97 Fed. 155; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364.

[17] Reynolds v. Lyon County, Iowa, 97 Fed. 155.

[18] City of Superior v. Ripley, 138 U. S. 93, 34 L. ed. 914.

[19] Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. ed. 118; Superior City v. Ripley, 138 U. S. 93, 34 L. ed. 914; Hoadley v. Day, 128 Fed. 302; Kirven v. Virginia-Carolina Chemical Co., C. C. A., 145 Fed. 288.

[20] Tredway v. Sanger, 107 U. S. 323, 27 L. ed. 582; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843; Hoadley v. Day, 128 Fed. 302.

[21] Mersman v. Werges, 112 U. S. 139, 28 L. ed. 641.

signed does not deprive the assignee of his right to seek the Federal jurisdiction.[22]

A mortgage given by a water company covering rentals accruing to it under a contract with a city is no more than an assignment of a chose in action as to such rentals, and, in such a case, one claiming the right to enforce the contract by subrogation to the rights of the mortgagee is considered to be an assignee.[23] But where a municipal ordinance directed that the rents be paid directly to the mortgagee, it was held that the previous grant of the franchise to citizens of defendant's State did not affect the jurisdiction.[24] It has been held: that a sale under a decree of foreclosure of waterworks, together with the rights of all the parties in the franchise and contract under which they were constructed, does not operate merely as an assignment of the contract; that such a provision does not affect the right of the purchaser to maintain a suit in a Federal court to enforce rights under such contract; and that in such a case the conveyance vests the purchaser with rights in real property, to the full enjoyment of which the enforcement of the contract is a necessary incident.[25] A purchaser of warrants at a judicial sale under authority of an order of the probate court is an assignee, within the meaning of the statute.[26] The Illinois statute giving a plaintiff in attachment the right to bring an action on a forth-coming bond taken by the sheriff, "the same as if such bond had been assigned to him," does not render him, in fact or constructively, an assignee, within the meaning of the act.[27] The prohibition does not extend to a suit by a stockholder to procure the appointment of a receiver of his corporation, because of insolvency.[28] A suit to collect a judgment by a creditors' bill or otherwise, cannot be brought

22 Cross v. Allen, 141 U. S. 528, 35 L. ed. 843.

23 American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed. 171; City of Eau Claire v. Payson, 107 F. 552, 46 C. C. A. 466, rehearing denied 109 Fed. 676, 48 C. C. A. 608.

24 City of Seymour v. Farmers' Loan & Trust Co., 128 Fed. 907, 63 C. C. A. 633.

25 Portage City Water Co. v. Portage, 102 Fed. 769.

26 Glass v. Police Jury of Concordia Parish, 176 U. S. 207, 44 L. ed. 436.

27 Smith v. Packard, 98 Fed. 793, 39 C. C. A. 294.

28 *Re* Cleland, 218 U. S. 120, 54 L. ed. 962. As to other stockholders' bills, see *infra*, § 145.

in a Federal court by an assignee, unless the assignor might have sued there.[29] But, it seems that, where the assignee of a chose in action has recovered in his own name, in a State court, a judgment upon the same; he can bring a suit founded upon such judgment in a Federal court, when there exists the requisite difference of citizenship between himself and the defendant, irrespective of that of his original assignor.[30] And it has been held that the citizenship of the assignor is immaterial in a suit by his assignee, to vacate the satisfaction of a judgment,[31] or to set aside a decree for fraud, although payment of the claim is incidentally requisite.[32] It seems that the holder of a municipal warrant, who seeks to recover municipal assets without a previous judgment at law, brings a suit to recover upon a chose in action within the meaning of the statute.[33] An endorsee, who is a citizen of the same State as the maker of the note, may sue his immediate endorser in a District Court of the United States, if the latter be a citizen of a different State from that of the plaintiff;[34] but when, in a suit by an endorser against the maker[35] or a prior endorser,[36] the plaintiff derives his title through a citizen of the same State as the defendant, such as in the former case, the original payee, there is no jurisdiction on account of a difference of sitizenship between the defendant and the plaintiff. There is an exception in the case of accommodation paper, where a person who has advanced money upon the same can sue the maker if there is a diversity of citi-

29 Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. 173; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. 75; First Nat. Bank v. Dull County, 74 Fed. 373; Sullivan v. Ayer, 174 Fed. 199.

30 Ober v. Gallagher, 93 U. S. 199, 206, 23 L. ed. 829, 831; Bean v. Smith, 2 Mason, 252, 269; Hultberg v. Anderson, 170 Fed. 657.

31 Hay v. Alexandria & W. R. Co., 20 Fed. 15. But see Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70.

32 Bertha Z. & M. Co. v. Vaughn, 88 Fed. 566.

33 New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764.

34 Young v. Bryan, 6 Wheat. 146, 5 L. ed. 228; Manufacturing Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034; Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654; Kolze v. Hoadley, 200 U. S. 76, 50 L. ed. 377.

35 State Nat. Bank of Denison v. Eureka Springs Water Co., 174 Fed. 827.

36 Turner v. Bank of N. A., 4 Dall. 8, 1 L. ed. 718; Mollan v. Torrance, 9 Wheat. 537, 538, 6 L. ed. 154. But see Portage C. R. Co. v. Portage, 102 Fed. 769.

zenship between them, irrespective of the citizenship of the endorser;[37] and under similar circumstances the payee of a bill of exchange can sue the acceptor although he could not have sued the drawer in the Federal court.[38] Assignees in insolvency[39] and buyers at a judicial sale[40] are included within this restriction; but receivers[41] and executors and administrators[42] are not. A party who claims the benefit of a contract as an incident to another contract is to be considered as the assignee of the former when he sues to enforce it, although it has never been formally assigned to him.[43] A party who claims by subrogation[44] or by novation[45] is not within this restriction. It was held under the old Judiciary Act that the jurisdiction over a suit by the heirs of a grantor of land who had been obliged to pay debts of their ancestor secured by a lien upon such land, to compel the grantee to reimburse them under his covenant with the grantor, was not affected by the citizenship of the grantor.[46] Where plaintiff alleged a cause of action for damages for a conspiracy charged to have been made by defendants against him after he became the assignee of a contract for the sale of real estate, it was held: that the citizenship of plain-

[37] Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801; Goldsmith v. Holmes, 36 Fed. 484; s. c., Holmes v. Goldsmith, 147 U. S. 150, 37 L. ed. 118; Wachusett Nat. Bank v. Sioux C. S. Works, 56 Fed. 321; Hoadley v. Day, 128 Fed. 302. When the notes had been pledged as collateral.

[38] Superior v. Ripley, 138 U. S. 93, 34 L. ed. 914.

[39] Sere v. Pitot, 6 Cranch, 332, 336, 3 L. ed. 240, 241.

[40] Glass v. Concordia Parish Police Jury, 176 U. S. 207, 44 L. ed. 436.

[41] Davies v. Lathrop, 12 Fed. 353. Nor the successor of a receiver. Paige v. Rochester, 137 Fed. 663. But see U. S. Nat. Bank v. McNair, 56 Fed. 323; Thompson v. Pool, 70 Fed. 725.

[42] Sere v. Pitot, 6 Cranch, 332, 336, 3 L. ed. 240, 241; Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. ed. 629; Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705.

[43] Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 76, 38 L. ed. 358, 360. But see Portage C. W. Co. v. Portage, 102 Fed. 769.

[44] New Orleans v. Caines' Adm'r, 138 U. S. 595, 606, 34 L. ed. 1102, 1106. *Contra*, Am. Waterworks & Guarantee Co. v. Home Water Co., 115 Fed. 171.

[45] American Colortype Co. v. Continental Colortype Co., 188 U. S. 104, 47 L. ed. 404.

[46] Weems v. George, 13 How. 190, 14 L. ed. 108.

tiff's assignor of the contract was immaterial to the jurisdiction.[47]

A Federal court is without jurisdiction of a suit on a cause of action existing in favor of a partnership, brought by one partner in his own right and as assignee of the interest of his copartner, unless the bill shows that the citizenship of the assignor is such that the suit might have been maintained in that court by the firm.[48] It has been held that the restriction does not apply when the only reason why the assignor could not have sued was that his claim was less in value than the jurisdictional amount.[49] If both the original promissor and the plaintiff have a citizenship different from that of the defendant, the citizenship of a mesne assignee is immaterial.[50] If the requisite diversity of citizenship existed between the original parties to a note or contract, and a suit between them might have been maintained thereon in a Federal court, any subsequent assignee may maintain such action, provided he is also a resident of a State other than that in which the defendant resides; and it is immaterial that an intermediate assignee was a resident of the same State.[51] It has been held: that where the requisite diversity of citizenship existed between the assignor and defendant, the residence of the assignor was immaterial;[52] that where at the time of the commencement of the suit the assignor might have sued in the Federal court, but at the time of the assignment he could not, if the citizenship of the assignee and the defendant are diverse, the court may

47 Noyes v. Crawford, 133 Fed. 796.

48 Ban v. Columbia Southern Ry. Co., 117 Fed. 21, 54 C. C. A. 407, reversing 109 Fed. 499.

49 Bernheim v. Birnbaum, 30 Fed. 885, 887; Bowden v. Burnham, C. C. A., 59 Fed. 752; Bergman v. Inman, 91 Fed. 293; Chase v. Sheldon R. M. Co., 56 Fed. 625; Hartford Fire Ins. Co. v. Erie R. Co., 172 Fed. 899. See also Hammond v. Cleaveland, 23 Fed. 1. But see Woodside v. Vasey, 142 Fed. 617.

50 Emsheimer v. New Orleans, 116 Fed. 893.

51 Portage City Water Co. v. Portage, 192 Fed. 769; Bolles v. Lehigh Valley R. Co., 127 Fed. 884; Farr v. Hobe-Peters Land Co., C. C. A., 188 Fed. 10.

52 Stimson v. United Wrapping Mach. Co. et al., 156 Fed. 298. See Dulles v. H. D. Crippen Mfg. Co., 156 Fed. 706; Ferguson v. Consolidated Rubber Tire Co., 169 Fed. 888; Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756, 106 C. C. A. 330. *Contra*, Waterman v. Chesapeake & Ohio Ry. Co., 199 Fed. 667.

take jurisdiction in a proper case;[53] that where the original owner of a chose in action, who might have sued thereon in a Federal court, assigned the same, he was entitled to sue in such court on again becoming the owner by a reassignment from his assignee, without regard to the citizenship of the latter;[54] that where an assignee of a chose in action is entitled to sue thereon alone in the Federal courts, he and his assignees may sue there together as if no assignment had been made;[55] that where one of complainant's contracts is within the jurisdiction of a court, it draws to the court jurisdiction to determine the entire controversy, although others of the contracts, as to which the issues are the same, were acquired by complainant through assignments from persons who could not have sued therein.[56] The fact that the assignor is a national bank does not give jurisdiction.[57] The statute does not forbid one of the original contractors from suing in a Federal court the assignee of the other party, although the citizenship of the plaintiff is the same as that of the assignor.[58] The assignee must aver in his pleading that his assignor might have sued in the Federal court.[59]

[53] Jones v. Shapero, C. C. A., 57 Fed. 457; Noyes v. Crawford, 133 Fed. 796.

[54] Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 Fed. 737.

[55] Paige et al. v. Rochester, 137 Fed. 663; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 49 C. C. A. 198, 55 L.R.A. 364.

[56] Camp v. Peacock, Hunt & West Co., C. C. A., 129 Fed. 1005; Howe & Davidson Co. v. Haugan, 140 Fed. 182; affirming 128 Fed. 1005.

[57] George v. Wallace, C. C. A., 135 Fed. 286.

[58] Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201.

[59] Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654; U. S. Nat. Bank v. McNair, 56 Fed. 323; Kolze v. Hoadley, 200 U. S. 76, 50 L. ed. 377; J. J. McCaskill Co. v. Dickson, C. C. A., 159 Fed. 704. An allegation in a bill filed by an assignee of claims against a Louisiana corporation, that the assignors are and were citizens of States other than Louisiana, and competent as such to sue the defendant in the Circuit Court, if no assignment had been made, was held to be insufficient to confer jurisdiction on the Circuit Court because the State or States of which the assignors were citizens were not specifically designated Benjamin v. New Orleans, C. C. A., 74 Fed. 417. Where it appeared in the record that the assignor was domiciled and resided in a State other than that of which the defendant was a citizen and no question concerning his citizenship was raised in the court of first instance, the court of review refused to dismiss the case for want of jurisdiction. First Nat. Bank of Canyon, Texas v. Crowley, C. C. A., 183 Fed. 578.

§ 64. Territorial jurisdiction of the District Courts of the United States. There is a District Court in each judicial district of the United States.[1] A District Court cannot serve process beyond its district,[2] except in the following cases: "In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."[3] A *subpœna ad testificandum* may be served upon a witness in a civil case anywhere within the district and beyond the same within one hundred miles of the place of trial, and in a criminal case in any part of the United States.[4] In certain cases, when the property is situated within the jurisdiction, the court may authorize service of process by publication, or without the jurisdiction; but then, unless there is a general appearance, the judgment has no effect, except upon the property there situated.[5] When the service of process is made within the district or the defendant voluntarily appears, the court may make a decree which directs the performance of, or abstention from, an act, or directs a transfer of, or otherwise affects the title to, property beyond the territorial jurisdiction;[6] or grants an injunction against an act within the jurisdiction, such as an interference with the flow of water, which injuriously affects lands beyond it.[7] Where, in order to obtain the relief sought, it will be necessary for the court to take possession, by its officers, of land beyond its territorial jurisdiction, such a decree will not

§ 64. [1] *Infra*, § 66.

[2] Toland v. Sprague, 12 Peters, 300, 328, 9 L. ed. 1093, 1104.

[3] § 54, 36 St. at L. 1087; copied from U. S. R. S., § 741, 4 Fed. St. Ann. 555.

[4] U. S. R. S., § 876; *infra*, §§ 342, 523.

[5] *Infra*, § 166.

[6] Arglasse v. Muschamp, 1 Vern. 75; Carron I. Co. v. Maclaren, 5 H. L. C. 416; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Dull v. Blackman, 169 U. S. 243, 246, 42 L. ed. 733, 734; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 69; Wheeler v. McCormack, 4 Fish. Pat. Cas. 433; s. c., 8 Blachf. 267; Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. R. 993, 996. For an excellent review of the authorities, see the learned opinion of Davies, J., in Gardner v. Ogden, 22 N. Y. 327. See also Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640.

[7] Morris v. Bean, 146 Fed. 423; Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867. *Contra*, Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. Pr. 233; affirming 5 McLean, 444.

be granted.[8] Thus, where the defendant is within its jurisdiction, it may decree specific performance of a contract,[9] or the administration of a trust,[10] or the cancellation of a conveyance, [11] which affects land within the jurisdiction; but under the former practice if the defendant refused to obey the directions of the court, the judgment had no force elsewhere, even when a State statute provided that the order directing a conveyance should have the same effect as if the conveyance were made in obedience thereto.[12] A recent rule authorizes the court to appoint a person to execute a mandatory order, injunction, or decree for specific performance, and provides that the act, when so performed, shall have like effect as if done by the defendant.[13] Accordingly, the court will not decree a partition of land beyond the jurisdiction, since no commissioner by it could have authority to act there,[14] and it cannot adjudge that a deed of land in another State is void; [15] nor in a suit for a divorce award to a married woman a dower right in land elsewhere, which will be valid until a conveyance thereof has been executed by her husband.[16]

[8] Muller v. Dows, 94 U. S. 444, 449, 24 L. ed. 207, 209; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65; affirming Fall v. Fall, 75 Neb. 104, 120, 113 N. W. 175; Macgregor v. Macgregor, 9 Iowa, 65; Glen v. Gibson, 9 Barb. (N. Y.) 634; Story's Eq. Jur., § 1292; 2 Spence, 8, n. (d); Smith's Eq. 30; Bispham's Eq. § 7.

[9] Selover, Bates & Co. v. Walsh, 226 U. S. 112, 57 L. ed. where it was *held* that specific performance of a contract made in one State for the sale of land in another, can be decreed by the courts of the former State, and that the courts of the latter will be bound to give effect to the judgment thus obtained; Western Union Tel. Co. v. Pittsburg, C., C. & St. L. Ry. Co., 137 Fed. 435; Roblin v. Long, 60 How. Pr. (N. Y.) 200.

[10] Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96, 108; affecting land situated outside the jurisdiction. Dunlap v. Byers, 110 Mich. 109 (a decree directing the conveyance of land upon the winding up of a corporation.

[11] Jones v. Byrne, 149 Fed. 457, 469.

[12] Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65; affirming Fall v. Fall, 75 Neb. 104, 120, 113 N. W. 175. *Contra*, Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621.

[13] Eq. Rule 8. See § 441, *infra*.

[14] Spence, 8, n. (d); Story's Eq. Jur., § 1292; Smith's Eq. 30; Bispham's Eq. § 47.

[15] Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640; State ex rel. Hunt v. Grimm (S. Ct. Mo., June 1912) 148 S. W. 868, where the deed was within the jurisdiction, but it had been recorded in another jurisdiction, where the land was situated.

[16] Fall v. Eastin, 215 U. S. 1, 54

A suit to abate a nuisance existing beyond the jurisdiction cannot be maintained.[17] It has been held that a Federal court can maintain an action for injuries caused to lands in another State by a canal within its jurisdiction.[18] Ordinarily, a court in equity cannot direct a sale of land situated in another State.[19] But the Judicial Code provides: "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."[20] "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such

L. ed. 65; affirming Fall v. Fall, 75 Neb. 104, 120, 113 N. W. 175.

[17] Mississippi & M. R. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Ladew v. Tennessee Copper Co., 218 U. S. 357, 54 L. ed. 1069, affirming 179 Fed. 245.

[18] Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275 (Fed. Cas. No. 12,139), affi'd. 14 Howard, 80, 14 L. ed. 335.

[19] Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334; 3 Am. St. Rep. 53, 11 Atl. 184; Carpenter v. Strange, 141 U. S. 87, 106, 35 L. ed. 640, 647; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Re Anderson, 94 Fed. 487; York County Sav. Bank v. Abbot, 139 Fed. 988.

[20] § 55, 36 St. at L. 1087; copied from U. S. R. S., § 742, 4 Fed. St. Ann. 555.

thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be."[21]

§ 65. Terms of the District Courts of the United States. In general. No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof."[1] "District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases."[2] Ordinarily, when one term begins, the preceding terms, which is held in the same place, ends; unless it was the evident intention of the statute that the term should be concurrent in whole or in part.[3] "When the trial or hearing of any cause, civil or criminal, in a District Court, has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion, in the same manner and with the same effect as if another stated term of the court had not intervened."[4] A special term of a court may be held while a regular term is in session at another place in the same district, where there are two judges, each having authority to hold court in said district.[5] The term of a District Court[6]

21 § 56, 36 St. at L. 1087.

§ 65. 1 Jud. Code § 7, 36 St. at L. 1087.

2 Jud. Code § 10, 36 Stat. at L. 1087.

3 Ex parte Friday, 43 Fed. 916, 918.

4 Jud. Code § 8, 36 St. at L. 1087.

5 East Tennessee Iron & Coal Co. v. Wiggin, C. C. A., 68 Fed. 446; U. S. v. Louisville & N. R. Co., 177 Fed. 780.

6 Alder v. Edenborn, 198 Fed. 928. See Guaranty Tr. Co. v. Metropoli-

may be extended to a period subsequent to the opening of the succeeding statutory term, for the purpose of a particular case. A term of a District Court may be adjourned to, and its regular continuous session may be resumed as a part of the same term, upon a distant day; although another term of the court has been held during the adjournment at another place.[7] Unless sooner adjourned, a term of a court of the United States may extend from the beginning thereof to the opening of the succeeding statutory term.[8] It does not necessarily end at the opening of a term, held pursuant to a statute, in another place in the same district.[9] The term does not expire until the limit set by law for its continuance;[10] except when it has been formally adjourned without a day,[11] or when there has been no attendance at the opening of the term and no instruction to the marshal to adjourn for a subsequent day.[12] "If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct."[13] "When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to

tan St. Ry. Co., C. C. A., 177 Fed. 925.

7 Florida v. Charlotte Harbor Phosphate Co., C. C. A., 70 Fed. 883.

8 Harlan v. McGourin, 218 U. S. 442, 450, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, 54 L. ed. 1101, 1106, affirming *Ex parte* Harlan, 180 Fed. 119; East Tennessee Iron & Coal Co. v. Wiggin, C. C. A., 68 Fed. 446.

9 Ibid.

10 Schofield v. Horse Springs Cattle Co., 65 Fed. 433.

11 Harlan v. McGourin, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; affirming *Ex parte* Harlan, 180 Fed. 119.

12 *Ex parte* Harlan, 180 Fed. 119; aff'd. as Harlan v. McGourin, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

13 Jud. Code § 12, 36 St. at L. 1087.

discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit judge of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests as require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed."[14] After the term has been regularly opened and adjourned, the failure of the judge to appear upon the adjourned day to appoint a time when the court will be resumed, does not forfeit the right to resume sittings at any time.[15]

§ 66. Territorial jurisdiction and terms of the different District Courts of the United States. The Judicial Code provides: "§ 69. The United States are divided into judicial districts as follows:

"§ 70. The State of *Alabama* is divided into three judicial districts, to be known as the *northern, middle,* and *southern districts* of Alabama. The *northern* district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the *northmiddle division* of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cheroffee, De Kalb, Etowah, Marshall, and Saint Clair, which shall constitutes the *middle division* of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the *southern division* of

[14] Jud. Code § 13, 36 St. at L. 1087.

[15] *Ex parte* Harlan, 180 Fed. 119; aff'd. as Harlan v. Gourin, 218 U. S. 442, 450, 54 L. ed. 1101, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall "constitute the *Jasper division* of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the *western division* of said district. Terms of the district court for the *northern division* shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the *northwestern division,* at Florence on the second Tuesday in February an dthe third Tuesday in October: *Provided,* That suitable rooms and accomodations for holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gladsden on the first Tuesdays in February and August: *Provided,* That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the Government; for the *southern division,* at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the *Jasper division,* at Jasper on the second Tuesdays in January and June: *Provided,* That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the *eastern division,* at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June. The clerk of the court for the *northern district* shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery and Pike, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry,

and Houston, which shall constitute the *southern division* of said district also the territory embraced on the date last mentioned in the counties of Chambers, Lee, Macon, Randolph, Russell and Tallapoosa, which shall constitute the eastern division of said middle judicial district. Terms of the district court for the *northern division* shall be held at Montgomery on the first Tuesdays in May and December; and for the eastern division, at Opelika on the first Mondays in April and November: *Provided, however,* That suitable rooms and accommodations for holding court at Opelika shall be furnished free of expense to the Government; and for the *southern division*, at Dothan on the first Mondays in June and December. The clerk for the *middle district* shall maintain an office, in charge of himself or a deputy, at Dothan, and shall maintain an office in charge of himself or a deputy, at Opelika, which said offices at Dotham and Opelika shall be open at all times for the transaction of the business of said divisions. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the *northern division* of said district. Terms of the district court for the *southern division* shall be held at Mobile on the fourth Mondays in May and November, and for the *northern division*, at Selma on the first Mondays in May and November."[1]

In the *Territory of Alaska* there is a District Court with general jurisdiction in civil, criminal, equity and admiralty cases. The court consists of three divisions, each

§ 66. 1 36 St. at L. 1087, am'd Act of Feb'y 28, 1913. Under the Act of Feb'y 25, 1907, ch. 1198, 34 St. at L. 931; Comp. St. Supp. 1907, p. 187, which authorized the appointment of a separate district judge for the northern district, it was *held* that he and the judge previously appointed for the middle and northern districts, under Act of Aug. 2, 1886, ch. 842, § 2, 24 St. at L. 213, Comp. St. 1901, p. 449, had co-ordinate powers, and that each could appoint and remove a referee in bankruptcy within the northern district. Birch v. Steele, C. C. A., 165 Fed. 577; affirming *Re* Steele, 156 Fed. 853, and overruling *Ex parte* Steele, 161 Fed. 886, 162 Fed. 694.

of which is held by a different judge with separate clerk, district attorney and marshal. The jurisdiction of each division extends over the entire territory; but the court, where an action is pending, may change the place of trial from one place to another in the same or another division for local prejudice, for the convenience of witnesses, disqualification of the division judge or the convenience of the defendant, and in criminal prosecutions also to save expense to the United States, where the defendant will not be prejudiced thereby. The *First* Division includes all that portion of said district east of the one hundred and forty-first degree of west longitude. The *Second* Division of said district consists of all that territory lying west, northwest, and north of that certain line described as follows: Commencing at the mouth of the Colville River, on the north coast of the district of Alaska; thence following the Colville River south and west to a point where said river crosses the one hundred and fifty-fourth meridian line the second time; thence following the one hundred and fifty-fourth meridian line south to the west side of Tohtankella Mountain and to the Yukon River; thence in a southeasterly direction to the western side of Mount McKinley; thence in a southwesterly direction on to the most northern point of Lake Clark; thence along the northwest side of Lake Clark to the sixtieth degree of long latitude; thence west along said degree of latitude to Kuskokwim Bay. This division shall also include the mainland west of said bay and all the islands north of the fifty-ninth degree of north latitude. The *Third* Division consists of all that portion of the district of Alaska not included within the first or second divisions of said district as hereinbefore described. In Division *One* at least four terms of court are annually held, two at Juneau and two at Skagway, at times designated by the judge in January. In Division *two* at least one term a year is held at Saint Michaels, beginning on the third Monday in June. In Division *Three* at least one term a year is held at Eagle City, beginning on the first Monday of June. Special terms may also be held upon thirty days' notice of the time and place.[2] The courts of Alaska have no power to punish a defend-

[2] 31 St. at L. 322–326; 32 St. at L. 385. See Ex parte Cooper, 143 U. S. 472, 36 L. ed. 232; Steamer Coquitlam v. U. S., 163 U. S. 346, 41 L. ed. 184; Decker v. Williams, 73 Fed. 308; *infra*, § 67.

ant arrested within the district, charged with the commission of an offense on board an American vessel on the high seas; and consequently, such an offender is tried in the First District of the United States, to which he is brought after his arrest in Alaska.[3] The judge of each division is required to divide his division into precincts, and is authorized to alter the same and establish new precincts from time to time, as public convenience may require. He is also required to appoint commissioners, who are ex-officio probate judges, with probate and certain other jurisdiction within their respective precincts, and to remove such commissioners at pleasure.[4] It was held: that an order abolishing a precinct, providing that the territory embraced therein should become a part of another precinct, accepting the resignation of the commissioner for the precinct abolished, and directing him to "deliver the record and property pertaining to his office" to the commissioner of the new district, with which the former one was consolidated; constituted the commissioner of the latter precinct the successor in office of the former commissioner of that abolished, and transferred to him all the probate cases pending in the former precinct, with power to proceed in the same.[5]

The State of *Arizona* constitutes one district, with one district judge, and is attached to the ninth circuit. The regular terms of the District Court are held at the capital of that Sate, Phoenix, on he first Mondays in April and October of each year.[6]

"§ 71. The State of *Arkansas* is divided into two districts, to be known as the *eastern* and *western* districts of Arkansas The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which shall constitute the *Texarkana division* of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which shall constiute the *Fort Smith division* of said district; also the territory embraced

[3] U. S. v. Newth, 149 Fed. 302.
[4] 31 St. at L. 321.
[5] Cheney v. Alaska Treadwell Gold Min. Co., C. C. A., 148 Fed. 808.
[6] 36 St. at L. 557, 576, § 31.

on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which shall constitute the *Harrison division* of said district. Terms of the District court for the *Texarkana division* shall be held at Texarkana on the second Mondays in May and November; for the *Fort Smith Division,* at Fort Smith on the second Mondays in January and June; and for the *Harrison division,* at Harrison on the second Mondays in April and October. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe, and Woodruff, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp, and Jackson, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which shall constitute the *Jonesboro division* of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, and White, which shall constitute the *western division* of said district. Terms of the District court for the *eastern division* shall be held at Helena on the second Monday in March and the first Monday in October; for the *northern division,* at Batesville on the fourth Monday in May and the second Monday in December; for the *Jonesboro division,* at Jonesboro on the second Mondays in May and November; and for the *western division,* at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the *western district* shall maintain an office in charge of himself or a deputy at Fort Smith, at Harri-

son, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court.[7]

"§ 72. The State of *California* is divided into two districts, to be known as the *northern* and *southern* districts of California. The *southern* district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura, which shall constitute the *southern division* of said district. Terms of the district court for the *northern division* shall be held at Fresno on the first Monday in May and the second Monday in November; and for the *southern division,* at Los Angeles, on the second Monday in January and the second Monday in July, and at San Diego on the second Mondays in March and September. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba. Terms of the District court for the *northern district* shall be held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November; at Sacramento on the second Monday in April; and at Eureka on the third Monday in July.

"§ 73. The State of *Colorado* shall constitute the judicial district, to be known as the district of Colorado. Terms of the District court shall be held at Denver on the first Tuesdays

[7] 36 St. at L. 1087. For the special jurisdiction of courts held in the western district over controversies affecting the Gulf, Colorado & Santa Fe Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. § 8, p. 72; 23 St. at L. § 8, p. 75; Briscoe v. Southern Kan. Ry. Co., 40 Fed. 273; s. c., 144 U. S. 133, 36 L. ed. 377. As to Indian Territory, see 25 St. at L. 786; Gowen v. Harley, 56 Fed. 973.

in May and November; at Pueblo on the first Tuesday in April; and at Montrose on the second Tuesday in September.

"§ 74. The State of *Connecticut* shall constitute one judicial district, to be known as the district of Connecticut. Terms of the District court shall be held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December.

"§ 75. The State of *Delaware* shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September, and December.

"§ 76. The State of *Florida* is divided into two districts to be known as the *northern* and *southern* districts of Florida. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwance, Saine Lucie, and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wahulla, Walton, and Washington. Term sof the District court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December.

"§ 77. The State of *Georgia* is divided into two districts ,to be known as the *northern* and *southern* districts of Georgia.

The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, DeKalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which shall constitute the *western division* of said *district;* also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, which shall constitute the *northwestern division* of said district. Terms of the district court for *northern division* of said district shall be held at Atlanta on the second Monday in March and the first Monday in October; for the *eastern division,* at Athens on the second Monday in April and the first Monday in November for the *western division,* at Columbus on the first Mondays in May and December; and for the *northwestern division* at Rome on the third Mondays in May and November. The clerk of the court for the *northern district* shall maintain an office in charge of himself or a deputy at Athens, at Columbus, and at Rome, which shall be kept open at all times for the transaction of the business of the court. The *Southern district* shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sum-

nam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which shall constitute the *northern division;* also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which shall constitute the *southern division.* Terms of the district court for the *northern division* shall be held at Peoria on the third Mondays in April and October; for the *southern division,* at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the *southern district* shall maintain an office in charge of himself or a deputy at Peoria, at Springfield, and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern division, who shall maintain an office at Peoria. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, arion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson. Terms of the district court for the eastern district shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East St. Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo, and at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files, and documents pertaining to the court at that place.

"§ 80. The State of *Indiana* shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in

January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep office at New Albany, one at Evansville, one at Fort Wayne, and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place.[10]

"§ 81. The State of *Iowa* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Iowa. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which shall constitute the *Cedar Rapids division;* also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Carroll, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which shall constitute the *central division;* also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the the *western division.* Terms of the district court for the *eastern division* shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the *Cedar Rapids division,* at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in

[10] 36 St. at L. 1087. A court sitting in one division has jurisdiction to hear and determine a motion for a new trial in a criminal case tried in another division. Dwyer v. U. S., C. C. A., 170 Fed. 160. The additional district judge, appointed for the northern district of Illinois under the Act of March 3, 1905, ch. 1427, §§ 2, 3, 23, 33 St. at L. 992, 997, Comp. St. Supp. 1909, pp. 123, 130, has jurisdiction to try offenses committed before the creation of his office as well as those committed subsequently. Walsh v. U. S., C. C. A., 174 Fed. 615.

September; for the *central division,* at Fort Dodge on the second Tuesdays in June and November; and for the *western division,* at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the *central division* of said district; also the territory embraced on the date last mentioned in the counties of Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, and Clinton, which shall constitute the *Davenport division* of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the *Ottumwa division* of said district. Terms of the district court for the *eastern division* shall be held at Keokuk on the second Tuesday in April and the third Tuesday in October; for the *central division,* at Des Moines on the second Tuesday in May and the third Tuesday in November; for the *western division,* at Council Bluffs on the second Tuesday in March and the third Tuesday in September; for the *southern division,* at Creston on the fourth Tuesday in March and the first Tuesday in November; for the *Davenport division,* at Davenport on the fourth Tuesday in April and the first Tuesday in October; and and for the *Ottumwa division,* at Ottumwa on the first Monday after the fourth Tuesday in March, and the first Monday after the third Tuesday in October. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa, for the transaction of the business of said divisions."[11]

Under the Act of June 1, 1900,[12] it was provided that all

[11] 36 St. at L. 1087, am'd. Act of Mar. 3, 1913.

[12] § 5, Ch. 601, 31 St. at L. 249, Comp. St. 1901, p. 353.

grand and petit jurors for the southern district should be selected from citizens residing therein. It was held that jurors drawn for service in the central division need not reside therein, provided they reside within the district.[13]

"§ 82. The State of *Kansas* shall constitute one judicial district, to be known as the district of Kansas. It is divided into three divisions, to be known as the *first, second, and third divisions* of the district of Kansas. The *first division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte. The *second division* shall include the territtory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita. The *third division* shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson. Terms of the district court for the *first division* shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May; but no cause, action, or proceeding shall be tried or considered at and term held at Salina unless by consent of all the parties thereto, or by order of the court for cause. Terms of the district court for the *second division* shall be held at Wichita on the second Mondays in March and September; and for the *third division,* at Fort

13 Spencer v. U. S., C. C. A., 169 Fed. 562.

Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint two deputies, one of whom shall reside and keep his office at Fort Scott, and the other at Wichita; and the marshal shall appoint a deputy who shall reside and keep his office at Fort Scott.[14]

"§ 83. The State of *Kentucky* is divided into two districts, to be known as the *eastern* and *western* districts of Kentucky: The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided,* That suitable rooms and accommodations are furnished for holding court at Jackson free of expense to the Government until such time as a public building shall be erected there. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey, Green, Adair, Russell, Clinton, Cumberland,

[14] See McGlashern v. U. S., 71 Fed. 434. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fe Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. 72, 75; Briscoe v. Southern Kan. Ry. Co., 40 Fed. 273.

Monroe, Metcalf, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Brayson, Hardin, Meade, Breckenridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd, Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. "The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Frankfort, at Covington, at Richmond, at London, at Catlettsburg, and at Jackson; and the clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought."[15]

"§ 84. The State of *Louisiana* is divided into two judicial districts, to be known as the *eastern* and *western* districts of Louisiana. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Or-

[15] 36 St. at L. 1087. Under the former law, 31 St. at L. 781, Comp. St. 1901, p. 360, it was *held* that a term held in Louisville did not lapse by reason of the commencement of intervening terms elsewhere. U. S. v. Louisville & N. R. Co., 177 Fed. 780.

leans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne, and Washington, which shall constitute the *New Orleans division;* also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana, which shall constitute the *Baton Rouge division* of said district. Terms of the district court for the *New Orleans division* shall be held at New Orleans on the third Mondays in February, May, and November; and for the *Baton Rouge division,* at Baton Rouge on the second Mondays in April and November. The clerk of the court for the *eastern district* shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaaction of the business of the court. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which shall constitute the *Opelousas division* of said district; also the territory embraced on the dast last mentioned in the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which shall constitute the *Alexandria division* of said district; also the territory embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which shall constitute the *Shreveport division* of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which shall constitute the *Monroe division* of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron, and Vernon, which shall constitute the *Lake Charles division* of said district. Terms of the district court for the *Opelousas division* shall be held at Opelousas on the first Mondays in January and June; for the *Alexandria division,* at Alexandria on the fourth Mondays in January and June; for the *Shreveport division,* at Shreveport on the third Mondays in February and October; for the *Monroe division,* at Monroe on the first Mondays in April and October;

and for the *Lake Charles division,* at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe, and at Lake Charles, which shall be kept open at all times for the transaction of the business of the court."[16] Prior to the Judicial Code it was held, that in a suit in admiralty in personam, where two or more of the defendants were citizens of different districts of the State of Louisiana, the suit might be brought in either district.[17]

"§ 85. The State of *Maine* shall constitute one judicial district, to be known as the district of Maine. Terms of the district court shall be held at Portland on the first Tuesday in April, on the third Tuesday in September, and on the second Tuesday in February and December; at Bangor on the first Tuesday in June; and at Bath on the first Tuesday in September.[17a]

"§ 86. The State of *Maryland* shall constitute one judicial district, to be known as the district of Maryland. Terms of the district court shall be held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May annd the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy, who shall reside and maintain an office at Cumberland, unless he shall himself reside there.

"§ 87. The State of *Massachusetts* shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided,* That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the Government until such time as a Federal building shall be erected there for that purpose. The marshal and the clerk for said dis-

[16] 36 St. at L. 1087.

[17] Downs v. Wall, C. C. A., 176 Fed. 657.

[17a] Jud. Code, 36 St. at L. 1087, as am'd. Act of Dec. 22, 1911..

trict shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place.

"§ 88. The State of Michigan is divided into two judicial districts, to be known as the *eastern* and *western* districts of Michigan. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscolo, which shall constitute the *northern division;* also the territory embraced on the date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St Clair, Sanilac, Washtenaw, and Wayne, which shall constitute the *southern division* of said district. Terms of the district court for the *southern division* shall be held at Detroit on the first Tuesdays in March, June, and November; for the *northern division,* at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of February in each year. The *western district* shall include the "territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which shall constitute the *northern division;* also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which shall constitute the *southern division* of said district. Terms of the district court for the *southern division* shall be held at Grand Rapids on the first Tuesdays in March and October; and for the *northern division,* at Marquette on the first Tuesdays in May and September. All issues of fact shall be tried at the terms held in the division where such suit shall be commenced. Actions in rem and admiralty

may be brought in whichever division of the eastern district service can be had upon the res. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the *western district* shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the *eastern district* shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said district shall keep an office and a deputy marshal at Bay City and mileage on service of process in said northern division shall be computed from Bay City.

"§ 89. The State of *Minnesota* shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the *first, second, third, fourth, fifth,* and *sixth* divisions. The *first division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston. The *second division* shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Yellow Medicine, Sibley, and Lac qui Parle. The *third division* shall include the territory embraced on the date last mentioned in the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The *fourth division* shall include the territory embraced on the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The *fifth division* shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The *sixth division* shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Otter Tail, Roseau, Wilkin, Clay, Becker, Wadena, Nor-

man, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the *first division* shall be held at Winona on the third Tuesdays in May and November; for the *second division,* at Mankato on the fourth Tuesdays in April and October; for the *third division,* at Saint Paul on the first Tuesdays in June and December; for the *fourth division,* at Minneapolis on the first Tuesdays in April and October; for the *fifth division,* at Duluth on the second Tuesdays in January and July; and for the *sixth division,* at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court.[18]

"§ 90. The State of *Mississippi* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Mississippi. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the *eastern division* of said district also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the Delta division of said district. The terms of the district court for the *eastern division* shall be held at Aberdeen on the first Mondays in April and October; and for the *western division,* at Oxford on the first Mondays in June and December; and for the *Delta division,* at Clarksdale on the fourth Mondays in January and July: *Provided,* That suitable rooms and accommodations for holding court at Clarksdale are fur-

[18] 36 St. at L. 1087. See Clement v. U. S., C. C. A., 149 Fed. 305. For the power to execute process upon the open waters of the Great Lakes, see The Lindsay, 62 Fed. 851.

nished free of expense to the United States. The *southern division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the *Jackson division;* also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the *western division;* also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the *eastern division;* also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which shall constitute the *southern division* of said district. Terms of the district court for the *Jackson division* shall be held at Jackson on the first Mondays in May and November; for the *western division,* at Vocksburg on the first Mondays in January and July; for the *eastern division,* at Meridian on the second Mondays in March and September; and for the *southern division,* at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an *ern division* of said district. Terms of the district court for the office in charge of himself or a deputy at each place in his district at which court is now required to be held at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district.[18a]

"§ 91. The State of *Missouri* is divided into two judicial districts, to be known as the *eastern* and *western* districts of Missouri. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrian, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries,

18a Jud. Code, 36 St. at L. 1087, as am'd. Act of May 27, 1912, ch. 136, 37 St. at L. 118.

man, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the *first division* shall be held at Winona on the third Tuesdays in May and November; for the *second division,* at Mankato on the fourth Tuesdays in April and October; for the *third division,* at Saint Paul on the first Tuesdays in June and December; for the *fourth division,* at Minneapolis on the first Tuesdays in April and October; for the *fifth division,* at Duluth on the second Tuesdays in January and July; and for the *sixth division,* at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court.[18]

"§ 90. The State of *Mississippi* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Mississippi. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the *eastern division* of said district also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the Delta division of said district. The terms of the district court for the *eastern division* shall be held at Aberdeen on the first Mondays in April and October; and for the *western division,* at Oxford on the first Mondays in June and December; and for the *Delta division,* at Clarksdale on the fourth Mondays in January and July: *Provided,* That suitable rooms and accommodations for holding court at Clarksdale are fur-

[18] 36 St. at L. 1087. See Clement v. U. S., C. C. A., 149 Fed. 305. For the power to execute process upon the open waters of the Great Lakes, see The Lindsay, 62 Fed. 851.

nished free of expense to the United States. The *southern division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the *Jackson division;* also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the *western division;* also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the *eastern division;* also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which shall constitute the *southern division* of said district. Terms of the district court for the *Jackson division* shall be held at Jackson on the first Mondays in May and November; for the *western division,* at Vocksburg on the first Mondays in January and July; for the *eastern division,* at Meridian on the second Mondays in March and September; and for the *southern division,* at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an *ern division* of said district. Terms of the district court for the office in charge of himself or a deputy at each place in his district at which court is now required to be held at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district.[18a]

"§ 91. The State of *Missouri* is divided into two judicial districts, to be known as the *eastern* and *western* districts of Missouri. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrian, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries,

[18a] Jud. Code, 36 St. at L. 1087, as am'd. Act of May 27, 1912, ch. 136, 37 St. at L. 118.

Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the *eastern division* of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the *southeastern division* of said district. Terms of the district court for the *eastern division* shall be held at Saint Louis on the third Mondays in March and September, and at Rolla on the second Mondays in January and June: *Provided,* That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the *northern division* at Hannibal on the fourth Monday in May and the first Monday in December; and for the *southeastern division* at Cape Girardeau on the second Mondays in April and October. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline, and Sullivan, which shall constitute the *western division;* also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the *southwestern division;* also the territory embraced on the date last mentioned in the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the *Saint Joseph division;* also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the *central division;* also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Leclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which shall constitute the

southern division. Terms of the district court for the *western division* shall be held at Kansas City on the fourth Monday in April and the first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided,* That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the *southwestern division,* at Joplin on the second Mondays in June and January; for the *Saint Joseph division,* at Saint Joseph on the first Monday in March and the third Monday in September; for the *central division,* at Jefferson City on the third Mondays in March and October; and for the *southern division,* at Springfield on the first Mondays in April and October. The clerk of the court at Saint Louis, in the eastern district, shall maintain an office in charge of himself or a deputy at Saint Louis and Hannibal and at such other places of holding court in said district as may be deemed necessary by the judge, which shall be kept open at all times for the transaction of the business of the court. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Louis, at Chillicothe, at Joplin, and at Springfield, which shall be kept open at all times for the transaction of the business of the court. The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district.[18b]

"§ 92. The State of *Montana* shall constitute one judicial district, to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the

18b Jud. Code, 36 St. at L. 1087, as am'd. Act of Dec. 22, 1911, 37 St. at L. 51.

transfer; and any interlocutory order may be made by the court or judge thereof in either place.

"§ 93. The State of *Nebraska* shall constitute one judicial district to be known as the district of Nebraska. Said district is divided into *eight divisions.* The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the *Omaha division;* the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the *Norfolk division;* the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Box Butte, and Sioux, shall constitute the *Chadron division;* the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the *Grand Island division;* the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's Bluff, shall constitute the *North Platte division;* the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the *Lincoln division;* the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the *Hastings division;* and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the *McCook division.* Terms of the district court for the *Omaha division* shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the *Norfolk division*, at Norfolk on the third Monday in September; for the *Chadron division*, at Chadron on the second Monday in September; for the *Grand Island division,* at Grand Island on the second Monday in January; for the *North Platte division,* at North Platte on the second Monday in June; for

the *Lincoln division*, at Lincoln on the second Monday in May and the first Monday in October; for the *Hastings division*, at Hastings on the second Monday in March; and for the *McCook division* at McCook on the first Monday in March: *Provided*, That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed.

"§ 94. The State of *Nevada* shall constitute one Judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October.

"§ 95. The State of *New Hampshire* shall constitute one judicial district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton on the third Tuesday in August.[18c]

"§ 96. The State of *New Jersey* shall constitute one judicial district, to be known as the district of New Jersey. Terms of the District Court shall be held at Newark on the first Tuesday in April and the first Tuesday in November, and at Trenton on the third Tuesday in January and the second Tuesday in September of each year. The clerk of the court for the district of New Jersey shall maintain an office in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court; and the marshal shall also maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court."[19] By an agreement made between the States of New Jersey and New York on September 6, 1833, of which Congress

[18c] Jud. Code, 36 St. at L. 1087, as am'd. Act of Aug. 23, 1912.

[19] 36 St. at L. 1087, am'd. Act of Feb'y. 14, 1913.

approved by the Act of June 28, 1834,[20] the boundary line between the two States was fixed "from a point in the middle of Hudson river, opposite the point on the western shore thereof, in the forty-one degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay, to the main sea." The boundary of the respective jurisdictions of the Federal courts sitting in New York and New Jersey is the same as that fixed in this agreement.[21] The District Court of the United States for the District of New Jersey when sitting in admiralty has exclusive jurisdiction of a vessel fastened to the New Jersey shore, although below the low water line.[22] It was so held when a tug was afloat in the Kill Von Kull, between Staten Island and New Jersey, fastened at the end of a dock at Bayonne, about three hundred feet below low water mark and about half a mile from the entrance of the Kill Von Kull into the Bay of New York;[23] and when a vessel was lying afloat at anchor on the Hudson River, between Jersey City and Manhattan Island, on the westerly side of the middle of the Hudson River, several hundred feet east of the Morris Street Pier of Jersey City; and when made fast to a wharf in the Morris Canal basin in Jersey City.[24]

"The State of *New Mexico* constitutes one district, with one District judge. It is attached to the Eighth Circuit. The regular terms of the district court are held at the capital of that State, Santa Fe, on the first Mondays of April and October in each year.[25]

"§ 97. The State of *New York* is divided into four judicial districts, to be known as the *northern, eastern, southern,* and *western* districts of New York. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison,

20 4 St. at L. 708.

21 *Re* Devoe Mfg. Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; s. c., 14 Fed. 183; The Sarah E. Kennedy, 25 Fed. 569; The Norma, 32 Fed. 411.

22 Ibid.

23 The Sarah E. Kennedy, 25 Fed. 569.

24 The Norma, 32 Fed. 411.

25 36 St. at L. 557, 565, § 13.

Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Oonodaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters."[26] The District Court of the Southern District of New York, in admiralty, has no jurisdiction on the westerly side of the middle of the Hudson River.[27] "The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegany,

[26] 36 St. at L. 1087.

[27] The Norma, 32 Fed. 411. See, also, *Re* Devoe Mfg. Co., 108 U. S. 401, 2 Sup. Ct. 894, 27 L. ed. 764; s. c., 14 Fed. 183; The Sarah E. Kennedy, 25 Fed. 569; and *supra* under New Jersey.

Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monuroe, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions and for preceedings [*sic*] in bankruptcy and the trial of causes in admrialty, shall be held at Buffalo at least two weeks in each month o fthe year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge.

"§ 98. The State of *North Carolina* is divided into two districts to be known as the *eastern* and *western districts* of North Carolina. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Cartedet, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnson, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays

[28] 36 St. at L. 1087.

in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October: *Provided,* That the city of Washington shall provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, and at Washington, which shall be kept open at all times for the transaction of the business of the court. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the District court for the western district shall be held at Greensboro on the first Mondays in June and December at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October, at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court.

"§ 99. The State of *North Dakota* shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, Sheridan, Adams, Bowman, Dunn, Hettinger, Morton, Stock, and McKenzie, shall constitute the *southwestern division* of

said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs, and Steele, shall constitute the *southeastern division;* and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, shall constitute the *northeastern division;* and the territory embraced on the date last mentioned in the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry, shall constitute the *northwestern division;* and the territory embraced on the date last mentioned in the counties of Ward, Williams, Montraille, Burk and Rendille, shall constitute the *western division.* The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the *southwestern division* shall be held at Bismarck on the first Tuesday in March; for the *southeastern division,* at Fargo on the third Tuesday in May; for the *northeastern division,* at Grand Forks on the second Tuesday in November; for the *northwestern division,* at Devils Lake on the first Tuesday in July; and for the *western division,* at Minot on the second Tuesday in October. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district." [28a] This part of the statute becomes inoperative in so far as any particular reservation is concerned upon the extinguishment of the Indian title.[29] A prosecution for felonous homicide alleged to have been committed on an Indian reservation cannot be maintained in this court where the indictment does not allege that either the defendant or the person killed is an Indian.[30]

"§ 100. The State of *Ohio* is divided into two judicial districts, to be known as the *northern* and *southern* districts of Ohio. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trum-

[28a] 36 St. at L. 1087, am'd Act of Feb'y. 5, 1912. 39 St. at L. 59.

[29] U. S. v. La Plant, 200 Fed. 92.

[30] Ibid.

bull, and Wayne, which shall constitute the *eastern division;* also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa; Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandotte, which shall constitute the *western division* of said district. Terms of the district court for the *eastern division* shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the *western division,* at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the *eastern division* shall be cognizable at the terms held at Cleveland, or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the *western division;* also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the eastern division of said district. Terms of the district court for the *western division* shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the *eastern division,* at Columbus on the first Tuesdays in June and December: *Provided,* That terms of the district court for the southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the southern

district, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton.

"§ 101. The State of *Oklahoma* is divided into two judicial districts, to be known as the *eastern* and the *western* districts of Oklahoma. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, LeFlore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Ofuskee, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the eastern district shall be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; and at Chickasha on the first Monday in November in each year. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the western district shall be held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June; at Lawton on the first Monday in September; and at Woodward on the first Monday in November: *Provided*, That suitable rooms and accommodations for holding court at Woodward are furnished free of expense to the United States. The clerk of the district court for the eastern district shall keep his office at Muskogee, and the clerk for the western district at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City.

"§ 102. The State of *Oregon* shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first

Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the clerk for said district shall each appoint, in the manner provided by law, at least one deputy at Pendleton and one at Medford, who shall reside and maintain an office at each of said places."[31] The State courts of Oregon have "jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State."[32] The District Court of Oregon has the same territorial jurisdiction.[33] This concurrent jurisdiction does not extend to permanent structures attached to the river-bed within the boundary of the other State.[34] It has been held that the District Court of Washington has concurrent jurisdiction over floating structures used in connection with fish-nets in the river, although anchored by means of weights,[35] and that the District Court of Oregon has jurisidetion in admiralty over a vessel moored at a wharf on the Washington shore.[36]

"§ 103. The State of *Pennsylvania* is divided into three judicial districts, to be known as the *eastern, middle*, and *western districts* of Pennsylvania. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntington, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter,

31 36 St. at L. 1087.

32 Organic Act of Feb'y. 14, 1859, ch. 33, 11 St. at L. 383.

33 Nielsen v. Oregon, 212 U. S. 315, 316, 29 Sup. Ct. 383, 53 L. ed. 528; Columbia River Packers' Ass'n. v. McGowan, 172 Fed. 991.

34 Columbia River Packers' Ass'n. v. McGowan, 172 Fed. 991.

35 Ibid.

36 The Annie M. Smull, 2 Sawyer 226, Fed. Cas. No. 423. See, also, State v. Mullen, 35 Iowa, 199.

Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the District court shall be held at Scranton on the second Monday in March and the third Monday in October; at Harrisburg on the first Mondays in May and December; and at Williamsport on the first Monday in June. The clerk of the court for the middle district shall maintain an office in charge of himself or a deputy at Harrisburg and civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties thay are removed to another place for trial. The *western district* shall include the territoory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburg on the first Monday in May and the third Monday in October; and at Erie on the third Monday in July and the second Monday in January." [37]

In *Porto Rico* there is one district. Regular terms of the court are held at San Juan beginning on the second Mondays of April and October, and also at Ponce on the second Monday in January in each year, and special terms are also held at Mayaguez at such other stated times as the district judge deems expedient.[38] At the special terms held at Mayaguez, jury cases may be tried; and section 670 of the Revised Statutes of the United States does not apply to such terms of the District Court of Porto Rico.[39]

"§ 104. The State of *Rhode Island* shall constitute one judicial district, to be known as the district of Rhode Island. Terms of the district court shall be held at Providence on the fourth Tuesday in May and the Third Tuesday in November.[39a]

"§ 105. The State of *South Carolina* is divided into two districts, to be known as the *eastern* and *western* districts of South

[37] St. at L. 1087, am'd. Act of Mar. 3, 1913.

[38] 31 St. at L. 84, 85.

[39] Am. Railroad Co. v. Castro, 204 U. S. 453, 51 L. ed. 564.

[39a] Jud. Code, 36 St. at L. 1087, as am'd. Act of Feb'y. 1, 1912. as am'd. Act of Feb'y 1, 1912. See § 70, *infra*.

Carolina. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the District court for the western district shall be held at Greenville on the third Tuesdays in April and October. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the District court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville, and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other.[39b]

"§ 106. The State of *South Dakota* shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hansan, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sonborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the *southern division* of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the *northern division;* the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld,

[39b] Jud. Code, 36 St. at L. 1087, as am'd. Act of Feb'y. 5, 1912.

Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the *central division;* and the territory embraced on the date last mentioned in the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the *western division.* Terms of the district court for the southern division shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the *northern division,* at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the *central division,* at Pierre on the second Tuesday in June and the first Tuesday in October; and for the *western division,* at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the District court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court." [40]

"§ 27. The District court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota." [41] The District Court of the United States for South Dakota is the same court, whether held in one division or another; and where a recognizance bound an accused to appear at a term to be held in one division; it was held, that he might be subsequently ordered to appear for trial in another division, without relieving the sureties upon his recognizance.[42]

"§ 107. The State of *Tennessee* is divided into three districts, to be known as the *eastern, middle,* and *western* districts of Tennessee. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall consti-

[40] 36 St. at L. 1087.

[41] Ibid.

[42] Hollister v. U. S., C. C. A., 145 Fed. 773.

tute the *southern division* of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the *northern division* of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the *northeastern division* of said district. Terms of the District court for the *southern division* of said district shall be held at Chatanooga on the fourth Monday of April and the second Monday in November; for the *northern division,* at Knoxville on the fourth Monday in May and the first Monday in May and the first Monday in December; and for the *northeastern division*, at Greeneville on the first Monday in March and the third Monday in September. The *middle district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the *Nashville division* of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the *northeastern division* of said district. Terms of the district court for the *Nashville division* of said district shall be held at Nashville on the second Monday of March and the first Monday of November; and for the *northeastern division,* at Cookeville on the third Monday in April and the first Monday in November: *Provided,* That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the *western division* of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll,

Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the west bank of the river, which shall constitute the *eastern division* of said district. Terms of the District court for the *western division* of said district shall be held at Memphis on the fourth Mondays in May and November; and for the *eastern division,* at Jackson on the fourth Mondays in April and October. The clerk of the court for the *western district* shall appoint a deputy who shall reside at Jackson. The marshal for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the *eastern district* shall appoint a deputy who shall reside at Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greenville, which shall be kept open at all times for the transaction of the business of the court.[42a]

"§ 108. The State of *Texas* is divided into four districts, to be known as the *northern, eastern, western,* and *southern* districts of Texas. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which shall constitute the *Dallas division;* also the territory embraced on the date last mentioned in the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which shall constitute the *Fort Worth division;* also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and

42a Jud. Code, 36 St. at L. 1087, as am'd Act of Aug. 20, 1912.

Wheeler, which shall constitute the *Amarillo division;* also the territory embraced on the date last mentioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton, and Yoakum, which shall constitute the *Abilene division;* also the territory embraced on the date last mentioned in the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Manard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and Upton, which shall constitute the *San Angelo division* of the said district. Terms of the district court for the *Dallas division* shall be held at Dallas on the second Monday in January and the first Monday in May; for the *Fort Worth division,* at Fort Worth on the first Monday in November and the second Monday in March; for the *Amarillo division,* at Amarillo on the third Monday in April and the fourth Monday in September; for the *Abilene division,* at Abilene on the first Monday in October and the second Monday in April; and for the *San Angelo division,* at San Angelo on the third Monday in October and the fourth Monday in April. The clerk of the court for the *northern* district shall maintain an office in charge of himself or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, and at San Angelo, which shall be kept open at all times for the transaction of the business of the court. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which shall constitute the *Tyler division;* also the territory embraced on the date last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall constitute the *Beaumont division;* also the territory embraced on the date last mentioned in the counties of Collin, Cook, Denton, Grayson, and Montague, which shall constitute the *Sherman division;* also the territory embraced on the date last mentioned in the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which shall constitute the *Jefferson division;* also the territory embraced on the dast last mentioned in the counties of Delta,

Fannin, Red River, and Lamar, which shall constitute the *Paris division;* also the territory embraced on the date last mentioned in the counties of Bowie, Franklin, and Titus, which shall constitute the *Texarkana division.* Terms of the District court for the *Tyler division* shall be held at Tyler on the fourth Mondays in January and April; for the *Jefferson division,* at Jefferson on the first Monday in October and the third Monday in February; for the *Beaumont Division,* at Beaumont on the third Monday in November and the first Monday in April; for the *Sherman division,* at Sherman on the first Monday in January and the third Monday in May; for the *Paris division,* at Paris on the third Monday in October and the first Monday in March; and for the *Texarkana division* at Texarkana on the third Monday in March and the first Monday in November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Sherman at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the *Austin division;* also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the *San Antonio division;* also the territory embraced on the date last mentioned in the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward, and Winkler, which shall constitute the *El Paso division:* also the territory embraced on the date last mentioned in the counties of Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell, which shall constitute the *Waco division;* also the territory embraced on the date last mentioned in the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the *Del Rio division.* Terms of the District court for the *Austin division* shall be held at Austin on the fourth Monday in January and

the second Monday in June; for the *Waco division* on the fourth Monday in February and the second Monday in November; for the *San Antonio division,* at San Antonio on the first Monday in May and the third Monday in December; for the *El Paso division,* at El Paso on the first Monday in April and the first Monday in October; and for the *Del Rio division,* at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Austin, El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The *southern district* shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which shall constitute the *Laredo division;* also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the *Brownsville division;* also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the *Galveston division;* also the territory embraced on the date last mentioned, in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall constitute the *Houston division;* also the territory embraced on the date last mentioned, in the counties of Calhoun, Dewitt, Goliad, Jackson, Refugio, and Victoria, which shall constitute the *Victoria division.* Terms of the District Court for the *Galveston division* shall be held at Galveston on the second Monday in January and the first Monday in June; for the *Houston division,* at Houston on the fourth Mondays in February and September; for the *Laredo division,* at Laredo on the third Monday in April and the second Monday in November; for the *Brownsville division,* at Brownsville on the second Monday in May and the first Monday in December; and for the *Victoria division,* at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at each of the places now designated for holding court in said

district."[43] "The counties of Bee, Live Oak, Aransas, San Patricio, Nueces, Jim Wells, Duval, Brooks, and Willack shall constitute a division of the southern judicial district of Texas. Terms of the District Court of the United States for the said southern district of Texas shall be held twice in each pear at the city of Corpus Christi, in Nueces County, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Corpus Christi, of which he shall make publication and give due notice."[43a] "That the counties of Reeves, Ward, Martin, Reagan, Winkler, Ector, Gaines, Andrews, Upton, Midland, Loving, Jeff Davis, and Crane shall constitute a division of the western judicial district of Texas. Terms of the District Court of the United States for the western district of Texas shall be held twice in each year at the city of Pecos, in Reeves county, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Pecos, of which he shall make proclamation and give due notice: *Provided,* however, that suitable rooms and accommodations shall be furnished for the holding of said court and for the use of the officer of said court at Pecos, free of expense to the Government of the United States."[43b]

"§ 109. The State of *Utah shall* constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the *northern* and *central* divisions. The *northern division* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The *central division* shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne. Terms of the district court

[43] 36 St. at L. 1087. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fe Railroad Company, see 23 St. at L., ch. 177, § 8, p. 72; 23 St. at L. ch. 179, § 8, p. 975; Briscoe v. Southern Kan. Ry. Co., 40 Fed. 273. As to jurisdiction over pending cases, see O'Connor v. O'Connor, 146 Fed. 994. See also *Re* Jackson, 40 Fed. 372; International Bank & Trust Co. v. Scott, C. C. A., 159 Fed. 58.

[43a] Act of May 29, 1912.

[43b] Act of Feb'y 5, 1913.

for the *northern division* shall be held at Ogden on the second Mondays in March and September; and for the *central division,* at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district.

"§ 110. The State of *Vermont* shall constitute one judicial district, to be known as the district of Vermont. Terms of the District court shall be held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October. And at Brattleboro on the third Tuesday in December. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier and one at Newport; *Provided, however,* that suitable rooms and accommodations shall be furnished for the holdings of said court and for the use of the officers of said court at Brattleboro free of expense to the Government of the United States until the public building provided for by Act of Congress shall be erected."[43c]

"§ 111. The State of *Virginia* is divided into two districts to be known as the *eastern* and *western* districts of Virginia. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoin, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York. Terms of the District court shall be held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November and at Alexandria, on the first Mondays in January and July. The *western district* shall include the the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albemarle, Am-

herst, Appomattox, Augusta, Bath, Bedford, Bland, Botecourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe. Terms of the district court shall be held at Lynchburg on the Tuesdays after the second Mondays in March and September; at Danville on the Tuesdays after the second Mondays in April and November; at Abingdon on the Tuesdays after the first Mondays in May and October; at Harrisonburg on the Tuesdays after the first Mondays in June and December; at Charlottesville on the second Monday in January and the first Monday in July; at Roanoke on the third Monday in February and the third Monday in June; and at Big Stone Gap on the fourth Monday in January and the second Monday in August. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Lynchburg, at Danville, at Charlottesville, at Roanoke, at Abingdon, and at Big Stone Gap, which shall be kept open at all times for the transaction of the business of the court."[44] The court of admiralty in the Eastern District of Virginia can serve process of the Potomac River below Georgetown, between the District of Columbia and Alexandria County, Virginia.[45]

"§ 112. The State of *Washington* is divided into two districts, to be known as the *eastern* and *western* districts of Washington. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *northern division;* also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas,

[44] 36 St. at L. 1087. As to the boundary between Virginia and West Virginia, see Bluefield Water Works & Imp. Co. v. Sanders, 63 Fed. 333.

[45] Atcheson v. The Endless Chain Dredge, 40 Fed. 253.

and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *southern division* of said district. Terms of the District court for the *northern division* shall be held at Spokane on the first Tuesdays in April and September; for the *southern division,* at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *northern division;* also the territory embraced on the date last mentioned in the counties of Pieree, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which shall constitute the *southern division* of said district. Terms of the district court for the *northern division* shall be held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the *southern division,* at Tacoma on the first Tuesdays in February and July. The clerks of the courts for the eastern and western districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held."[46] The United States District Court and the State courts of Washington have jurisdiction concurrent with the courts, State and Federal, in the State of Oregon, in civil and criminal cases upon the Columbia River.[47] This includes jurisdiction over a floating structure used in connection with fish-nets in the river, although anchored by means of weights.[48] It has been said, that ordinarily when such a structure is on the Oregon side of the river, the Federal court in Washington should, through comity, decline to grant an injunction vacating the same, but should leave the parties aggrieved to their remedy in the court sitting in the other State.[49] Where the court granted an injunction against the use of such a floating structure on

[46] 36 St. at L. 1087.

[47] Columbia River Packers' Ass'n. v. McGowan, 172 Fed. 991.

[48] Ibid. See *supra* under Oregon.

[49] Columbia River Packers' Ass'n. v. McGowan, 172 Fed. 991.

the Oregon side of the Columbia River, under the erroneous belief that it was within the boundary of Washington, it refused to dismiss the suit at the complainant's request so as to deprive the defendant of its remedy upon the injunction bond.[50]

"§ 113. The State of *West Virginia* is divided into two districts, to be known as the *northern* and *southern* districts of West Virginia. The *northern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley ,and Jefferson, with the waters thereof. Terms of the District court for the northern district shall be held at Martinsburg, the first Tuesday of April and the third Tuesday of September; at Clarksburg, the second Tuesday of April and the first Tuesday of October; at Wheeling, the first Tuesday of May and the third Tuesday of October; at Philippi, the fourth Tuesday of May and first Tuesday of November; at Parkersburg, the second Tuesday of January and second Tuesday of June: *Provided,* That a place for holding court at Philippi shall be furnished the Government free of cost by Barbour County until other provision is made therefor by law. The *southern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday in June and the third Tuesday in November; at Huntington, on the first Tuesday in April and the first Tuesday after the third Monday in September; At Bluefield on the first Tuesday in May and the third Tuesday in October; at Addison on the first Tuesday in September; and at Lewisburg on the second Tuesday in July: *Provided,* That ac-

50 Ibid.

commodations for holding court at Addison shall be furnished without cost to the United States.[50a]

§ 114. The State of *Wisconsin* is divided into two districts, to be known as the *eastern* and *western* districts of Wisconsin. The *eastern district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago. Terms of the District court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The *western district* shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood. Terms of the District court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The District court for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior may be made returnable at Superior; and the clerk at that place shall keep in his office the original records of all

[50a] Jud. Code, 36 St. at L. 1087, as am'd. Act of Mar. 23, 1913.

actions, prosecutions, and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned, shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers and orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial."[51]

It was held: that the District Court for the Eastern District of Wisconsin had no jurisdiction of an indictment for assault, committed on a vessel on Lake Huron, within the boundary of the jurisdiction of the Eastern District of Michigan.[52]

"§ 115. The State of *Wyoming* and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided,* That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the Government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park."[53] "§ 26. The District court for the district of Wyoming shall have jurisdiction of all felonies committed within the

[51] 36 St. at L. 1087.

[52] U. S. v. Peterson, 64 Fed. 145.

[53] 36 St. at L. 1087.

Yellowstone National Park and appellate jurisdiction of judgments in cases of convictions before the commissioner authorized to be appointed under section five of an Act entitled 'An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes,' approved May seventh, eighteen hundred and ninety-four."[54] "It seems that the territorial limits of these districts, as fixed by the statute, are unaffected by any subsequent State legislation authorizing new counties and changing county lines.[55]

§ 67. Jurisdiction of District Court of Alaska. In Alaska there is a District Court with general jurisdiction in civil, criminal, equity and admiralty cases. The court consists of three divisions, each of which is held by a different judge with a separate clerk, district attorney and marshal. Jurisdiction of each division extends over the entire territory; but the court, where an action is pending, may change the place of trial from one place to another in the same or another division for local prejudice, for the convenience of witnesses, disqualification of the division judge or the convenience of the defendant, and in criminal prosecution also to save expense to the United States, where the defendant will not be prejudiced thereby.[1] The judge of each division is required to divide his division into precincts, and is authorized to alter the same and establish new precincts from time to time, as public convenience may require.[2] He is also required to appoint commissioners and to remove such commissioners, at pleasure.[3] These commissioners have within their respective precincts the jurisdiction and powers of the commissioners of the District Courts of the United States and of notaries public. They are *ex officio* justices of the peace, recorders and probate judges. They have also power to grant writs of *habeas corpus,* returnable before a district judge, for the purpose of inquiring into the cause of restraint of liberty.[4]

It was held: that an order abolishing a precinct, providing that the territory embraced therein should become a part of another precinct, accepting the resignation of the commissioner

[54] Ibid.

[55] Hyde v. Victoria Land Co., 125 Fed. 970.

§ 67. [1] 23 St. at L. 24; 30 St. at L. 545; 31 St. at L. 321. The boundaries of these divisions are described *supra*, § 66, paragraph § 70.

[2] Ibid.

[3] Ibid.

[4] Act of June 6, 1900, 31 St. at L. 321, § 6. This act contains the Code of Civil Procedure for Alaska.

for the precinct abolished, and directing him to "deliver the record and property pertaining to his office" to the commissioner of the new district, with which the former one was consolidated; constituted the commissioner of the latter precinct the successor in office of the former commissioner of that abolished, and transferred to him all the probate cases pending in the former precinct, with power to proceed in the same.[5] The practice in Alaska is regulated by a Code of Civil Procedure for Alaska [6] and a Criminal Code.[7] The common law is also in force in this territory.[8] The inhabitants of Alaska, at least when they are not members of the Indian tribes there, have the right, when charged with crime, to a trial by jury of twelve, before they can be convicted.[9]

§ 68. Jurisdiction of the Supreme Court of the District of Columbia. The Supreme Court of the District of Columbia has in general the same civil jurisdiction that was vested in the General Court, or the Supreme Court of Chancery, of Maryland, on February 27th, 1801.[1] It has also the same civil jurisdiction as the District Courts of the United States,[2] with the possible exception of admiralty, and including jurisdiction in bankruptcy, when the bankrupt resides in the district.[3] It has no jurisdiction of suits against persons not inhabitants of the district, except in the same way that nonresidents were proceeded against in the General Court or Supreme Court of Chancery of Maryland on May 3, 1802, and where such jurisdiction is conferred by special statutes.[4] It has jurisdiction of applications for divorce.[5] It has jurisdiction to issue writs of

For the Alaska Criminal Code, see Act of March 3, 1899, 30 St. at L. 1253. For the former statute, see the Organic Act of May 17, 1884, 23 St. at L. 24. It has been held that such commissioners have no jurisdiction of larceny committed in a ship, steamboat or other vessel. *Ex parte* Kie, 46 Fed. 485. As to probate jurisdiction, see *Ex parte* Emma, 48 Fed. 211.

5 Cheney v. Alaska Treadwell Gold Min. Co., C. C. A., 148 Fed. 808.

6 31 St. at L. 321.

7 30 St. at L. 253. Act of March 3, 1899.

8 The common law is in force in this territory. McCloskey v. Pacific Coast Co., C. C. A., 22 L.R.A.(N.S.) 673, 160 Fed. 794.

9 Rassmussen v. U. S., 197 U. S. 516, 25 Sup. Ct. 514, 49 L. ed. 863.

§ 68. 1 D. C. Code, § 1; 31 St. at L. 1189.

2 Ibid.

3 R. S. D. C. § 765, 19 St. at L. 253, 254.

4 D. C. Code, §§ 105–112. 32 St. at L. 520.

5 D. C. Code, § 963.

mandamus, prohibition and certiorari which cannot be issued by the District Courts of the United States.[6] It may thus issue the writ of mandamus addressed to administrative officers of the United States within the district.[7] It might be held that it has power to review by *certiorari* in a proper case a decision of a *quasi* judicial nature made by an executive officer of the United States at Washington;[8] and to issue writs of prohibition directed to inferior courts and to public boards and officers acting in a *quasi* judicial capacity within the district,[9] and writs of *quo warranto* to determine the right to hold an office of the United States within the district.[10] The practice in this court is regulated by a code of procedure, enacted by Congress, which recognizes the distinction between common law and equity.[11] Before the enactment of that code, the court had power to make rules for its practice at common law and in equity;[12] including a rule that in an action on contract where the plaintiff or his agent files an affidavit setting forth his cause of action and the sum claimed, exclusive of set-off and just grounds of defense, and serves the defendant with copies of the same and of his declaration, he shall be entitled to judgment, unless the defendant filed with his plea in bar a sufficient affidavit of defense, which specifically states in precise and distinct terms grounds of a defense in whole or in part.[13]

[6] 32 St. at L. 520.

[7] D. C. Code § 68, 31 St. at L. 1189; U. S. v. Schurz, 102 U. S. 378, 394, 26 L. ed. 167, 171; Kendall v. U. S., 12 Pet. 524, 9 L. ed. 1181; Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Com'r of Patents v. Whiteley, 4 Wall. 522, 18 L. ed. 335; U. S. ex rel. Miller v. Black, 128 U. S. 40, 50, 32 L. ed. 354; U. S. ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183; Roberts v. U. S., 176 U. S. 221, 44 L. ed. 443; U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 47 L. ed. 1074. See *infra*, § 457.

[8] Alexandria C. R. & Br. Co. v. District of Columbia, 5 Mackey (D. C.) 376; Wood v. District of Columbia, 6 Mackey (D. C.) 142; Foster & Abbott on the Federal Income Tax, 238. See *infra*, § 460.

[9] Smith v. Whitney, 116 U. S. 167, 173, 29 L. ed. 601, 602. See *infra*, § 456.

[10] See the discussion in the Electoral Commission, cited, *infra*, § 468.

[11] 31 St. at L. 1189.

[12] Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 47 L. ed. 194.

[13] Ibid. It is doubtful whether the Equity Rules prescribed by the Supreme Court of the United States apply to this court. The judges thereof are preparing new rules substantially in accordance with these, which will probably be in force before this work is through the press.

§ 69. Jurisdiction of the Court of Appeals of the District of Columbia. The appellate jurisdiction of the Court of Appeals of the District of Columbia is as follows: "Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, including any final order or judgment in any case heard on appeal from a justice of the peace, may appeal therefrom to the said court of appeals; and upon such appeal the court of appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said court of appeals from all interlocutory orders of the supreme court of the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said court of appeals, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal."[1] This court has further jurisdiction of appeals from the decisions of the Commissioner of Patents refusing to issue or to reissue patents,[2] and from the decision of that commissioner in any interference case.[3] It has also jurisdiction of appeals from the decisions of the commissioner upon an application for the registration of a trade-mark, or for the cancellation of such a registration, or upon an interference as to a trademark.[4] In the last class of cases, the appeal may be taken by an applicant for a registration, or a party to an interference, or a party who has filed opposition to a registration, or a party to an application for the cancellation of a registration.[5] In these classes of cases, "when an appeal is taken to the [Court of Appeals] of the District of Columbia, the ap-

§ 69. [1] D. C. Code, § 226. 27 St. at L. 434, Comp. St. 573, 4 Fed. St. Ann. 466.

[2] D. C. Code, § 228, 27 St. at L. 436, § 9, Comp. St. 3391, 5 Fed. St. Ann. 502, Pierce's Fed. Code, § 7336, D. C. R. S., § 780; U. S. R. S., § 4912, 5 Fed. St. Ann. 505; Pierce's Fed. Code, § 8777; McKnight v. Metal Volatilization Co., 128 Fed. 51.

[3] D. C. Code, § 228, 27 St. at L. 436, § 9, Comp. St. 3391, 5 Fed. St. Ann. 502; McKnight v. Metal Volatilization Co., 128 Fed. 51.

[4] 34 St. at L. 1251, § 9; Pierce's Fed. Code, § 8815; McKnight v. Metal Volatilization Co., 128 Fed. 51.

[5] Ibid.

pellant shall give notice thereof to the Commissioner, and file in the Patent-Office, within such time as the commissioner shall appoint, his reasons of appeal, specifically set forth in writing."[6] "The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded."[7] "The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent-Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."[8] The statute authorizing such appeals is constitutional.[9] It does not repeal[10] the prior statutes authorizing subsequent bill in equity to compel the issue of patents[11] and for relief against interfering patents,[12] which are discussed in a subse-

6 U. S. R. S., § 4912, 5 Fed. St. Ann. 505, Pierce's Fed. Code, § 8777.

7 U. S. R. S., § 4913, 5 Fed. St. Ann. 506, Pierce's Fed. Code; § 8778.

8 U. S. R. S., § 4914, Pierce's Fed. Code, § 8779.

9 U. S. v. Duell, 172 U. S. 576.

10 McKnight v. Metal V. Co., 128 Fed. 51; Dover v. Greenwood, 143 Fed. 136.

11 U. S. R. S., § 4915, 5 Fed. St. Ann. 507; Pierce's Fed. Code, § 8780.

12 U. S. R. S., § 4918, 5 Fed. St. Ann. 526.

quent section of this work.[13] Upon appeals to the Court of Appeals from the District of Columbia in interference cases, the question in issue is merely the priority between the two inventors, and whether either of them was the original defendant is not to be determined.[14]

§ 70. Jurisdiction of District Court of Porto Rico. The District Court of the United States for Porto Rico has the ordinary jurisdiction of the District Courts of the United States. It has jurisdiction over all controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign State or States; wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $1,000.[1] This includes a suit between two subjects of a foreign government.[2] It has not jurisdiction over controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country, such as a suit where the sole plaintiff is a citizen of Porto Rico, and one or more of the defendants are citizens of the United States or aliens.[3] The laws of the United States relating to appeals, writs of error and *certiorari* which apply to the Supreme Courts of the Territories and those relating to the removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States, govern in such matters and persons, as between the District Court of the United States and the courts of Porto Rico.[4] The Supreme and District courts of Porto Rico, and the judges thereof, may grant writs of *habeas corpus,* in all cases in which the same can be made by the judges of the District Courts of the United States.[5] The District Court of the United States for Porto Rico is not a constitutional court of the United States.[6] Its authority emanates wholly from Congress, under the sanction of its power to govern territory occupying the relation that exists between Porto Rico and the United States.[7] When Congress has not legislated upon

13 *Infra*, § 147.

14 Wheaton v. Kendall, 85 Fed. 666.

§ 70. 1 31 St. at L. 77, 84, 85.

2 Ortega v. Larga, 202 U. S. 339, 50 L. ed. 1055.

3 Cuebas v. Cuebas, 223 U. S. 376, 56 L. ed. 476.

4 31 St. at L. 84, 85, 953.

5 31 St. at L. 86.

6 Romeu v. Todd, 206 U. S. 358, 51 L. ed. 1093.

7 Ibid.

the subject, the local law of Porto Rico remains in force.[8] The statute laws of the United States not locally inapplicable have the same force and effect in Porto Rico as in the United States, except the revenue law.[9] It is subject to the provisions of the Revised Statutes[10] providing for the surrender of fugitive criminals by Governors of Territories.[11] The Employers' Liability Act[12] and the Safety Appliance Acts,[13] the there in force. The sections of the Revised Statutes regulating bills of exceptions apply to the District Court of the United States for Porto Rico.[14] It is undetermined whether the provisions of the Code of Civil Procedure of Porto Rico upon that subject apply to that court.[15]

§ 71. Jurisdiction of District Court of Hawaii. The District Court of Hawaii has jurisdiction of all cases cognizable in a District Court of the United States, and it proceeds therein in the same manner as a District Court of the United States. The laws of the United States relating to juries and jury trials are applicable to this court. The laws of the United States, relating to appeals, writs of error, removal of causes, and other matters and proceedings, as between the State and Federal courts, govern in such matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii,[1] Until the Act of June 14, 1900, which formally incorporated the Territory of Hawaii,[2] there was no right to a grand jury, nor to the unanimous verdict of a petit jury, in Hawaii.[3]

8 Ibid.

9 Act of April 12, 1900, 31 St. at L 7780, Ch. 191, § 14.

10 U. S. R. S., § 5278.

11 Kopel v. Bingham, 211 U. S. 468, 53 L. ed. 286.

12 Act of April 22, 1908, 35 St. at L. 65, 291 Ch. 149; Am. R. R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879.

13 Act of March 2, 1893, 27 St. at L. 531, Ch. 196; Act of April , 1896, 29 St. at L. 85; Act of March 2, 1903, St. at L. ; Am. R. R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. —.

14 See U. S. R. S., § 953; Guardian Assurance Co. v. Quintana, 227 U. S. 100, 57 L. ed. —.

15 Ibid., 227 U. S. 100, 105, 57 L. ed. —.

§ 71. 1 31 St. at L. 158.

2 31 St. at L. 141. See §§ 5 and 83.

3 Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. ed. 1016. See Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 129.

§ 72. Jurisdiction of the Supreme Court and other courts of the Philippine Islands. The Acts of the Phillipine Commission provide: "Courts of justice shall be maintained in every province in the Philippine Islands in which civil government is established; which courts shall be open for the trial of all causes proper for their cognizance, and justice shall be therein impartially administered without corruption or unnecessary delay."[1] "The judicial power of the Government of the Philippine Islands shall be vested in a Supreme Court, Courts of First Instance, and courts of justices of the peace, together with such special jurisdictions of municipal courts and other special tribunals as now are or hereafter may be authorized by law. The two courts first named shall be courts of record,"[2] "The interlocutory jurisdiction referred to in the previous sections of this chapter shall be held to include the hearing of all motions for appointment of receiver, for temporary injunctions, and for all other orders of the court which are not final in their character and do not involve a decision of the case pending upon its merits. The interlocutory jurisdiction shall also include the hearing of petitions for the writ of habeas corpus, applications for bail, the holding of preliminary examinations, and such orders in criminal causes as do not involve a final sentence of conviction or judgment of acquittal. The interlocutory jurisdiction shall also include the power of appointing notaries public, as provided in section thirty-three hundred and seventy-

§ 72. [1] § 2160, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 207.

[2] § 2161, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ct. 207. See Act of July 1, 1902 (32 St. at L. 691, 695). "Chap. 1369.—An Act temporarily to provide for the administration of the affairs of civil government in the Philippine islands, and for other purposes." . . .

"§ 9. That the Supreme Court and the court of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the government of said Islands, subject to the power of said government to change the practice and method of procedure. The municipal courts of said Islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law."

seven hereof."[3] "The Supreme Court shall consist of a Chief Justice and six associate judges, any five of whom when convened shall form a quorum, and may transact any of the business of the court; but in the absence of a quorum the member or members present may adjourn the court from time to time with the same effect as if all were present. The concurrence of at least four members of the court shall be necessary to pronounce a judgment. The word 'judges' or 'judges of the Supreme Court when used in this title shall include the Chief Justice."[4] "The Supreme Court shall sit in banc as a body composed of all its members, and the Chief Justice shall be the presiding officer thereof. In case of his absence at a session of the court, the judge present next in seniority to the Chief Justice shall preside. The seniority of the associate judges shall be determined by the dates of their respective commissions."[5] "The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, and quo warranto in the cases and in the manner prescribed in title forty-one hereof, and to hear and determine the controversies thus brought before it, and in other cases provided by law."[6] "The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from Courts of First Instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court."[7] "The Supreme Court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction."[8] "There shall be in each province a Court of

[3] § 2164 (*d*), Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 207.

[4] § 2169, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

[5] § 2171, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

[6] § 2177, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208. See chapters 252 and 253 and cases there cited.

[7] § 2178, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208. U. S. v. Atienza, 1 Phil. Rep. 736. See, also, chapter 251 and cases there cited.

[8] § 2179, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 208.

First Instance, in each of which a judge shall preside. Each judge shall preside in all Courts of First Instance in his judicial district, which shall consist of such provinces as shall be by law designated to constitute such judicial district. But this section shall not apply to the city of Manila."[9] "There shall be one Court of First Instance for the city of Manila, with three judges who shall preside in such court in separate court rooms. The judges of said court may be removed by the Governor-General, by and with the approval of the Commission. Actions brought in the Court of First Instance for the city of Manila shall be equally apportioned for trial among the judges thereof in accordance with rules to be made by the judges of the Supreme Court. Any action apportioned to one judge may be tried by another judge when more convenient to the judges."[10] "The jurisdiction of Courts of First Instance shall be of two kinds: (*a*) Original: and (*b*) Appellate."[11] "Courts of First Instance shall have original jurisdiction: (*a*) In all civil actions in which the subject of litigation is not capable of pecuniary estimation; (*b*) In all civil actions which involve the title to or possession of real property, or any interest therein, or the legality of any tax, impost, or assessment, except actions of forcible entry into and detainer of lands or buildings, original jurisdiction of which is by law conferred upon courts of justice of the peace; (*c*) In all cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to two hundred pesos or more; (*d*) In all actions in admiralty and maritime jurisdiction, irrespective of the value of the property in controversy or the amount of the demand; (*e*) In all matters of probate, both of testate and intestate estates, appointment of guardians, trustees, and receivers, and in all actions for annulment of marriage, and in all such special cases and proceedings as are not otherwise provided for; (*f*) In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding two hundred pesos may be imposed;

[9] § 2198, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209.

[10] § 2199, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209. Garcia v. Ambler, 4 Phil. Rep. 81.

[11] § 2204, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209.

(*g*) Said courts and their Judges, or any of them, shall have power to issue writs of injunction, mandamus, certiorari, prohibition, quo warranto, and habeas corpus in their respective provinces and districts, in the manner provided in title forty-one hereof; (*h*) Of all crimes and offenses committed on the high seas or beyond the jurisdiction of any country, or within any of the navigable waters of the Philippine Islands, on board a ship or water craft of any kind registered or licensed in the Philippine Islands in accordance with the laws thereof. The jurisdiction herein conferred may be exercised by the Court of First Instance in any province into which the ship or water craft upon which the crime or offense was committed shall come after the commission thereof: *Provided, nevertheless,* That the court first lawfully taking cognizance thereof shall have jurisdiction of the same to the exclusion of all other courts in the Philippine Islands."[12] "Courts of First Instance shall have appellate jurisdiction over all causes arising in justices' and other inferior courts in their respective provinces."[13] "A judge of First Instance shall have power to issue writs of injunction and to make orders appointing receivers in causes pending in the Court of First Instance within his district, and all other preliminary and interlocutory orders, when he is within the district but without the province; and to hear and determine, when within the district but without the province, any interlocutory motion or issue after due and

[12] § 2205, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209; U. S. v. Sweet, 1 Phil. Rep. 18; Legarda v. Valdez, 1 Phil. Rep. 146; U. S. v. Fowler, 1 Phil. Rep. 614; U. S. v. Dasal, 3 Phil. Rep. 6; Benedicto v. De la Rama, 3 Phil. Rep. 34; Springer v. Odlin, 3 Phil. Rep. 344; Artacho v. Provincial Board of Pangasinan, 4 Phil. Rep. 670; Oehlers v. Hartwig, 5 Phil. Rep. 487; Castano v. Lobingier, 7 Phil. Rep. 91; Rafferty v. Judge of First Instance, 7 Phil. Rep. 164. See, also, chapters 238 and 256, and cases there cited under different subjects mentioned in this section. The phrase "admiralty and maritime jurisdiction" did not put in force in the Philippines the law, practice, and procedure in force in admiralty courts in the United States, Ivancich v. Odlin, 1 Phil. Rep. 284; Heath v. Steamer "San Nicholas," 7 Phil. Rep. 532. For annulment of marriage and divorce see Benedicto v. De la Rama, 3 Phil. Rep. 34; Ibanez v. Ortiz, 5 Phil. Rep. 325.

[13] § 2206, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209.

reasonable notice to the parties; but all final hearings shall be had within the province unless the parties by their counsel consent in writing to a hearing at a place not within the province. On the filing of a petition for the writ of habeas corpus or for release upon bail or reduction of bail in any Court of First Instance, the hearing may be tried at any place in the judicial district which the judge shall deem convenient. All criminal trials must be tried at the place designated in the law as the place at which the court having jurisdiction thereof shall be held, unless the Secretary of Finance and Justice shall otherwise order, as provided in section twenty-two hundred and twenty-seven hereof."[14] "In every province in which there now is, or shall hereafter be established, a Court of First Instance, courts of justices of the peace shall be maintained in every organized municipality."[15] "In all civil actions including those mentioned in sections twenty-six hundred and ninety to twenty-seven hundred, inclusive, hereof, arising in his municipality and not exclusively cognizable by the Court of First Instance, the justice of the peace shall have exclusive original jurisdiction where the value of the subject-matter or amount of the demand does not exceed two hundred pesos, exclusive of interest and costs; and where such value or demand exceeds two hundred pesos but is less than six hundred pesas the justice of the peace shall have jurisdiction concurrent with the Court of First Instance. In forcible entry and detainer proceedings the justice shall have original jurisdiction but he may receive evidence upon the question of title therein solely for the purpose of determining character and extent of possession and damages for detention. A justice of the peace shall have no jurisdiction to adjudicate questions of title to real estate or any interest therein, and whenever a case requiring such adjudication is brought before him it shall be his duty, upon discovering the same, to suspend further proceedings therein and certify the cause forthwith to the Court of First Instance. The jurisdiction of a justice of the peace shall not extend to civil actions

[14] § 2229, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 209. U. S. v. Tan Bauco, 4 Phil. Rep. 325.

[15] § 2234, Compilation Acts of the Philippine Commission 1908, Part VIII, the Judiciary, Title 39, Ch. 210.

in which the subject of litigation is not capable of pecuniary estimation, except in forcible entry and detainer cases; nor to those which involve the legality of any tax, impost or assessment; nor to actions involving admiralty or maritime jurisdiction; nor to matters of probate, the appointment of guardiens, trustees, or receivers; nor to actions for annulment of marriage."[16] "The territorial jurisdiction of a justice of the peace, except in the case of ex officio justices and in other special cases provided by existing law, shall be coextensive with his municipality, and the civil process of his court shall not run beyond the same except to summon a defendant impleaded with one who resides and has been served therein as provided in section twenty-four hundred and seventy-nine hereof. Forcible entry and detainer actions shall be brought in the municipality where the subject-mater thereof is situated. All other proceedings shall be instituted in the municipality wherein a defendant resides or may be served with summons."[17] "Justices of the peace, except in the city of Manila, shall have original jurisdiction to try parties charged with misdemeanors, offenses, and infractions of municipal ordinances, arising within the municipality, in which the penalty provided by law does not exceed six months' imprisonment or a fine of two hundred pesos, or both such imprisonment and fine."[18] "Concurrent jurisdiction is hereby conferred upon the justices of the peace for the municipalities of Iloilo and Buenavista over causes arising in the barrio now known as Sanao, on the Island of Guimaras, in the Province of Iloilo, anything in existing law to the contrary notwithstanding: *Provided, however,* That the justice of the peace first acquiring jurisdiction over any cause shall have exclusive jurisdiction thereof."[19] "The governor of the Province of Palawan is hereby made ex officio justice of the peace with authority to perform all the duties of a justice of the peace throughout the whole of the Province of

[16] § 2237, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[17] § 2238, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[18] § 2239, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[19] § 2240, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

Palawan. His jurisdiction as justice of the peace shall be concurrent in every municipality and in every part of said province with that of the proper justice of the peace of the municipality. The fees that would accrue to a justice of the peace shall, in all cases where the provincial governor acts as justice of the peace, be covered into the treasury of the province for the general purposes of the province."[20] "The governor of the Province of Mindoro is hereby made ex officio justice of the peace with authority to perform all the duties of a justice of the peace throughout the whole of the Province of Mindoro. His jurisdiction as justice of the peace shall be concurrent in every municipality and in every part of said province with that of the proper justice of the peace of the municipality. The fees that would accrue to a justice of the peace shall, in all cases where the provincial governor acts as justice of the peace, be covered into the treasury of the province for the general purposes of the province."[21] "The Governor-General is authorized, with the advice and approval of the Philippine Commission, to appoint a justice of the peace and auxiliary justice of the peace, from time to time, for the Island of Basilan, notwithstanding said island has been included within the municipality of Zamboanga by Act Numbered Twenty-one of the legislative council of the Moro Province. The justice of the peace and auxiliary justice of the peace appointed by virtue of this section shall have jurisdiction throughout the Island of Basilan to the same extent and with the same effect as though the Island of Basilan constituted a regular municipality. The justice of the peace and auxiliary justice of the peace for the municipality of Zamboanga shall not have jurisdiction within the Island of Basilan."[22] The commission has also passed statutes regulating the practice in these courts in civil[23] and criminal procedure.[24] The power to enact such

[20] § 2241, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[21] § 2242, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[22] § 2243, Compilation Acts of the Philippine Commission 1908, Part VIII. the Judiciary, Title 39, Ch. 210.

[23] Ibid. Title 41, chaps. 29–275. §§ 2403, 3248.

[24] Ibid. Title 42, chaps. 276–290, § 3249, 3375.

legislation is given by the Act of July 1, 1902.[25] The Act of February 6, 1905, after providing for the guarantee by the Philippine Government of the payment of interest on certain railroad bonds and of the security for the same by lien upon the railroad and the company's other property, subsequent to the mortgage, under which the bonds were issued, continues "The Supreme Court of the Philippine Islands shall have original and exclusive jurisdiction in all actions, proceedings or suits at law or in equity brought by the Philippine government against any person or corporation involving the construction of this section or any right existing under, duty enjoined, or act prohibited by said section or any contract made in pursuance thereof; and jurisdiction is hereby vested in the supreme court to make such order, to enter such judgment or decree and to take such proceedings in enforcement thereof as may be proper. During the vacations of said court the chief justice or any judge thereof shall have all the power to grant restraining orders, orders of injunction, to appoint receivers, or to do any other act under authority herein granted, that a judge of a court of general jurisdiction may do in the vacation of court."[26] It also has jurisdiction to determine adverse claims to land.[27] The Constitution of the United States does not guarantee to the inhabitants of the Philippine Islands the right to trial by jury.[28] It has been said that this right cannot exist until these Islands have been by Congress formally incorporated into the United States.[29]

§ 73. Jurisdiction of the United States Court for China. The United States Court for China has exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction might on June 30th, 1906,[1] "be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said juris-

[25] 32 St. at L. 691, 695; unchanged in this respect by Act of February 6, 1905, Ch. 453, 33 St. at L. 689, 691. Quoted *supra*, note 2.

[26] Ch. 453, § 4, 33 St. at L. 689, 691.

[27] Ibid. § 39.

[28] Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 129.

[29] Dorr v. U. S., 195 U. S. 138, 149, 24 Sup. Ct. 808, 49 L. ed. 129.

§ 73. [1] This jurisdiction is shown in U. S. R. S., §§ 4083–4130, quoted *infra*, § 74, and the treaties with China of Dec. 31, 1846, by Malley's Treaties, I, 196.

diction is qualified by section two of this act. The said court shall hold sessions at Shanghai, China, and shall also hold sessions at the cities of Canton, Tientsin, and Hongkong, at stated periods, the dates of such sessions at each city to be announced in such manner as the court shall direct, and a session of the court shall be held in each of these cities at least once annually. It shall be within the power of the judge, upon due notice to the parties in litigation, to open and hold court for the hearing of a special cause at any place permitted by the treaties, and where there is a United States consulate, when, in his judgment, it shall be required by the convenience of witnesses, or by some public interest. The place of sitting of the court shall be in the United States consulate of each of the cities, respectively." "§ 2. The consuls of the United States in the cities of China to which they are respectively accredited shall have the same jurisdiction as they now possess in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged cannot exceed by law one hundred dollars fine or sixty days' imprisonment, or both, and shall have power to arrest, examine, and discharge accused persons or commit them to the said court. From all final judgments of the consular court either party shall have the right of appeal to the United States court for China: Provided, also, That appeal may be taken to the United States court for China from any final judgment of the consular courts of the United States in Korea so long as the rights of extra-territoriality shall obtain in favor of the United States." "§ 4. The jurisdiction of the said United States court, both original and on appeal, in civil and criminal matters, also the jurisdiction of the Consular courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American Consular courts in China, and all judgments and decisions of said Consular courts, and all decisions, judgments, and decrees of the United States court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common

law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject of the terms of any treaties between the United States and China."[2] The provisions of the statute making the common law applicable to criminal offenses, committed by American citizens in China, are construed as referring to the common law in force in the several American Colonies at the time of their separation from England, and include, not only the ancient common or internal law, but also statutes, which had previously been passed amendatory or in aid of the common law.[3] Among these was chapter 24 of the Statutes of 30, George II, enacted in 1757, creating the offense of obtaining money or goods under false pretenses, and subsequent amendments to the same.[4] The judicial authority of the United States Court in China is restricted to the five ports mentioned in the treaty with that nation,[5] namely, Kwang-Chow, Amoy, Fuchow, Ningpo and Shanghai.[6] The jurisdiction of Consular Courts is explained in the succeeding section.[7] The Chinese Court Regulations of 1864 promulgated the following rule: "Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others, within two."[8] Final decrees and judgments of this court may be

[2] Act of June 30, 1906, 34 Stat. at L. 814, Chap. 3934, "An Act creating a United States court for China and prescribing the jurisdiction thereof."

[3] Biddle v. U. S., C. C. A., 156 Fed. 759. As to the effect of a plea of former acquittal, based upon proceedings in the former United States Consular Court of Shanghai, see Price v. U. S., 156 Fed. 950, 85 C. C. A. 247, 13 Ann. Cas. 483, 15 L.R.A.(N.S.) 1272.

[4] Biddle v. U. S., C. C. A., 156 156 Fed. 950.

[5] See 9 Op. A. G. 294.

[6] Treaty of Dec. 31, 1846, Malley's Treaties, I. 196.

[7] *Infra*, § 74.

[8] Secretary Bayard said concerning this: "I do not, it is true, regard this rule as a statute. Not only had Mr. Burlingame no power to enact a statute, as such, but the language of the rule shows that it cannot be regarded as a statutory enactment. It limits suits on even sealed instruments to six years, and on unwritten engagements, no matter how solemn or how strongly evidenced, to two years. It contains no exception in favor of minors or persons under disability. It must be regarded, therefore, not as a statute covering civil limitations in all their bearings, but as an assertion that suits in consular courts in China are to be limited as to time, the limitation to be adapted to the social and business conditions of the

brought for review to the Circuit Court of Appeals for the Ninth Circuit, by appeal or writ of error, as the case may be.[9] Upon an appeal from this court, the record in this court should show an allowance of the appeal.[10] Unless the appeal is allowed in open court, a citation should be issued and served,[11] and the proceedings should conform in other respects to those of appeals to the Circuit Court of Appeals.

§ 74. Jurisdiction of the Consular Courts. The Revised Statutes provided as follows: "To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt, and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty."[1]

period of suit. In this way we can explain not only the limitation of two years for unwritten engagements, which in the then immature and unsettled condition of our business in China may have been eminently proper, but the omission of the exceptions I have noticed above. I held, therefore, that Rule XV. of the Regulations of 1864, while not to be regarded as having the authority or the fixedness of a statute, is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do the equity rules adopted by the Supreme Court of the United States and courts of the several States, not as a statutory mandate, to remain in force until expressly repealed or modified, but as a principle and regulation of practice which it is open to the court to expand or vary as the purposes of justice may require. As to the importance of your adopting such a rule there can be no question. Were there no such limitation required in China, American merchants in China might be harassed by old debts and stale demands outlawed in the United States, and their business much impeded. Aside from this the principle that the right of suit should be limited as to time, is as essential to public justice as is the principle that the right of suit should exist at all." Mr. Bayard to Mr. Denby, April 27, 1887. Wharton's Dig., § 125, Vol. III, Appendix, pp. 883, 884.

9 § 3, 34 St. at L. 814, 815, Jud. Code, § 131, 36 St. at L. 1087.

10 Steamer Spark v. Lee Choi Chum, 1 Sawyer 713.

11 Ibid.

§ 74. 1 U. S. R. S., § 4083, 2 Fed. St. Ann. 819, Pierce's Fed. Code, § 4245.

"The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution."[2] "Such officers are also invested with all the judicial authority necessary to execute the provisions of such treaties, respectively, in regard to civil rights, whether of property or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at least where, or nearest to which, the damage complained of was sustained, provided such port be one of the posts at which the United States are represented by consuls. Such jurisdiction shall embrace all controversies between citizens of the United States, or others, provided for by such treaties, respectively."[3] "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treates, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and

[2] U. S. R. S., § 4084, 2 Fed. St. Ann. 819, Pierce's Fed. Code, § 4246.

[3] U. S. R. S., § 4085, 2 Fed. St. Ann. 819, Pierce's Fed. Code, § 4247

deficiencies."[4] "Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed."[5] "The consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States, are authorized to try, hear, and determine all cases in regard to civil rights, whether of person or property, where the real debt or damages do not exceed the sum of one thousand dollars, exclusive of costs, and upon full hearing of the allegations and evidence of both parties, to give judgment according to the laws of the United States, and according to the equity and right of the matter, in the same manner as justices of the peace are now authorized and empowered where the United States have exclusive jurisdiction. They are also invested with the powers conferred by the provisions of sections forty hundred and eighty-six and forty hundred and eighty-seven for trial of offenses or misdemeanors."[6] "Any consul when sitting alone may also decide all cases in which the fine imposed does not exceed five hundred dollars, or the term of imprisonment does not exceed ninety days; but in all such cases, if the fine exceeds one hundred dollars, or the term of imprisonment for misdemeanor exceeds sixty days, the defendants or any of them, if there be more than one, may take the case, by appeal, before the minister, if allowed jurisdiction, either upon errors of law or matters of fact, under such rules as may be prescribed by the minister for the prosecution of appeals in such cases."[7] "Capital cases for murder or insurrection against the government of either of the countries hereinbefore mentioned, by citizens

[4] U. S. R. S., § 4086, 2 Fed. St. Ann. 820, Pierce's Fed. Code, § 4248.

[5] U. S. R. S., § 4087, 2 Fed. St. Ann. 820, Pierce's Fed. Code, § 4249.

[6] U. S. R. S., § 4088, 2 Fed. St. Ann. 820, Pierce's Fed. Code, § 4250.

[7] U. S. R. S., § 4089, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4251.

of the United States, or for offenses against the public peace amounting to felony under the laws of the United States, may be tried before the minister of the United States in the country where the offense is committed if allowed jurisdiction; and every such minister may issue all manner of writs, to prevent the citizens of the United States from enlisting in the military or naval service of either of the said countries, to make war upon any foreign power with whom the United States are at peace, or in the service of one portion of the people against any other portion of the same people; and he may carry out this power by a resort to such force belonging to the United States, as may at the time be within his reach."[8] "Each of the ministers mentioned in section forty hundred and eighty-three shall, in the country to which he is appointed, be fully authorized to hear and decide all cases, criminal and civil, which may come before him, by appeal, under the provisions of this Title, and to issue all processes necessary to execute the power conferred upon him; and he is fully empowered to decide finally any case upon the evidence which comes up with it, or to hear the parties further, if he thinks justice will be promoted thereby; and he may also prescribe the rules upon which new trials may be granted, either by the consuls or by himself, if asked for upon sufficient grounds."[9] "In all cases, criminal and civil, the evidence shall be taken down in writing in open court, under such regulations as may be made for that purpose; and all objections to the competency or character of testimony shall be noted, with the ruling in all such cases, and the evidence shall be part of the case."[10] "It shall be the duty of the ministers and the consuls in the countries mentioned in section forty hundred and eighty-three, to encourage the settlement of controversies of a civil character, by mutual agreement, or to submit them to the decision of referees agreed upon by the parties; and the minister in each country shall prepare a form of submission for such cases, to be signed by the parties, and acknowledged before the consul. When parties have so agreed to refer, the referees may, after suitable notice of the time and

[8] U. S. R. S., § 4090, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4252.

[9] U. S. R. S., § 4091, 2 Fed. St. Ann. 821, Pierce's Fed. Code, § 4253.

[10] U. S. R. S., § 4097, 2 Fed. St. Ann. 822, Pierce's Fed. Code, § 4259.

place of meeting for the trial, proceed to hear the case, and a majority of them shall have power to decide the matter. If either party refuses or neglects to appear, the referees may proceed ex parte. After hearing any case such referees may deliver their award, sealed, to the consul, who, in court, shall open the same; and if he accepts it, he shall indorse the fact, and judgment shall be rendered thereon, and execution issue in compliance with the terms thereof. The parties, however, may always settle the same before return thereof is made to the consul."[11] In all criminal cases which are not of a heinous character, it shall be lawful for the parties aggrieved or concerned therein, with the assent of the minister in the country, or consul, to adjust and settle the same among themselves, upon pecuniary or other considerations."[12] "The ministers and consuls shall be fully authorized to call upon the local authorities to sustain and support them in the execution of the powers confided to them by treaty, and on their part to do and perform whatever is necessary to carry the provisions of the treaties into full effect, so far as they are to be executed in the countries, respectively."[13] "In all cases, except as herein otherwise provided, the punishment of crime provided for by this Title shall be by fine or imprisonment, or both, at the discretion of the officer who decides the case, but subject to the regulations herein contained, and such as may hereafter be made. It shall, however, be the duty of such officer to award punishment according to the magnitude and aggravation of the offense. Every person who refuses or neglects to comply with the sentence passed upon him shall stand committed until he does comply, or is discharged by order of the consul, with the consent of the minister in the country."[14] "Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes, unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for

[11] U. S. R. S., § 4098, 2 Fed. St. Ann. 822, Pierce's Fed. Code, § 4260.

[12] U. S. R. S., § 4099, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4261.

[13] U. S. R. S., § 4100, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4262.

[14] U. S. R. S., § 4101, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4263.

either of these crimes, of a less offense of a similar character, if the evidence justifies it, and to punish, as for other offenses, by fine or imprisonment, or both."[15] "Whenever any person is convicted of either of the crimes punishable with death, in either of these countries, it shall be the duty of the minister to issue his warrant for the execution of the convict, appointing the time, place, and manner; but if the minister is satisfied that the ends of public justice demand it, he may from time to time postpone such execution; and if he finds mitigating circumstances which authorize it, he may submit the case to the President for pardon."[16] "No fine imposed by a consul for a contempt committed in presence of the court, or for failing to obey a summons from the same, shall exceed fifty dollars; nor shall the imprisonment exceed twenty-four hours for the same contempt."[17] "Any consul, when sitting alone for the trial of offenses or misdemeanors, shall decide finally all cases where the fine imposed does not exceed one hundred dollars, or the term of imprisonment does not exceed sixty days."[18] "Whenever, in any case, the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of opinion that severer punishments than those specified in the preceding sections will be required, he shall summon, to sit with him on the trial, one or more citizens of the United States, not exceeding four, and in capital cases not less than four; who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases, except of capital offenses, and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering

[15] U. S. R. S., § 4102, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4264.

[16] U. S. R. S., § 4103, 2 Fed. St. Ann. 823, Pierce's Fed. Code, § 4265.

[17] U. S. R. S., § 4104, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4266.

[18] U. S. R. S., § 4105, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4267.

up judgment therein, or by remitting the same to the consul with instruction how to proceed therewith."[19] "Each of the consuls mentioned in section four thousand and eighty-three shall have at the port for which he is appointed, jurisdiction as herein provided, in all civil cases arising under such treaties, respectively, wherein the damages do not exceed the sum of five hundred dollars, and, if he sees fit to decide the same without aid, his decision thereon shall be final. But whenever he is of opinion that any such case involves legal perplexities, and that assistance will be useful to him, or whenever the damages demanded exceed five hundred dollars, he shall summon, to sit with him on the hearing of the case, not less than two nor more than three citizens of the United States, if such are residing at the port, who shall be taken from a list which had previously been submitted to and approved by the minister, and shall be of good repute and competent for the duty. Every such associate shall note upon the record his opinion, and also, in case he dissents from the consul, such reasons therefor as he thinks proper to assign; but the consul shall give judgment in the case. If the consul and his associates concur in opinion, the judgment shall be final. If any of the associates differ in opinion from the consul, either party may appeal to the minister, under such regulations as may exist; but if no appeal is lawfully claimed, the decision of the consul shall be final."[20] "The jurisdiction allowed by treaty to the ministers, respectively, in the countries named in section four thousand and eighty-three shall be exercised by them in those countries, respectively, wherever they may be."[21] "The jurisdiction of such ministers in all matters of civil redress, or of crimes, except in capital cases for murder or insurrection against the governments of such countries, respectively, or for offenses against the public peace amounting to felony under the laws of the United States, shall be appellate only; Provided, That in cases where a consular officer is interested, either as party or witness, such minister shall have original jurisdiction."[22] "All such officers shall be responsible for their conduct to the United

[19] U. S. R. S., § 4106, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4268.

[20] U. S. R. S., § 4107, 2 Fed. St. Ann. 824, Pierce's Fed. Code, § 4269.

[21] U. S. R. S., § 4108, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4270.

[22] U. S. R. S., § 4109, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4271.

States, and to the laws thereof, not only as diplomatic or consular officers, but as judicial officers, when they perform judicial duties, and shall be held liable for all negligences and misconduct as public officers."[23] "The President is authorized to appoint marshals for such of the consular courts in those countries as he may think proper, not to exceed seven in number, namely: one in Japan, four in China, one in Siam, and one in Turkey, each of whom shall receive a salary of one thousand dollars a year, in addition to the fees allowed by the regulations of the ministers, respectively, in those countries."[24] "It shall be the duty of the marshals, respectively, to execute all process issued by the minister of the United States in those countries, respectively, or by the consul at the port at which they reside, and to make due return thereof to the officer by whom it was issued, and to conform in all respects to the regulations prescribed by the ministers, respectively, in regard to their duties."[25] "Each marshal, before entering upon the duties of his office, shall give bond for the faithful performance thereof in a penal sum not to exceed ten thousand dollars, with two sureties to be approved by the Secretary of State. Such bond shall be transmited to the Secretary of the Treasury, and a certified copy thereof be lodged in the office of the minister."[26] "Whenever any person desires to bring suit upon the bond of any such marshal, it shall be the duty of the Secretary of the Treasury, or of the minister having custody of a copy of the same, to give to the person so applying a certified copy thereof, upon which suit may be brought and prosecuted with the same effect as could be done "upon the original: Provided, The Secretary of the Treasury, or the minister to whom the application is made, is satisfied that there is probable cause of action against the marshal."[27] "Upon a plea of non est factum, verified upon oath, or any other good cause shown, the court or the consul or minister trying the cause may require the original bond of the marshal in those countries to be produced;

[23] U. S. R. S., § 4110, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4272.

[24] U. S. R. S., § 4111, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4273.

[25] U. S. R. S., § 4112, 2 Fed. St. Ann. 825, Pierce's Fed. Code, § 4274.

[26] U. S. R. S., § 4113, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4275.

[27] U. S. R. S., § 4114, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4276.

and it shall be the duty of the Secretary of the Treasury to forward the original bond to the court, or consul, or minister requiring the same."[28] "All rules, orders, writs, and processes of every kind which are intended to operate or be enforced against any of the marshals, in any of the countries named in this Title, shall be directed to and executed by such persons as may be appointed for that purpose by the minister or consul issuing the same."[29] "In order to organize and carry into effect the system of jurisprudence demanded by such treaties, respectively, the ministers, with the advice of the several consuls in each of the countries, respectively, or of so many of them as can be conveniently assembled, shall prescribe the forms of all processes to be issued by any of the consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs to be allowed to the prevailing party, and the fees to be paid for judicial services; the manner in which all officers and agents to execute process, and to carry this Title into effect, shall be appointed and compensated; the form of bail-bonds, and the security which shall be required of the party who appeals from the decision of a consul; and shall make all such further decrees and regulations from time to time, under the provisions of this Title, as the exigency may demand."[30] "All such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as hereinbefore provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, and such consul shall signify his assent or dissent in writing, with his name subscribed thereto. After taking such advice, and considering the same, the minister in each of those countries may, nevertheless, by causing the decree, order, or regulation to be published with his signature thereto, and the opinions of his advisers inscribed thereon, make it binding and obligatory, until annulled or modified by Congress; and it shall take effect from the publication

[28] U. S. R. S., § 4115, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4277.

[29] U. S. R. S., § 4116, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4278.

[30] U. S. R. S., § 4117, 2 Fed. St. Ann. 826, Pierce's Fed. Code, § 4279.

or any subsequent day thereto named in the act."[31] "All such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the ministers, with the opinions of their advisers, as drawn up by them severally, to the Secretary of State, to be laid before Congress for revision."[32] "It shall be the duty of the minister in each of those countries to establish a tariff of fees for judicial services, which shall be paid by such parties, and to such persons, as the minister shall direct; and the proceeds shall, as far as is necessary, be applied to defray the expenses incident to the execution of this Title; and regular accounts, both of receipts and expenditures, shall be kept by the minister and consuls and transmitted annually to the Secretary of State."[33] "The President, when provision is not otherwise made, is authorized to allow, in the adjustment of the accounts of each of the ministers or consuls, the actual expenses of the rent of suitable buildings or parts of buildings to be used as prisons for American convicts in those countries, not to exceed in any case the rate of six hundred dollars a year; and also the wages of the keepers of the same, and for the care of offenders, not to exceed, in any case, the sum of eight hundred dollars per annum. But no more than one prison shall be hired in Japan, four in China, one in Turkey, and one in Siam, at such port or ports as the minister, with the sanction of the President, may designate, and the entire expense of prison and prison-keepers at the consulate of Bangkok, in Siam, shall not exceed the sum of one thousand dollars a year."[34] "The provisions of this Title, so far as the same relate to crimes and offenses committed by citizens of the United States, shall extend to Turkey, under the treaty with the Sublime Porte of May seventh, eighteen hundred and thirty, and shall be executed in the Ottoman dominions in conformity with the provisions of the treaty, and of this Title, by the minister and the consuls appointed to reside therein, who are hereby ex-officio vested with the powers herein conferred upon the ministers and consuls in China, for the purposes above expressed, so far as regards the punishment of crime, and also for the exercise of

[31] U. S. R. S., § 4118, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4280.

[32] U. S. R. S., § 4119, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4281.

[33] U. S. R. S., § 4120, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4282.

[34] U. S. R. S., § 4121, 2 Fed. St. Ann. 827, Pierce's Fed. Code, § 4283.

jurisdiction in civil cases wherein the same is permitted by the laws of Turkey, or its usages in its intercourse with the Franks, or other foreign Christian nations."[35] "The provisions of this Title shall extend to Persia, in respect to all suits and disputes which may arise between citizens of the United States therein; and the minister and consuls who may be appointed to reside in Persia are hereby invested, in relation to such suits and disputes, with such powers as are by this Title conferred upon the ministers and consuls in China. All suits and disputes arising in Persia between Persian subjects and citizens of the United States shall be carried before the Persian tribunal to which such matters are usually referred, at the place where a consul or agent of the United States may reside, and shall be discussed and decided according to equity, in the presence of an employe of the consul or agent of the United States; and it shall be the duty of the consular officer to attend the trial in person, and see "that justice is administered. All suits and disputes occurring in Persia between the citizens of the United States and the subjects of other foreign powers, shall be tried and adjudicated by the intermediation of their respective ministers or consuls, in accordance with such regulations as shall be mutually agreed upon by the minister of the United States for the time being, and the ministers of such foreign powers, respectively, which regulations shall from time to time be submitted to the Secretary of State."[36] "The provisions of this title so far as the same are in conformity with the stipulations in the existing treaties between the United States and Tripoli, Tunis, Morocco, Muscat, and the Samoan or Navigator Islands, respectively, shall extend to those countries, and shall be executed in conformity with the provisions of the treaties and of the provisions of this title by the consuls appointed by the United States to reside therein, who are hereby ex officio invested with the powers herein delegated to the ministers and consuls of the United States appointed to reside in the countries named in section four thousand and eighty-three, so far as the same can be exercised under the provisions of treaties between the United States and the several countries

[35] U. S. R. S., § 4125, 2 Fed. St. Ann. 828, Pierce's Fed. Code, § 4287.

[36] U. S. R. S., § 4126, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4290.

mentioned in this section, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations. And whenever the United States shall negotiate a treaty with any foreign government, in which the American consul-general or consul shall be clothed with judicial authority, and securing the right of trial to American citizens residing therein before such consul-general or consul, and containing provisions similar to or like those contained in the treaties with the governments named in this act, then said title, so far as the same may be applicable, shall have full force in reference to said treaty, and shall extend to the country of the government negotiating the same."[37] "If at any time there be no minister in either of the countries hereinbefore mentioned, the judicial duties which are imposed by this Title upon the minister shall devolve upon the Secretary of State, who is authorized and required to discharge the same."[38] "The provisions of this Title relating to the jurisdiction of consular and diplomatic officers over civil and criminal cases in the countries therein named, shall extend to any country of like character with which the United States may hereafter enter into treaty relations."[39] "The word 'minister,' when used in this title shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice consul-general, consul or vice-consul or a consular agent."[40] Formerly the acting consul[41] or acting consul-general could not exercise the jurisdiction conferred by those statutes.[42] Where no treaty otherwise provided, it was the opinion of Attorney General Cushing that the authority of consuls of the United States in foreign countries, in cases of crime at sea or in port, was ministerial and not judicial.[44]

[37] U. S. R. S., § 4127, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4291.

[38] U. S. R. S., § 4128, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4292.

[39] U. S. R. S., § 4129, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4293.

[40] U. S. R. S., § 4130, 2 Fed. St. Ann. 830, Pierce's Fed. Code, § 4294. Act of Feb'y. 1876, as amended by 19 St. at L. 2.

[41] Acting Secretary Adee, March 22, 1894, Moore's Dig., § 264, II., 622.

[42] Moore, §§ 261-284, Secretary Fish, Feb'y 9, 1876, Moore's Dig. § 264, II., 623.

[44] 8 Op. A. G. 830.

Consuls have exclusive jurisdiction over disputes between captains and crews of vessels of the United States, including questions of wages, by treaties or conventions, in the following countries: Austria-Hungary, Belgium, Columbia, Denmark, Dominican Republic, France, Germany, Greece, Italy, Kongo Free State, Netherlands (and colonies), Portugal, Roumania, Salvator, Sweden and Norway, and Tripoli.[45] Similar powers were given by a treaty with Russia;[46] but whether that will be in force at the time this book is published, is a doubtful question. In Sweden and Norway at least, this power does not extend to public offenses, nor to actual breaches of the public peace or other differences between the captains and crews which "disturb the order or tranquility of the country."[47] They have also power to adjust damages suffered at sea and in matters of wrecks and salvage, granted to them by treaties with Austria-Hungary, Belgium, Bolivia, Borneo, China, Columbia, Dominican Republic, Ecuador, France, Germany, Greece, Guatemala, Hayti, Honduras, Italy, Japan, Corea, Liberia, Madagascar, Maskat, Morocco, Netherlands (including colonies), Ottoman Porte, Paraguay, Roumania, Salvador, Siam, Spain, Sweden and Norway, Tripoli, and Tunis.[48] In Maskat and the Ottoman dominions, they have the right, in the absence of the owner or agent, to receive the property of American citizens wrecked or captured from pirates.[49] Conventions secure to them the right to take depositions in Austria-Hungary, Belgium, Columbia, France, Germany, (for American citizens only), Italy, Kongo Free State, Netherlands, Roumania, Servia and Salvador.[50] The advice of a consul in a foreign port gives the master of a vessel no justification for an illegal act.[51] His action in discharging a seaman in a foreign port is not conclusive where the latter subsequently files a libel for wages,[52] and where he has discharged seamen at the request of a master, the consul cannot detain them in prison as a punishment.[53] A consul has no au-

45 Consular Regulations, 1896, V. 88.

46 Ibid.

47 15 Op. A. G. 178.

48 Consular Regulations, 1896, V. 90.

49 Ibid. V. 90.

50 Ibid. V. 87.

51 Wilson v. The Mary, Gilpin 31.

52 Campbell v. The Uncle Sam, McAllister 77.

53 Jordan v. Williams, 1 Curtis, 69.

thority to order the sale of a ship in a foreign port, whether on complaint of the crew or otherwise.[54] Where such a sale took place and the consul retained the money for the payment of sailors' wages, Attorney General Cushing was of the opinion that the United States were not liable to the owners for the money thus illegally collected and retained.[55] He has no authority to demand and receive from the master of a vessel, the money and effects belonging to aa deserter from the same,[56] nor to retain the papers of vessels which he suspects are destined for the slave trade.[57] American consuls have no authority to require masters of American ships to carry to the United States for trial, persons accused of crime.[58] The constitutionality of the statute granting judicial powers to consuls in countries where Christianity does not prevail has been sustained under the treaty power.[59] The consular courts have jurisdiction

[54] 6 Op. A. G. 617.

[55] Ibid.

[56] 14 Op. A. G. 520.

[57] 9 Op. A. G. 426.

[58] 7 Op. A. G. 722.

[59] Re Ross, 140 U. S. 453, 462–463, 11 Sup. 897, 35 L. ed. 581, per Field, J.:

"The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls

of crimes committed on water within the territory of their district.[60] A consular court has jurisdiction of a criminal offense, such as murder, committed in a port of its district by a citizen of a foreign State, such as a British subject, while duly enrolled as a seaman on a merchant vessel of the United States.[61] By a regulation of the Minister to China, approved by the State Department,[62] when a criminal prosecution was pending in any consular district of China against a citizen of the United States, who might be found in another district, the consul before whom the prosecution is pending might issue a warrant for the arrest, under which, when based by the consul of the latter district, the accused might be arrested and transported to the former district for trial.[63] The State Department has expressed the opinion: that the statutes confer no jurisdiction over citizens of the United States serving on board foreign vessels of war;[64] nor authority to make a regulation requiring citizens of the United States to register their names, nor power to enforce such a regulation judicially;[65] nor to banish a convict to China or another foreign country;[66] nor to try a criminal charge against anyone who is not a citizen of the United States;[67] nor a regulation concerning the importation of fire-arms and ammunities into a port, with the government of which there is no treaty.[68] The provisions of the Constitution which guarantee trial by jury under an indictment by a grand jury do not apply to the consular courts,[69] nor to their juris-

were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people. The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein."

60 Re Ross, 140 U. S. 453, 11 Sup. 897, 35 L. ed. 581.

61 Ibid.

62 Secretary Olney, Feb'y. 2, 1897.

63 Moore's Dig., § 263, II., 621.

64 Mr. Cadwalader, November 26, 1875, Wharton's Dig., § 125, Vol. I., p. 809.

65 Secretary Fish, February 26, 1873, Wharton's Dig., § 125, Vol. I., p. 803.

66 Mr. Fish, September 10, 1870, Wharton's Dig., § 125, Vol. I., p. 805.

67 Mr. Fish, January 8, 1873, Wharton's Dig., § 125, Vol. I., p. 808.

68 Instruction of August 15, 1895, Moore's Dig., § 263, I., 622.

69 *Re* Ross, 140 U. S. 453, 464–465, 11 Sup. Ct. 897, 35 L. ed. 581,

diction over persons charged with crimes committed within their districts,[70] or upon vessels of the United States.[71] In the trial of a crime before a consular court, the accused should have an opportunity of exhibiting the complaint against him or should be presented with a copy stating the offense he has committed.[72] At least in the absence of an act of Congress author-

per Field, J.: "By the Constitution a government is ordained and established (for the United States of America), and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. Cook v. United States, 138 U. S. 157, 181, 34 L. ed. 906, 912. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture."

70 Ibid.

71 Ibid.

72 Ibid.

izing proof by the depositions of witnesses beyond the jurisdiction, he is entitled to be confronted with the witnesses against him and to cross-examine them.[73] He has the right to be represented by counsel.[74] The State Department has disapproved the use of torture to elicit testimony, although authorized by the law of the country where the consul holds court,[75] and the infliction of flogging as a punishment for wife-beating.[76] The Attorney General has expressed the opinion that a consular court cannot execute a sentence of imprisonment beyond its territorial jurisdiction, so that, in the absence of legislation, a convict of a consular court cannot be imprisoned in the United States.[77] The State Department has directed that, in all cases of capital punishment, the execution shall be postponed until the case has been reported, copies of the judgment and testimony transmitted to the Department, and the President's views in the premises shall have been received.[78] Consuls exercise in the Turkish dominions, by usage, the power to adjudicate controversies between Christian citizens of the United States and the trial of suits by foreign Christians against the same.[79] Citizens of a foreign country, who are not in the employ of the consulate, nor enrolled on American ships, can only sue in the courts of the United States by comity.[80] The Attorney General has ruled that a consular court cannot, in a suit by a person not a citizen of the United States, enter judgment for a set-off beyond the extent of the claim asserted by the plaintiff, nor render a judgment against a person of foreign birth not a citizen of the United States.[81] In Oriental countries, consuls may probate wills.[82] They have granted decrees of divorce.[83] In Turkey,

[73] Ibid.

[74] Ibid.

[75] Assistant Secretary Hay, August 16, 1880, Wharton's Dig., (2nd ed.) § 125, Vol. I, p. 810.

[76] Moore's Dig., § 266, Vol. II, p. 632.

[77] 14 Op. A. G. 522.

[78] Wharton's Dig., § 125, Vol. I, p. 819.

[79] 7 Op. A. G. 565; Consular Regulations, XXX, 620. See U. S. R. S., § 4125, 2 Fed. St. Ann. 829, Pierce's Fed. Code, § 4291, quoted *supra*.

[80] Acting Secretary Davis, August 11, 1882, Moore's Dig., § 260, Vol. II, p. 604.

[81] 11 Op. A. G. 474.

[82] Secretary Evarts, March 15, 1879, Moore's Dig., § 265, Vol. II, p. 626.

[83] See Naggar's Case in Cairo, Egypt, Moore's Dig., § 265, Vol. II, p. 626. Regulations concerning divorce by Minister of Japan were

the consular courts have exclusive jurisdiction to decide who are the heirs and widow of an American citizen who died when there domiciled.[84] It seems to be the rule that, in the absence of legislation by Congress, consuls and consular courts have no jurisdiction over the property of Americans in a foreign country who have abandoned their residence or have never resided there.[85] It has been ruled by the State Department that a Consul General in a country with which there is no treaty, has no power to promulgate a regulation concerning the validity of mortgages and bills of sale,[86] nor to adjudicate upon the title to land; but that he may pass on the rights of landlord and tenant or adverse claims to the right of possession under a written contract.[87] The power of the Secretary of State to exercise the right to review by appeal a consular decision or the exercise of other judicial functions, has been said to be doubtful.[88] It has been said that where the consul acts beyond his jurisdiction, his order may be set aside by the Secretary of State or the President, but that, in the absence of a treaty giving such authority, this cannot be done in case of an erroneous decision upon the merits within the consular jurisdiction.[89] A person imprisoned within the United States by the order of a consul or a consular court acting beyond its jurisdiction may, in a proper case, have a review by habeas corpus.[90] Except possibly in the five ports of China,[91] an action will lie against the consul if his order is void for want of jurisdiction.[92] It has been

disapproved; Secretary Fish, December 26, 1870, Wharton's Dig. (2nd ed.), § 125, Vol. I, p. 807.

[84] Decree of Turkish Council of Ministers, Moore's Dig., § 265, Vol. II, p. 627.

[85] Mr. Fish, December 20, 1870, Wharton's Dig., § 125, Vol. I, p. 807. See Dainese v. Hale, 91 U. S. 13.

[86] Assistant Secretary Rockhill, Oct. 9, 1896, Moore's Dig., § 263, II, 622.

[87] Assistant Secretary Hunter, Sept. 3, 1874, Moore's Dig., § 265, II, 627.

[88] Assistant Secretary Strobell, January 16, 1894, concerning the Madagascar Treaty, Moore's Dig., § 266, Vol. II, p. 631. See *Re* Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581.

[89] Pacific Mail S. S. Case, by Secretary Seward, Moore's Dig., August 18, 1868, § 265, Vol. II, p. 629.

[90] *Re* Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581.

[91] See Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[92] Dainese v. Hale, 91 U. S. 13, 23 L. ed. 190; Secretary Seward in Pacific Mail S. S. Case, Moore's Dig., August 18, 1868, § 265, Vol.

held that a Consular Court is a court of limited jurisdiction and that all the jurisdictional facts must be alleged in the plaintiff's libel, petition or other pleading, which otherwise will be insufficient.[93]

§ 75. Jurisdiction and practice of the Commerce Court. The Commerce Court is composed of five judges, selected from the Circuit Judges of the United States; in the first instance, by the President, and in the case of subsequent vacancies, by the Chief Justice of the United States.[1] A quorum must consist of four judges and at least a majority of the whole court must concur in all decisions.[2] The Commerce Court has exclusive jurisdiction of the following cases: "First. All cases "for the enforcement, otherwise than by the adjudication and "collection of a forfeiture or penalty or by infliction of criminal "punishment, of any order of the Interstate Commerce Com- "mission other than for the payment of money. Second. "Cases brought to enjoin, set aside, annul, or suspend in whole "or in part any order of the Interstate Commerce Commission.[3] "Third. Such cases as by section three of the Act, which is "usually known as the Interstate Commerce law, entitled 'An "Act to further regulate commerce with foreign nations and "among the States,' approved February nineteenth, nineteen "hundred and three, are authorized to be maintained in a circuit "court of the United States. Fourth. All such mandamus

II, p. 629. But see Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

93 Steamer Spark v. Lee Choi Chum, 1 Sawyer, 713. For this subject generally, see Wharton's Dig., § 125, Vol. I, Moore's Dig. §§ 259–266, and the authorities therein cited.

§ 75. 1 It has been said that the phrase "other than for the payment of money" refers to actions in which there is a right under the Constitution to a trial by jury and that the Commerce Court has jurisdiction of a suit to annul an order of the commission awarding reparation in damages under the Interstate Commerce Act. Southern Ry. Co. v. U. S., (Comm. Ct.) 193 Fed. 664.

2 The court has jurisdiction of a petition by a carrier to restrain an order of the commission directing it to desist from an alleged discrimination in allowances for litherage. U. S., Interstate Commerce Commission, and Federal Sugar Refining Co. v. The Baltimore & Ohio Railroad Co., (Comm. Ct.) 225 U. S. 306, 56 L. ed. 1100. It has been said that an order of the commission fixing a rate should be set aside when it is not based upon evidence which the carrier has had an opportunity to answer. Atlantic Coast Line R. Co. v. Interstate Commerce Commission, (Comm. Ct.) 194 Fed. 449.

3 In such a suit under the act of

"proceedings[4] as under the provisions of section twenty or "section twenty-three of the Act, which is usually known "as the Elkins law, entitled 'An Act to regulate commerce,' "approved February fourth, eighteen hundred and eighty-"seven, as amended, are authorized to be maintained in a "circuit court of the United States.[5] Fifth. "Suits to en-"join, set aside, annul, or suspend any order of the Inter-"state Commerce Commission shall be brought in the Com-"merce Court against the United States. The pendency of "such suit shall not of itself stay or suspend the operation of "the order of the Interstate Commerce Commission; but the "Commerce Court, in its discretion, may restrain or suspend, "in whole or in part, the operation of the commission's order "pending the final hearing and determination of the suit. No "order or injunction so restraining or suspending an order of "the Interstate Commerce Commission shall be made by the "Commerce Court otherwise than upon notice and after hear-"ing, except that in cases where irreparable damage would "otherwise ensue to the petitioner, said court, or a judge there-"of, may, on hearing after not less than three days' notice to the "Interstate Commerce Commission and the Attorney General, "allow a temporary stay or suspension in whole or in part of "the operation of the order of the Interstate Commerce Com-"mission for not more than sixty days from the date of the "order of such court or judge, pending application to the "court for its order or injunction, in which case the said order "shall contain a specific finding, based upon evidence submitted "to the judge making the order and identified by reference "thereto, that such irreparable damage would result to the "petitioner and specifying the nature of the damage. The court "may, at the time of hearing such application, upon a like find-"ing, continue the temporary stay or suspension in whole "or in part until its decision upon the application."[6] "All "cases and proceedings in the Commerce Court which but for

March 2, 1889, the Circuit Court had no power to amend or modify the order of the commission, but was obliged to enforce it, if at all, in its entirety. Interstate Commerce Comm. v. Lake Shore & M. S. Ry. Co., 134 Fed. 942.

[4] See U. S. v. Louisville & N. R. Co., (Comm. Ct.) 195 Fed. 88.

[5] Jud. Code, § 207, 36 St. at L. 1087.

[6] Ibid. § 208.

"this chapter would be brought by or against the Interstate "Commerce Commission, shall be brought by or against the "United States, and the United States may intervene in any "case or proceeding in the Commerce Court whenever, though "it has not been made a party, public interests are involved."[7] The attorney general has charge of the interests of the government in all cases and proceedings in the Commerce Court and in the Supreme Court of the United States upon appeal therefrom. He may employ special attorneys and counsel for his assistants.[8] The Interstate Commerce Commission and any party or parties in interest to a proceeding before the commission, in which an order or requirement is made, may appear as parties of their own motion and as of right and may be represented by their own counsel, in any suit wherein is involved the validity of such order or requirement or of any part thereof and the interest of such party.[9] The court may make all such rules and orders as to such appearance and representations, the number of counsel, and all matters of procedure and otherwise, as will subserve the ends of justice and speed the determination of such suits.[10] Communities, associations, corporations, firms and individuals, interested in a controversy or question before the Interstate Commerce Commission or in any suit relating to action of the Interstate Commerce Commission, which may be brought in the Commerce Court, may intervene in such suit or proceedings at any time after the institution thereof, and the attorney general cannot dispose of or discontinue the same against the objection by such party or intervenor; but such intervenor or intervenors may prosecute, defend or continue such suit by proceedings unaffected by the action or non-action of the attorney general therein.[11] "Com- "plainants before the Interstate Commerce Commission in- "terested in a case shall have the right to appear and be made "parties to the case and be represented before the courts by "counsel, under such regulations as are now permitted in similar "circumstances under the rules and practice of equity courts "of the United States."[12] A suit in the Commerce Court is begun by filing a petition setting forth briefly the facts consti-

7 Ibid. § 211.
8 Ibid. § 212.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid. § 215.

tuting the petitioner's cause of action and specifying the relief sought.[13] A copy of the petition is forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, except the United States, and upon the United States when a defendant by filing a copy of the petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice.[14] An answer to the petition must be filed in the clerk's office within thirty days after its service, unless the time is extended by order of the court or a judge thereof, and at the same time a copy of the answer must be mailed to the petitioner's attorney.[15] The answer must briefly and categorically respond to the allegations of the petition.[16] This sets the case at issue and no replication or other pleading is required.[17] Objections to the sufficiency of the petition or answer, as not setting forth a cause of action or defense, as the case may be, must be specifically taken at the final hearing or by a motion to dismiss the petition made before the answer is filed.[18] If the defendant files no answer, the petitioner may apply on notice for such relief as may be proper upon the facts alleged in the petition.[19] The court may by rule prescribe the method of taking evidence in cases therein pending and it may prescribe that the evidence be taken before a single judge with power to rule upon the admission of evidence.[20] Otherwise, unless there is a rule of the court to the contrary, the practice and procedure in the Commerce Court conforms as nearly as may be in like cases to that of the District Court of the United States.[21] The Commerce Court has no jurisdiction to entertain a complaint because of the refusal of the commission to act; its jurisdiction is limited to the review of affirmative orders of the commission.[22] Accordingly, this court has no jurisdiction of a claim by a shipper to recover from a carrier excessive freight charges which has not

13 Ibid. § 209.
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
22 Proctor & Gamble Co. v. U. S., 225 U. S. 282, 56 L. ed. 1091. (reversing 188 Fed. 221).

been presented to the commission,[23] by the claimant[24] nor of a claim upon which the commission has not passed,[25] nor to review the denial by the commission of a petition by a carrier for leave to refund an excessive freight charge.[26] It seems that the District Courts of the United States are not deprived of jurisdiction of actions by shippers from the recovery of freight charges which have been declared by the commission to be excessive,[27] and to recover damages under the statute because of secret advantages given by a carrier to his competitor, in violation of its published rates.[28] It seems that this court has jurisdiction of a suit to annul an order of the commission which awards reparation to a complainant under the Interstate Commerce Act.[29] This court has jurisdiction over a constitutional question dependent upon the provisions of the Interstate Commerce Act when reviewing an affirmative order of the Commission, but not to review an order by the commission denying a constitutional right asserted in a petition to it, which is independent of all questions of rights and remedies under this statute.[30] The direction that the order shall contain a finding concerning irreparable damages[31] applies only to a stay of an order of the commission pending an application to the court for an injunction.[32] It has been held that when an order of the commission fixing a rate for the transportation of freight has been directed against several carriers, either of them may petition the Commerce Court for redress without joining the other parties, since the suit is plenary and the injury is several and not joint.[33]

23 Ibid.

24 National Pole Co. v. Chicago & N. W. Ry. Co., 200 Fed. 185.

25 U. S. ex rel. Stony Fork Coal Co. v. Louisville & N. R. Co. (Comm. Ct.) 195 Fed. 88.

26 Arkansas Fertilizer Co. v. U. S., (Comm. Ct.) 193 Fed. 667.

27 Chicago, B. & Q. R. Co. v. Feintuch, 191 Fed. 482.

28 A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12; Langdon v. Pennsylvania R. Co., 194 Fed. 486.

29 Arkansas Fertilizer Co. v. U. S., (Comm. Ct.) 193 Fed. 667; Southern Ry. Co. et al. v. United States (Interstate Commerce Commission, Intervener).

30 Proctor & Gamble Co. v. U. S., 225 U. S. 282, 56 L. ed. 1091.

31 Jud. Code, § 208; 36 St. at L. 1087.

32 U. S. v. B. & O. R. R. Co. 225 U. S. 306.

33 Atlantic Coast Line R. Co. v. Interstate C. Commission, (Comm. Ct.) 194 Fed. 449.

§ 76. Jurisdiction of the Board of General Appraisers. The Payne Tariff Law of August 5, 1909, contains the following provisions concerning the Board of General Appraisers of merchandise: "§ 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment. That the office of said general appraisers shall be at the port of New York, and three of them shall be on duty at that port daily as a board of general appraisers.

"All of the general appraisers of merchandise heretofore or hereafter appointed under the authority of said Act shall hold their office during good behavior, but may, after due hearing, be removed by the President for the following causes, and no other: Neglect of duty, malfeasance in office, or inefficiency. "That hereafter the salary of each of the general appraisers of merchandise shall be at the rate of nine thousand dollars per annum. "That the boards of general appraisers and the members thereof shall have and possess all the powers of a circuit court of the United States in preserving order, compelling the attendance of witnesses, and the production of evidence, and in punishing for contempt.

"All notices in writing to collectors of dissatisfaction of any decision thereof, as to the rate or amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), with the invoice and all papers and exhibits, shall be forwarded to the board of nine general appraisers of merchandise of New York to be by rule thereof assigned for hearing or determination, or both. The President of the United States shall designate one of the board of nine general appraisers of merchandise as president of said board and others in order to act in his absence. Said general appraisers of merchandise shall be divided into three boards of three members each, to be denominated respectivly Board 1, Board 2, and Board 3. The president of the board shall assign three general appraisers to each of said boards and shall designate one member of each of said boards as chairman thereof,

and such assignment or designation may be by him changed from time to time, and he may assign or designate all boards of three general appraisers where it is no wor heretofore was provided by law that such might be assigned or designated by the Secretary of the Treasury. The president of the board shall be competent to sit as a member of any board or assign one or two other members thereto, in the absence of or inability of any one or two members of such board. Each of the boards of three general appraisers where it is now or heretofore was full power to hear and determine all cases and questions arising therein or assigned thereto; and the general board of nine general appraisers, each of the boards of three general appraisers and each of the general appraisers of merchandise, shall have all the jurisdiction and powers and proceed as now, heretofore, and herein provided. The said board of nine general appraisers shall have power to establish from time to time such rules of evidence, practice, and procedure, not inconsistent with the statutes, as may be deemed necessary for the conduct and uniformity of its proceedings and decisions and the proceedings and decisions of the boards of three thereof; and the production, care, and custody of samples and records of said board. The president of the board shall have control of the fiscal affairs and the clerical force of the board, make all recommendations for appointment, promotion, and otherwise affecting said clerical force; he may at any time before trial under the rules of said board assign or reassign any case for hearing, determination, or both, and shall designate a general appraiser, or a board of general appraisers, and, if necessary, a clerk thereto, to proceed to any port within the jurisdiction of the United States for the purpose of hearing, or determining if authorized by law, causes assigned for hearing at such port, and shall cause to be prepared duly promulgated dockets therefor. No member of any of said boards shall sit to hear or decide any case on appeal in the decision of which he may have previously participated. The board of three general appraisers, or a majority of them, who decided the case, may, upon motion of either party made within thirty days next after their decision, grant a rehearing or retrial of said case when in their opinion the ends of justice may require it.

"§ 13. That the appraisers shall revise and correct the

reports of the assistant appraisers as he may judge proper, and the appraisers" at ports where there is no appraiser, the person acting as such, shall report to the collector his decision as to the value of the merchandise appraised. At ports where there is no appraiser the certificate of the customs officer to whom is committed the estimating and collection of duties, of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise. If the collector shall deem the appraisement of any imported merchandise too low, he may, within sixty days thereafter, appeal to reappraisement, which shall be made by one of the general appraisers, or if the importer, owner, agent or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within ten days thereafter given notice to the collector, in writing, of such dissatisfaction. The decision of the general appraiser in cases of reappraisement shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within five days thereafter, give notice to the collector, in writing, of such dissatisfaction, or unless the collector shall deem the reappraisement of the merchandise too low, and shall within ten days thereafter appeal to re-appraisement; in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers, to be by rule thereof duly assigned for determination. In such cases the general appraiser and boards of general appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the dutiable value of the imported merchandise, and in so doing may exercise both judicial and inquisitorial functions. In such cases hearings may in the discretion of the General Appraiser or board of General Appraisers before whom the case is pending be open and in the presence of the importer or his attorney and any duly authorized representative of the Government, who may in like discretion examine and cross-examine all witnesses produced. The decision of the appraiser, or the person acting as such (in case where no objection is

made thereto, either by the collector or by the importer, owner, consignee or agent) or the single general appraiser in case of no appeal, and the board of three general appraisers in all reappraisement cases, shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court, and the collector or the person acting as such shall ascertain, fix and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon according to law.

"§ 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within fifteen days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as hereinbefore provided; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for in this Act.

"§ 15. That the general appraisers, or any of them, are hereby authorized to administer oaths, and said general appraisers, the board of general appraisers, the local appraisers or the collectors, as the case may be, may cite to appear before

them, and examine upon oath any owner, importer, agent, consignee, or other person touching any matter or thing which they, or either of them, may deem material respecting any imported merchandise, in ascertaining the dutiable value or classification thereof; and they, or either of them, may require the production of any letters, accounts, or invoices relating to said merchandise, and may require such testimony to be reduced to writing, and when so taken it shall be filed in the office of the collector, and preserved for the use or reference until the final decision of the collector or said board of appraisers shall be made respecting the valuation or classification of said merchandise, as the case may be.

"§ 16. That if any person so cited to appear shall neglect or refuse to attend, or shall decline to answer, or shall refuse to answer in writing any interrogatories, and subscribe his name to his deposition, or to produce such papers when so required by a general appraiser, or a board of general appraisers, or a local appraiser or a collector, he shall be liable to a penalty of one hundred dollars; and if such person be the owner, importer, or consignee, the appraisement which the general appraiser, or board of general appraisers, or local appraiser or collector, where there is no appraiser, may make of the merchandise shall be final and conclusive; and any person who shall willfully and corruptly swear falsely on an examination before any general appraiser, or board of general appraisers, or local appraiser or collector, shall be deemed guilty of perjury; and if he is the owner, importer, or consignee, the merchandise shall be forfeited.

"§ 17. That all decisions of the general appraisers and of the boards of general appraisers, respecting values and rates of duty, shall be preserved and filed, and shall be open to inspection under proper regulations to be prescribed by the Secretary of the Treasury. All decisions of the general appraisers shall be reported forthwith to the Secretary of the Treasury and to the board of general appraisers on duty at the port of New York, and the report to the board shall be accompanied, whenever practicable, by samples of the merchandise in question, and it shall be the duty of the said board, under the direction of the Secretary of the Treasury, to cause an abstract to be made and published of such decisions of the appraisers as

they may deem important, and of the decisions of each of the general appraisers and boards of general appraisers, which abstract shall contain a general description of the merchandise in question, and of the value and rate of duty fixed in each case, with reference, whenever practicable, by number or other designation, to samples deposited in the place of samples at New York, and such abstract shall be issued from time to time, at least once in each week, for the information of customs officers and the public.

"§ 22. No allowance shall be made in the estimation and liquidation of duties for shortage or non-importation caused by decay, destruction or injury to fruit or other perishable articles imported into the United States whereby their commercial value has been destroyed, unless under regulations prescribed by the Secretary of the Treasury. Proof to ascertain such destruction or non-importation shall be lodged with the collector of customs of the port where such merchandise has been landed, or the person acting as such, within ten days after the landing of such merchandise. The provisions hereof shall apply whether or not the merchandise has been entered, and whether or not the duties have been paid or secured to be paid, and whether or not a permit of delivery has been granted to the owner or consignee. Nor shall any allowance be made for damage, but the importers may within ten days after entry abandon to the United States all or any portion of goods, wares or merchandise of every description included in any invoice and be relieved from the payment of the duties on the portion so abandoned: Provided, That the portion so abandoned shall amount to ten per centum or more of the total value or quantity of the invoice. The right of abandonment herein provided for may be exercised whether the goods, wares or merchandise have been damaged or not, or whether or not the same have any commercial value. Provided further, That section twenty-eight hundred and ninety-nine of the Revised Statutes, relating to the return of packages unopened for appraisement, shall in no wise prohibit the right of importers to make all needful examinations to determine whether the right to abandon accrues, or whether by reason of total destruction there is a non-importation in whole or in part. All merchandise abandoned to the Government by the importers shall be delivered by the im-

porters thereof at such place within the port of arrival as the chief officer of customs may direct, and on the failure of the importers to comply with the direction of the collector or the chief officer of customs, as the case may be, the abandoned merchandise shall be disposed of by the customs authorities under such regulations as the Secretary of the Treasury may prescribe, at the expense of such importers. Where imported fruit or perishable goods have been condemned at the port of original entry within ten days after landing by health officers or other legally constituted authorities the importers or their agents shall, within twenty-four hours after such condemnation, lodge with the collector, on the person acting as collector, of said port, notice thereof in writing, together with an invoice description and the quantity of the articles condemned, their location, and the name of the vessel in which imported. Upon receipt of said notice the collector, or person acting as collector, shall at once cause an investigation and a report to be made in writing by at least two customs officers touching the identity and quantity of fruit or perishable goods condemned, and unless proof to ascertain the shortage of non-importation of fruit or perishable goods shall have been lodged as herein required, or if the importer or his agent fails to notify the collector of such condemnation proceedings as herein provided, proof of such shortage or non-importation shall not be deemed established and no allowance shall be made in the liquidation of duties chargeable thereon.

"Sec. 23. That whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of any money in the Treasury not otherwise appropriated. The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation; and the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation, for or against the United States, at any time within one year of the date of such entry, but not afterwards: Provided,

That the Secretary of the Treasury shall, in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this Act or of any other Act of Congress relating to the revenue, together with copies of the rulings under which repayments were made."[1]

§ 77. Jurisdiction of the Court of Customs Appeals. The Court of Customs Appeals was created by the Payne Tariff Law of August 5, 1909.[1] It was continued by the Judicial Code which provides for the same as follows:

§ 188. There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.

"§ 189. The said court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and as such places as said court may from time to time designate.

"§ 194. The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the busi-

§ 76. [1] 36 St. at L. 11.

§ 77. [1] 36 St. at L. 11, 105.

ness of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

"§ 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases.

"§ 196. After the organization of said court, no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: *Provided,* That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine; *Provided further,* That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided

may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed."[2]

"§ 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided,* That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such application shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

"§ 199. Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission, and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided,* That such calendar need not be called during the month of July and August of any Year." Prior to the creation of this court, the questions of law and fact involved in the de-

[2] 36 St. at L. 1087.

cisions of the Board of General Appraisers were reviewed by the Circuit Court of the United States within the district in which the matter arose.[3] No appeal would lie from the decision of the Board of General Appraisers ascertaining and fixing the dutiable value of goods when the board had acted regularly and without fraud or other misunderstanding.[4] The return of the board was compared to a master's report.[5] Where, on review by a Circuit Court of a decision of the Board of General Appraisers, the record returned by the Board was defective by reason of the loss of the evidence on which the Board's findings were based, it was held that, no other evidence being presented, is must be conclusively presumed that the findings by the Board were proper and justifiable.[6] The Board may make a different finding from the local appraiser without taking additional evidence.[7] In a case where the only fact certified by the appraisers was that "silk is the component material of chief value," it was held that the return should be sent back for a further statement. Judge Lacombe then said: "Had the board also certified that the articles were correctly described in the invoice or entry, or in the appraisers' return, there might be sufficient; but, as it is, there is nothing to show what the articles really are."[8] In a case where the return stated that "all the facts involved in said case, so far as ascertained by the board, are fully stated in [a certain opinion] and decision annexed thereto; and in such opinion it was stated, that inasmuch as some of the questions raised by protest were "understood to be now pending in the United States courts, [they] do not deem it advisable to enter into the merits of the same, but affirmed the [collector's] assessment of dues;" a further return was ordered.[9] A single day's delay after the period of thirty days allowed for filing the application compelled the dismissal of the appeal although the parties have gone to trial in the Circuit Court upon the merits.[10]

[3] 26 St. at L., ch. 407, § 15, p. 131; 35 St. at L. 403. See Louisville Pub. W. Co. v. Collector, 49 Fed. 561.

[4] Passavant v. U. S., 148 U. S. 214, 37 L. ed. 426.

[5] *Re* Van Blankensteyn, C. C. A., 56 Fed. 474.

[6] Schoellkopf, Hartford & Maclagan v. U. S., 147 Fed. 855.

[7] U. S. v. Strauss Bros. & Co., 128 Fed. 473.

[8] *Re* Dieckerhoff, 45 Fed. 235.

[9] *Re* Blumlein, 45 Fed. 236; *Re* Downing, 45 Fed. 412.

[10] Carriere & Son v. U. S., 163 Fed. 1009.

The provision in the former Act, that upon an appeal to the Circuit Court the board should return "the record and the evidence taken before them," was held not to require the return of evidence which was excluded.[11] Where a party wished to have the court upon appeal review evidence that had been excluded, he was required either to except below to the ruling excluding the same and bring the matter up by assignments of error or else offer it as additional evidence upon the appeal.[12] An importer who had offered evidence before the board was not thereby precluded from introducing new evidence in the Circuit Court upon an appeal from the board's decision.[13] Where no new evidence was offered by the importers before the Board of General Appraisers, it was held that they could offer none before the Circuit Court.[14]

[11] Harris v. U. S., 177 Fed. 475.

[12] Ibid.

[13] Wm. Wolff & Co. v. U. S., 168 Fed. 970.

[14] William F. Allen & Co. v. U. S., 127 Fed. 777. See also U. S. v. Klingenberg, 153 U. S. 93, 38 L. ed. 647; U. S. v. Jahn, 155 U. S. 109, 39 L. ed. 87; U. S. v. Lies, 170 U. S. 628, 42 L. ed. 1170; Earnshaw v. U. S. 146 U. S. 60, 36 L. ed. 887; Apgar v. U. S., C. C. A., 78 Fed. 332; Marine v. Lyon, C. C. A., 65 Fed. 992; U. S. v. Davis, C. C. A., 54 Fed. 147; *Re* Marquand, 57 Fed. 189; U. S. v. Rosenwald, C. C. A., 67 Fed. 323; White v. U. S., C. C. A., 72 Fed. 251; U. S. v. Lies, 74 Fed. 546; U. S. v. Kenworthy, C. C. A., 68 Fed. 904; "Zante Currants," 73 Fed. 183; Sang Lung v. Jackson, 85 Fed. 502; Foster v. Vocke, 60 Fed. 745; *Re* Chase, 50 Fed. 695; *Re* Wyman, 45 Fed. 469; *Re* Sternbach, 44 Fed. 413; *Re* Sherman, 49 Fed. 224; s. c., *sub nom. Re* Collector of Customs, C. C. A., 55 Fed. 276; *Re* Kursheedt Mfg. Co., 49 Fed. 633; s. c., C. C. A., 54 Fed. 159; *Re* Muser, 49 Fed. 831; *Re* Crowly, 50 Fed. 465; s. c., C. C. A., 55 Fed. 283; *Re* Bache, 54 Fed. 371; s. c., U. S. v. Bache, C. C. A., 59 Fed. 762; Mexican Onyx & Tr. Co. v. U. S., 66 Fed. 732; *Re* Buffalo Natural Fuel Co., 73 Fed. 191; s. c., U. S. v. Buffalo N. G. F. Co., C. C. A., 78 Fed. 110; Stern v. U. S., 77 Fed. 607; Lesser v. U. S., 89 Fed. 197; U. S. v. Hahn, 91 Fed. 755; Morris E. & A. Ex. Co. v. U. S., 94 Fed. 643; *Re* F. W. Myers & Co., 123 Fed. 952.

CHAPTER II.

JURISDICTION IN EQUITY.

§ 78. Equitable jurisdiction in general. Equity is that system of jurisprudence which was administered by the High Court of Chancery of England in the exercise of its extraordinary jurisdiction, and which has been amplified and extended by the more modern decisions of the English and American courts. It owed its origin to a desire upon the part of the English sovereigns and their chancellors to supplement the deficiencies and soften the rigors of the common law; and whereas the wellsprings of this were such of the customs of the German tribes as had been brought with them from their Fatherland by the Jutes and Angles;[2] those of that, which was administered at first conclusively by ecclesiastics are in the canon, which was itself derived from the greatest monument of the genius of Ancient Rome, the civil law.[3] Since the time of Nottingham, before whom each succeeding chancellor had decided the cases brought before him in accordance with his own notions of what was proper, or in the language of Selden,[4] measured justice out by the length of his foot, the same respect has been paid to precedent in the courts of equity and common law. But the rules regulating the remedies administered by the former are much more plastic. And even at the present time cases often occur where the judges sitting at equity, with the approval and assistance of the profession, invent and adopt new remedies suited to a state of society and of civilization unknown and not anticipated when the procedure in chancery first assumed the form that it still substantially retains.[5] The chronicles of the

§ 78. [1] Mitford's Pleadings; Bispham's Equity, § 1.

[2] Holmes' Com. Law.

[3] Langdell's Eq. Pl., Introduction.

[4] Selden's Table Talk, Title "Equity."

[5] Kennedy v. St. Paul & Pacific R. Co., 2 Dill. 448; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Joy v. St. Louis, 138 U. S. 1, 50, 34 L. ed. 843, 859; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.,

growth and development of equity abound with names well known to the students, as well of general history as of jurisprudence. Among them Wolsey, More, Bacon, Clarendon, Somers, and Erskine are the most familiar to the former, while the members of the profession look back with especial admiration upon the careers of Nottingham, Hardwicke, Eldon, Westbury, Kent, Story, and Taney. Although originally no one could seek their aid who was not denied justice by the courts of common law; yet after he had once shown a title to their assistance, courts of equity would almost always give a suitor complete relief in the matter about which he complained.[6] And now that since the time of Mansfield the courts of common law have, abandoning their former jealousy, in many instances of their own accord as well as under the compulsion of statutes, accepted doctrines first created by courts of equity,[7] the latter have not felt obliged to relinquish the jurisdiction which they formerly acquired.[8] One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court;[9] and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its writs; equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived.[10]

19 L.R.A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746, 751; Wallworth v. Holt, 4 Mylne & Cr. 619.

6 1 Fonblanque's Equity, b. i, ch. i, § 3, note (*f*); Motteux v. London Assur. Co., 1 Atk. 545; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 405, 13 L. ed. 187.

7 Moses v. Macferlan, 2 Burr. 1005; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

8 Putnam v. New Albany, 4 Biss. 365.

9 Langdell's Eq. Pl., § 40.

10 Archer v. Preston, 1 Eq. Cas. Ab. 133, pl. 3, cited and followed in Arglasse v. Muschamp, 1 Vern. 75; s. c., 1 Vern. 135; Penn v. Lord Baltimore, 1 Ves. Sr. 444; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Muller v. Dows, 94 U. S. 443, 24 L. ed. 207, at Pages 449–450. The au-

§ 79. General survey of the jurisdiction of courts of equity. The jurisdiction of courts of equity is exercised either for the protection of rights which the common law does not recognize; or for the prevention or redress of wrongs for which the common law affords no adequate remedy. A full consideration of this topic is beyond the scope of this treatise. The following summary, although imperfect, may occasionally assist the reader. The rights which a court of equity alone respects are: the rights of beneficiaries under a trust,[1] either express or

thorities are well collected in a learned opinion by Judge, subsequently Chief Judge, Henry E. Davies, in Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192. *Cf.* Carpenter v. Strange, 141 U. S. 87, 106, 35 L. ed. 640, 647, cited *infra*, § 325.

§ 79. [1] Stuart v. Mellish, 2 Atk. 610; New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184; Smith v. Am. Nat. Bank, C. C. A., 89 Fed. 832. By a legatee against an executor, Mayer v. Foulkrod, 4 Wash. C. C. 349; Speckart v. Schmidt, C. C. A., 190 Fed. 499; and by one of the next of kin against an administrator and his sureties, Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Pratt v. Northam, 5 Mason, 95, *supra*, § 54; to recover the complainant's share of a decedent's estate. So may an executor to establish his individual claim against the estate. Glover v. Patten, 165 U. S. 394, 41 L. ed. 760. By a married woman to recover money which belongs to her separate estate, Hunt v. Danforth, 2 Curt. 592. By a municipal corporation to enjoin the sale on execution of property held by it in trust, New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184. By a trustee and his beneficiary to obtain possession of land subject to the trust, Harrison v. Rowan, 4 Wash. C. C. 202. To recover from a bank money of the plaintiff deposited by a third person in the latter's name, Union S. Y. Bank v. Gillespie, 137 U. S. 411, 420, 34 L. ed. 724, 727; National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 658. To compel the assignment to a principal by his agent of judgments recovered by the latter for the benefit of the former, Burke v. Davis, 63 Fed. 456. But *not* a bill by the assignee of a cause of action to enforce for his own use the legal right of his assignor, when he seeks the aid of equity merely upon the ground that he cannot maintain an action at law in his own name, Hayward v. Andrews, 106 U. S. 672, 27 L. ed. 271; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 27 L. ed. 484. In the absence of any statutory restrictions, by a resident taxpayer in a county to prevent an illegal disposition of the county funds, or the illegal creation of a debt which he in common with the other property holders there may be compelled to pay, Field, J., in Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1070, 1071. By the beneficiary of a trust against his trustee and a debtor of the trust estate to enforce a cause of action belonging to the trust estate, upon which the trustee has refused to sue, U. S. v. Myers, 2 Brock. 516;

Davis v. Davis, 89 Fed. 532; Brun v. Mann, 12 L.R.A.(N.S.) 154, 151 Fed. 145. By a stockholder in a corporation to recover its money fraudulently misappropriated by its directors. Gindrat v. Dane, 4 Cliff. 260. See *infra*, § 145. But not, by a stockholder, to recover damages for a depreciation of his stock, by an injury to the property or business of the corporation, Kelly v. Mississippi River Coaling Co., 175 Fed. 482. For a case where a minority dissenting stockholder was refused a decree for an accounting by a consolidated railroad company, when he objected to the merger of his corporation therein, see Miller v. Chicago & A. R. Co., 198 Fed. 695. By a stockholder against a corporation to compel the transfer of stock fraudulently transferred to another, Kilgour v. N. O. Gas-Light Co., 2 Woods, 144; and to compel the transfer of stock to its equitable owners, Mechanics' Bank v. Seton, 1 Pet. 299, 7 L. ed. 152; Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931, unless it has been acquired unconscientiously or for speculative purposes, Mississippi & Mo. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; Foll's Appeal, 91 Pa. St. 434, 438, 36 Am. Rep. 671; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 34 L. ed. 200. "It has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. Bloxom v. Met. Railway, L. R. 3 Ch. App. 337; Seaton v. Grant, L. R. 2 Ch. App. 459; Elkins v. Camden & Atlantic Railroad, 36 N. J. Eq. 5." Brown, J., in Dickerman v. Northern Trust Co., 176 U. S. 181, 192, 44 L. ed. 423, 430. See Jahu v. Champagne Lumber Co., 147 Fed. 631. In the absence of statutory authority, a private individual *cannot* file a bill to obtain the forfeiture of a corporate franchise. Gaylord v. Fort Wayne, M. & C. R. Co., 6 Biss. 286. Nor a stockholder a bill to dissolve a foreign corporation under a statute of the country which chartered it, Republican Silver Mines v. Brown, 24 L.R.A. 776, 58 Fed. 644. But see F. L. & Tr. Co. v. Sioux Falls, 131 Fed. 890. Nor, in the absence of a State or Federal statute, can a bill for the dissolution of a State corporation be maintained, Jacobs v. Mexican Sugar Co., 130 Fed. 589, 592, where the court said that the New Jersey statute, authorizing a dissolution of a corporation by the state court of chancery, could be followed by the Federal court. In Conklin v. U. S. Ship Building Co., 140 Fed. 219, held, that such a statute could not be followed by the Federal court, *infra*, § 82. For the power of congress to enact a statute regulating the internal management of state corporations and authorizing the disintegration of its assets by the Federal courts, see Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed. 679. Nor can a corporation be enjoined from acting beyond its legal powers at the suit of a business rival not one of its stockholders, Railroad Co. v. Ellerman, 105 U. S. 166, 26 L. ed. 1015. To compel specific performance of a contract for the sale of a patent-right, Hall v. Pitrat, 45 Fed. 94, of a contract to issue an insurance policy, and in the same suit to compel payment of the policy, Tayloe v. Merchants' F. Ins. Co., 9 How. 390, 13 L. ed. 187; Hebert v. Mutual L. Ins. Co., 12 Fed. 807; Brugger v. State Inv. Ins. Co., 5 Saw.

304; of a contract for the purchase of an entire stock of general merchandise for a lump sum, that had been paid when it was alleged that defendant had delivered about two-thirds of the goods, but refused to deliver the remainder, which he had concealed, so that complainant could not obtain them by an action of replevin, Raymond Syndicate v. Brown, 124 Fed. 80; of a contract between a railroad and a telegraph company, authorizing the maintenance and operation of the telegraph line upon the railroad company's right of way, with a provision for free telegraph service to be given to the railroad company, and a grant to the railroad company of the right to string and use a wire, Western Union Tel. Co. v. Pennsylvania Co., C. C. A., 68 L.R.A. 968, 129 Fed. 849; Pennsylvania R. Co. v. St. L., A. & T. H. R. Co., 118 U. S. 290, 30 L. ed. 83; Franklin Tel. Co. v. Harrison, 145 U. S. 459, 30 L. ed. 83; St. Louis A. & T. H. R. Co. v. I. & St. L. R. Co., 9 Biss. 144. But *not* of a contract containing a power of revocation by the defendant, Express Co. v. Railroad Co., 99 U. S. 191, 25 L. ed. 319. It has been held that a provision that the employer may terminate by ten days' notice a contract does not prevent his obtaining an injunction against its violation by the employee. Phila. Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973. Nor of a bill to compel a railway company to maintain its permanent terminus at a certain place, Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385. But a bill was sustained to compel specific performance of a covenant, to construct and to maintain a station upon land which the complainant had conveyed to a railroad company, Murray v. Northwestern R. Co., 64 S. C. 520, 42 S. E. 617. Nor, except perhaps under special circumstances, to compel a railroad company to compel specific performance by either party to a contract for the construction of a railroad, Strang v. Richmond, P. & C. R. Co., 93 Fed. 71. See also Fallon v. Railroad Co., 1 Dill. 121; Ross v. Union Pac. Ry. Co., 1 Woolw. 26. As early as Year Book 8 ed. IV. 4, it was held that specific performance of a contract to build could be decreed. But the adequacy of the plaintiff's remedy at law, as he could have the work done by a stranger to the contract, as well as the difficulty of supervision, afterwards led the courts to refuse to take jurisdiction in the case of an ordinary building contract. Errington v. Aynesly (1788) 2 Bro. Ch. 341; Lucas v. Commerford (1790) 3 Bro. Ch. 166. Where, however, the building is to be done on land conveyed to the defendant as consideration the plaintiff can obtain the expected benefit in no other way; and in such cases the courts do not always find insurmountable the difficulty that supervision of the construction or even of indefinite maintenance is involved. Hood v. N. E. R. Co. (1869) L. R. 8 Eq. 666; Gregory v. Ingwersen (1880), 32 N. J. Eq. 199; Lawrence v. Saratoga Lake R. Co. (1885), 36 Hun, 467; Jones v. Parker (1895), 163 Mass. 564, 47 Am. St. Rep. 485, 40 N. E. 1044. It has been said that a court of equity has no power to seize a man's property, and through its officers complete a bridge in pursuance of a contract which he has made. Texas & St. Louis Ry. Co. v. Rust, 17 Fed. 275. To establish an attorney's lien. Coram v. Ingersoll, 211

implied,—which latter term includes those which are resulting[2] or constructive:[3] the right to be relieved from an obligation which has been entered into, or to recover a right which has been lost by accident,—[4] which expression is said to include the cases where one has become subject to a penalty or forfeiture,[5] or has lost a document the possession of which was essential to his success in an action at common law,[6] and is also often used to bolster up a weak equity of another kind—;[7] by mistake,[8]—which must be mutual, material, and not caused by the negligence of the party seeking relief,[9] and which, if solely of a point

U. S. 335. By the holder of a corporate bond or other claim to enforce his lien upon tolls or other income pledged to secure its payment. Good Templars' L. Ass'n v. United L. I. Ass'n, 59 Fed. 220; Grand Trunk Ry. Co. v. Central Vt. Ry. Co., 85 Fed. 87. See Townsend v. Vanderwerker, 160 U. S. 171, 40 L. ed. 383; Vallette v. White W. V. C. Co., 4 McLean, 192.

2 Dyer v. Dyer, 2 Cox Eq. Cas. 92; Hoxie v. Carr, 1 Sumn. 173.

3 National Bank v. Insurance Co., 104 U. S. 54, 64–71, 26 L. ed. 693, 698–700.

4 L. Bucki & Son Lumber Co. v. Atlantic Coast Line Co., C. C. A., 116 Fed. 1. To enjoin a township from setting up, as a defense to an action upon bonds issued by it, the accidental omission of the town seal thereon. Bernard's Township v. Stebbins, 109 U. S. 341, 27 L. ed. 956.

5 1 Spence Eq., §§ 629, 630; Bispham's Eq., § 178. Mortgages are included under this head. Mitford's Pl. 118–276; Story's Eq. Jur., § 89. To set aside a contract entered into by a mistake of law, the execution of which would subject the complainant to penalties under the anti-trust law. Chalmers Chemical Co. v. Chadeloid Chemical Co., 175 Fed. 995.

6 Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373; Donaldson v. Williams, 50 Mo. 408; Story's Eq. Jur., § 84; Bispham's Eq., §§ 176, 177. But not, it has been said, to assist in maintaining an action for a tort. Security S. & L. Ass'n v. Buchanan, C. C. A., 66 Fed. 799.

Story's Eq. Jur., §§ 90–99; Bispham's Eq., §§ 182, 183. Cases where this head of equity is invoked for relief against a defective execution of a power are included here.

8 For a case where relief was denied because of negligence, see Armour & Co. v. Renaker, 191 Fed. 48. The court refused to set aside a judgment recovered in favor of the United States through an alleged misunderstanding between the defendant and the district attorney. Buckley v. U. S., 196 Fed. 429.

9 Bispham's Eq., § 191; Whittemore v. Farrington, 76 N. Y. 452; McFerran v. Taylor, 3 Cranch, 281, 2 L. ed. 440; Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678; Williams v. U. S., 138 U. S. 514, 34 L. ed. 1026; Duke of Beaufort v. Neeld, 12 Cl. & Fin. 248, 286; Stephenson v. Wilson, 2 Vern. 325; New River Mineral Co. v. Seeley, C. C. A., 120 Fed. 193. To reform an instrument executed by mistake. Walden v.

of law, will very rarely release one from his contractual obligations—;[10] by fraud, whether actual[11] or constructive;[12] or by

Skinner, 101 U. S. 577, 25 L. ed. 963.

[10] Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 215, 5 L. ed. 589, 599; s. c., 1 Pet. 1, 14, 7 L. ed. 33; Snell v. Insurance Co., 98 U. S. 85, 25 L. ed. 52; Pitcher v. Hennessey, 48 N. Y. 415; Adair v. Brimmer, 74 N. Y. 539; Relief F. Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291; Allen v. Galloway, 30 Fed. 406; Cooper v. Phibbs, L. R. 2 H. L. 170; Elliott v. Sackett, 108 U. S. 132, 142, 27 L. ed. 678, 682; Taylor v. Holmes, 127 U. S. 489, 32 L. ed. 179; Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. ed. 414; Pope Mfg. Co. v. Gormully & Jeffery Co., 144 U. S. 238, 36 L. ed. 420; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678; Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 342, 44 L. ed. 1088, 1095; Hamblin v. Bishop, 41 Fed. 74; Bailey v. Am. Cent. Ry. Co., 13 Fed. 250; Sias v. Roger Williams Ins. Co., 8 Fed. 183; Sampson v. Mudge, 13 Fed. 260.

[11] Cobbeltiom v. William, Chan. Cal. II; Stonehouse v. Starishaw, Chan. Cal. XXIX; Bief v. Dyer, Chan. Cal. XI; Bacon v. Bronson, 7 Johns. Ch. (N. Y.) 194, 11 Am. Dec. 449; Jones v. Bolles, 9 Wall. 364, 19 L. ed. 734. A bill was sustained when filed by the Consul of Austria and Hungary, to restrain a beneficial association from using the name of the Emperor of Austria and Hungary, as a part of its corporate name, and the use of his portrait as a part of its advertising literature, in order fraudulently to induce his subjects, residents in the United States, to believe that the association is conducted under the customs of their own country, and that their Emperor is identified with the same and a patron thereof. Von Thororovich v. Franz Josef Beneficial Ass'n, 154 Fed. 911. But *not* a bill to recover damages for a fraudulent misrepresentation. Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271; White v. Boyce, 21 Fed. 228. "In cases of fraud and mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered in an action sounding in tort or for money had and received." Per Gray, J., in Buzard v. Houston, 119 U. S. 347, 352, 30 L. ed. 451, 453. Even when sought as an alternative to a prayer for a rescission. Alger v. Anderson, 92 Fed. 696. Nor for a fraudulent conspiracy. Ambler v. Choteau, 107 U. S. 586, 27 L. ed. 322. Nor, it has been held, a bill filed by an insurance company, after a loss has occurred, to obtain the cancellation of a policy procured by fraud. Home Ins. Co. v. Stanchfield, 1 Dill. 424; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501; Mutual Life Ins. Co. v. Griesa, 156 Fed. 398; Griesa v. Mutual Life Ins. Co., C. C. A., 169 Fed. 509. Not even where the State courts of equity took jurisdiction of bills of a similar character. Niagara Fire Ins. Co. v. Adams, C. C. A., 198 Fed. 822. *Contra*, U. S. Life Ins. Co. v. Cable, C. C. A., 98 Fed. 761; Mutual Life Ins. Co. v. Pearson, 114 Fed. 395. Nor, it has been held, where the suit is brought by several insurers, the liability of each being proportioned to the total amount of valid

duress;[13] and the rights of those who are justly entitled to compel election under a will,[14] subrogation[15] or an adjustment of liabilities,—under which term are included set-off,[16] contribution,[17] exoneration,[18] and marshaling of securities.[19] The cases where the jurisdiction of equity is exercised merely for the sake of the remedy are where its interposition is needed to assist in obtaining a judgment at law by compelling a discovery from a defendant,[20] or the perpetuation of the testimony of witnesses,[21] or their examination abroad,[22] when it is feared that

insurance, and an accounting between them is prayed. Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., C. C. A., 173 Fed. 888, 32 L.R.A.(N.S.) 940.

12 Mackreth v. Fox, 4 Bro. P. C. 258; Ex parte Lacey, 6 Ves. 625; Villa v. Rodriguez, 12 Wall. 323, 339, 20 L. ed. 406, 410; Adams v. Cowen, 177 U. S. 471, 484, 44 L. ed. 851, 855.

13 Nicholls v. Nicholls, 1 Atk. 409; Gould v. Okeden, 4 Bro. P. C. 198; Baker v. Morton, 12 Wall. 150, 20 L. ed. 262.

14 Arnold v. Kempstead, 1 Amb. 466; Jones v. Collier, 2 Amb. 730; Herbert v. Wren, 7 Cranch, 370, 378, 3 L. ed. 374, 377.

15 First Nat. Bank v. City Tr., S. D. & Surety Co., C. C. A., 114 Fed. 529.

16 Chapman v. Derby, 2 Vern. 117; Lord Lanesborough v. Jones, 1 P. Wms. 325; 2 Story's Eq. Jur., § 1433; Story, J., in Greene v. Darling, 5 Mason, 201, 207–213; North Chicago R. M. Co. v. St. Louis O. & S. Co., 152 U. S. 596, 38 L. ed. 565; Anglo-Am. Provision Co. v. Davis Pr. Co., 112 Fed. 574; Sutherland Innes Co. v. American Wired Hoop Co., C. C. A., 113 Fed. 183; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 116 Fed. 1. Loy v. Alston, C. C. A., 172 Fed. 90.

17 Layer v. Nelson, 1 Vern. 456; Howards v. Selden, 5 Fed. 465, 473. A bill for an account of general average and decree of contribution has been sustained. Sturgess v. Cary, 2 Curt. 59.

18 Galton v. Hancock, 2 Atk. 425; Walker v. Jackson, 2 Atk. 625; Bank of U. S. v. Beverly, 1 How. 134, 151, 11 L. ed. 75, 82.

19 Aldrich v. Cooper, 8 Ves. 394; Trimmer v. Bayne, 9 Ves. 209; *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. A bill may be sustained when the defendant's land is so encumbered, by different liens, that it does not appear probable that it could be sold advantageously without an adjustment of the priority and rights of the several lienholders. Huff v. Bidwell, C. C. A., 151 Fed. 563.

20 Finch v. Finch, 2 Ves. Sr. 491; Moodalay v. Morton, 1 Bro. C. C. 469; Brown v. Swann, 10 Pet. 497, 500, 9 L. ed. 508; Heath v. Erie Ry. Co., 9 Blatchf. 316.

21 Earl of Suffolk v. Green, 1 Atk. 450; Pearson v. Ward, 1 Cox Eq. 177; Lord Dursley v. Berkeley, 6 Ves. 251; Richter v. Union Tr. Co., 115 U. S. 55, 29 L. ed. 345; N. Y. & B. C. P. Co. v. N. Y. C. P. Co., 9 Fed. 578. See U. S. R. S., §§ 863–867, and *infra*, § 345.

22 Moodalay v. Morton, 1 Bro. C. C. 469.

on account of death, illness, or absence, they cannot be obliged to attend upon the trial; in rare cases to grant a new trial;[23] to satisfy a judgment out of property of a debtor which cannot be

[23] Folsom v. Ballard, C. C. A., 70 Fed. 12. To set aside a judgment obtained by accident, mistake, or fraud. Metcalf v. Williams, 104 U. S. 93, 95, 26 L. ed. 665, 666; Coleman v. U. S., 181 Fed. 599. To set aside an award by arbitrators upon allegations of misconduct not apparent on the face of the award, nor affecting the jurisdiction of the arbitrators. Hartford F. Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 156. But *not* to set aside or enjoin proceedings to enforce a judgment at law because of fraud; unless the complainant had a defense to the action upon the merits. White v. Crow, 110 U. S. 183. 28 L. ed. 113. *Contra*, Mills v. Scott, 43 Fed. 452; and either the fraud was extrinsic to the matter tried and not in issue in the former suit, nor then known to the complainant, or else some unconscientious advantage was taken of the successful judgment debtor during the progress of the suit without any fault or negligence upon his part. Life Ins. Co. v. Bangs, 103 U. S. 780, 782, 26 L. ed. 608, 609; Cragin v. Lovell, 109 U. S. 194, 27 L. ed. 903; Nat. Surety Co. v. State Bank, C. C. A., 61 L.R.A. 394; 120 Fed. 593; Aldrich v. Crump, 128 Fed. 984. See Knox County v. Harshman, 133 U. S. 152, 33 L. ed. 586; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 33 L. ed. 1064; Sanford v. White, 132 Fed. 531. Nor to set aside a judgment at law. Lewis v. Cocks, 23 Wall. 466; or a decree in equity. Yeatman v. Bradford, 44 Fed. 536; for an omission to serve a party to the same, except perhaps when the record shows an apparent service. Where a party refused to carry out a lost stipulation, that a judgment should abide the result of a writ of error to another judgment, but did not deny that he had made the same, it was held that a bill in equity to vacate the judgment could not be sustained, because the complainant had an adequate remedy at law. Brown v. Arnold, 127 Fed. 387. Nor to set aside a judgment recovered in favor of the United States through an alleged misunderstanding between the defendant and the district attorney. Buckley v. U. S., 196 Fed. 429. Nor for newly discovered evidence, unless the complainant shows that his failure to discover the same before the former trial was not attributable to his own want of diligence; nor when the evidence ought to have been within the knowledge of the party when he made his defense to the action at law. Pickford v. Talbott, 225 U. S. 651, 56 L. ed. 1240. Nor, in the absence of a State statute authorizing such a proceeding, a bill to set aside the probate of a will. Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054; Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101; Goodrich v. Ferris, 145 Fed. 844. *Cf. supra*, § 54; nor to cancel a will itself. Oakley v. Taylor, 64 Fed. 245; on account of a mistake, undue influence, forgery or other fraud; but a Federal court may entertain a bill for the con-

reached by an execution;[24] to prevent a threatened breach of a

struction of a will duly established. Wood v. Paine, 66 Fed. 807.

[24] Angell v. Draper, 1 Vern. 399; Scottish Am. Mtg. Co. v. Follansbee, 14 Fed. 125. By a judgment creditor to apply to the satisfaction of his debt any interest which his debtor may hold in a patent or copyright, Ager v. Murray, 105 U. S. 126, 26 L. ed. 942. See Maitland v. Gibson, 79 Fed. 136; or in a license to use a patented invention. Matthews v. Green, 19 Fed. 649. By a judgment creditor against a city for an accounting of taxes collected by it which had been pledged for the payment of complainant's demand. City of New Orleans v. Fisher, C. C. A., 91 Fed. 574. To enforce a decree for the payment of money, at least when made by another court of equity. Shields v. Thomas, 18 How. 253, 262, 15 L. ed. 368, 372. But see Tilford v. Oakley, Hempst. 197. To enforce the payment of alimony directed to be paid in the final judgment or decree of a State court. Barber v. Barber, 21 How. 582, 16 L. ed. 226; Knapp v. Knapp, 59 Fed. 641; Israel v. Israel, 130 Fed. 237; Johnson v. Johnson, 13 Fed. 193; Bowman v. Bowman, 30 Fed. 849. By a creditor, whose claim has not been reduced to judgment, against an insolvent corporation for the appointment of a receiver and the marshaling and distribution of its assets; when the corporation waives the objection that his claim has not been reduced to judgment. *Re* Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Fink v. Patterson, 21 Fed. 602. Or when the charter of the corporation has expired, or because of a sheriff's sale of its property and franchises, the officers last elected have become trustees to distribute its assets. Am. Ice Co. v. Pocono Spring Water Ice Co., 165 Fed. 714. But *not* a bill filed by a creditor for himself alone to apply equitable assets to the payment of his debt, unless he has obtained a judgment for his claim in a court of the same State or judicial district, and had the return of an execution issued thereon unsatisfied. Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370; Smith v. Railroad Co., 99 U. S. 398, 25 L. ed. 437; Walser v. Seligman, 13 Fed. 415; Swan L. & C. Co. v. Frank, 148 U. S. 603, 37 L. ed. 577; Hollins v. Brierfield, C. & I. Co., 150 U. S. 371, 37 L. ed. 1113; Maxwell v. M'Daniels, C. C. A., 184 Fed. 311. A judgment debtor in a foreign jurisdiction cannot sue to recover equitable assets until he has recovered a judgment in the district where the suit is brought. Nat. Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070. Not even, it has been held, when it is shown that the debtor is insolvent and has no property which can be reached by a legal process, Walser v. Seligman, 13 Fed. 415; Am. Creosote Works v. C. Lembcke & Co., 165 Fed. 809. Unless to enforce a trust or equitable right; Case v. Beauregard, 101 U. S. 688, 690, 25 L. ed. 1004; Merchants' Nat. Bank v. Chattanooga Constr. Co., 53 Fed. 314. Nor, in the absence of statutory authority, when he is about to make a fraudulent transfer of his property. Am. Creosote Works v. C. Lembcke & Co., 165 Fed. 809. Whether a Federal court will entertain a creditor's bill founded

upon the judgment of a State court within the district has been doubted. Davis v. Davis, 65 Fed. 380. But that it was held in Bacon v. Harris, 62 Fed. 99; Bidwell v. Huff, 103 Fed. 362. It has been held: that such a bill may be maintained in Virginia, by a creditor of an insolvent firm which is disposing of its assets in fraud of creditors, filed on behalf of the other creditors as well as himself, and praying the appointment of a receiver, an injunction against any interference by others with the firm assets and the distribution of those assets among the creditors equally. Fink v. Patterson, 21 Fed. 602. That a judgment creditor of a national bank cannot sue in equity to compel the receiver of the bank to recognize his judgment and to enjoin the receiver from refusing such recognition; because he has an adequate remedy by an action at law in the Federal court against the receiver upon the judgment of the State court against the bank, Denton v. Baker, 79 Fed. 189. And it was said that a receiver, assignee in bankruptcy, or assignee under a voluntary general assignment, each of whom represents creditors as well as the debtor, cannot maintain a bill to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent. Jacobson v. Allen, 12 Fed. 454.

25 Robinson v. Lord Byron, 1 Bro. C. C. 588; Osborn v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204; Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65, 82, 46 L. ed. 808, 815. Bills may be sustained; to enjoin the head of a department of the national government from acting beyond the scope of his authority to the prejudice of the complainant. Noble v. Union River Logging R. Co., 147 U. S. 165, 37 L. ed. 123. See *infra*, § 100. To enjoin a State officer from revoking a permit authorizing a foreign corporation to transact business within the State. Greenwich Ins. Co. v. Carroll, 125 Fed. 121. *Infra*, § 105. By a railroad company, to enjoin scalpers from selling non-transferrable return tickets, already issued by complainant, and all tickets of a similar nature which complainant may issue in the future. Bitterman v. Louisville & N. R. R. Co., 207 U. S. 205, 52 L. ed. 171. To enjoin a State board of equalization from certifying to the different counties an assessment of a railroad for taxation at a higher percentage of its real value than the assessment of other property by the county officers, although the board has assessed the railroad at no more than its value, and the State Constitution ordains that all property be taxed according to its value; when, if the complaint were remitted to its remedy at law, a cloud would be cast upon its title and it would be obliged to bring at least thirty-five suits to obtain relief. Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 356, 358. *Cf.* Sanford v. Poe, C. C. A., 69 Fed. 546, 60 L.R.A. 641; Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444. See § 25, *supra*. To restrain public officers from making an assessment against real estate for a betterment, under a statute that is unconstitutional. Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599. To enjoin the collection of taxes, in the assessment of which the State authorities have denied the complainant the equal protection of the laws by an enormous disparity and discrimination be-

tween the value placed upon its franchises and other property and that placed upon the franchises and property held by other corporations of the same class; and if plaintiff sued to recover the taxes, after they had been paid, he would be obliged to bring separate actions against three or four different officers, to whom the money is payable after its collection. In this case part of the money was paid to the State, which could not be sued, and there was no statute authorizing a repayment by the State treasurer in case the taxpayer succeeded in an action against the collector. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 39, 52 L. ed. 78, 88. See Atchison, T. & S. F. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456, In general, to enjoin the collection of an illegal tax when its enforcement would lead to a multiplicity of suits, Union Pac Ry. Co. v. Cheyenne, 113 U. S. 516, 28 L. ed. 1098; Dundee Mtg. T. Inv. Co. v. School District, 19 Fed. 359; Cummings v. National Bank, 101 U. S. 153, 156, 25 L. ed. 903, 904; Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 357; Sanford v. Poe, C. C. A., 60 L.R.A. 641, 69 Fed. 546; or produce irreparable injury, Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. ed. 78; Taylor v. Louisville & N. R. Co., 88 Fed. 350; Hutchinson v. Beckham, C. C. A., 118 Fed. 399. In Shelton v. Platt, 139 U. S. 591, 596, 597, 35 L. ed. 273, 276, 277; where the only jurisdictional averments were "that the property of the United State Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience" and "that your orator and the United States Express Company are without adequate remedy at law in the premises;" it was held that no injunction should issue. There, however, the State law authorized the recovery of the taxes after their payment if their illegality was established. See Allen v. Pullman's Palace Car Co., 139 U. S. 658, 35 L. ed. 303. See also Keithsburg Bridge Co. v. McKay, 42 Fed. 427; Pacific Exp. Co. v. Seibert, 44 Fed. 310; Hoey v. Coleman, 46 Fed. 221, 223. A will may be sustained where the levy of the tax would throw a cloud upon the title of real estate, in which complainant has an interest: Sanford v. Gregg, 58 Fed. 620; Taylor v. Louisville & N. R. Co., C. C. A., 88 Fed. 350, 358; Kansas City, Ft. S. & M. R. Co. v. King, C. C. A., 120 Fed. 611; in such a case, there must be a specific averment, that the complainant owns, or holds an interest in, real estate, Indiana Mfg. Co. v. Koehne, 188 U. S. 681; Risley v. City of Utica, 173 Fed. 502; or when its assessment was made by a fraud, of which equity might take cognizance, First Nat. Bank v. Douglass County, 3 Dill. 298; Union Pac. R. Co. v. McShane, 3 Dill. 303, 312; Atchison, T. & S. F. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456, but see Nye, Jenks & Co. v. Washburn, 125 Fed. 817; such as an intentional and systematic undervaluation of other taxable property, Atchison, T. & S. F. Ry. Co. v. Sullivan, C. C. A., 173 Fed. 456; or by a corporation, which is directed by statute to pay the tax upon the shares of its stockholders, Cum-

mings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 75, 113, 49 L. ed. 669, 672, 688. Charleston Nat. Bank v. Melton, 171 Fed. 743. Otherwise, a bill will not lie to restrain the collection of taxes. Hannewinkle v. Georgetown, 15 Wall. 457, 21 L. ed. 231; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 669; Milwaukee v. Koeffler, 116 U. S. 219, 29 L. ed. 612; Pittsburg, etc., Ry. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354; Indiana Mfg. Co. v. Koehne, 23 S. Ct. 452, 188 U. S. 681, 47 L. ed. 651; except under extraordinary circumstances. It has been said: "It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty" for failure to pay a tax, "the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting in its name, a litigious or vindictive spirit, or a purpose needlessly to vex and harass the citizen with lawsuits. Whatever the rule may be in the case of natural persons, the court will presume that a State is incapable of such a vulgar passion and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights." Caldwell, J., in Pacific Exp. Co. v. Seibert, 44 Fed. 310, 315. Nor a bill to enjoin the collection of an internal revenue tax imposed by the United States and illegally assessed. U. S. R. S., § 3224; Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901. But see Pollock v. Farmers' L. & T. Co., 157 U. S. 429, 39 L. ed. 759; *infra*, §§ 105, 284. To enjoin a city from enforcing an unconstitutional ordinance, reducing the charges made by a person acting in a public employment, such as a street railroad company or a water company: Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 381, 46 L. ed. 592, 605; Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65, 82, 46 L. ed. 808, 815; Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 531, 48 L. ed. 1102, 1106; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 11, 43 L. ed. 341, 346; Hutchinson v. Beckham, 118 Fed. 399, 402; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23, 33; Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 125; Cleveland City Ry. Co. v. Cleveland, 94 Fed. 385, 395; Old Colony Trust Co. v. Atlanta, 83 Fed. 39, 40, aff'd, C. C. A., 88 Fed. 859; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245; Wilkie v. City of Chicago, 188 Ill. 444, 446, 80 Am. St. Rep. 182. To set aside and to declare null and void a municipal ordinance which impairs the operation of a contract with the complainants, when the invalidity of the ordinance does not appear upon its face, but must be proved by evidence *aliunde*, and is a cloud upon the title of the complainants to a franchise. Los Angeles v. Los Angeles C. Water Co., 177 U. S. 558, 568, 580, 44 L. ed. 886, 890, 896. The danger of a municipality of criminal proceedings, combined with irreparable injury to business, may sustain jurisdiction over a bill to

enjoin the enforcement of an ordinance imposing a license tax. Hutchinson v. Beckham, C. C. A., 118 Fed. 399; or a penalty for an act that is not unlawful. Borden's Condensed Milk Co. v. Baker, C. C. A., 177 Fed. 906. See *infra*, § 271. But not ordinarily to enjoin the passage of such an ordinance, since its invalidity will prevent its mere passage, unaccompanied by an attempt to carry the same into execution, from giving to the complainant a legal grievance. Murphy v. East Portland, 42 Fed. 308; Mo. & K. I. Ry. Co. v. Olathe, 156 Fed. 624; New Orleans Water Works Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518. But see Los Angeles v. Los Angeles Water Co., 177 U. S. 558, 44 L. ed. 86, § 25, *supra;* except perhaps when the ordinance would impose a municipal indebtedness; Murphy v. East Portland, 42 Fed. 308; or impair the obligation of a contract. Missouri & K. I. Ry. Co. v. Olathe, 156 Fed. 624. By receivers of a system of street railroads to establish the validity, and to obtain a decree declaring the duration, of its franchises, when the superintendent of streets has notified them that after a certain date all promises to work and make repairs upon the streets will be revoked; and the city has asserted in a number of other ways its purpose to treat the right of the companies, and whatever franchises they have had, as terminated at that date; and has declared its intention to resume possession of the streets and to resort to all legal means to protect its rights against what are deemed the unfounded claims of the companies as to the franchises, so that the attitude and claims of the city have caused a cloud upon the title to the property in the hands of the receivers. Blair v. Chicago, 201 U. S. 400, 405, 449, 50 L. ed. 801, 804, 821. By a corporation, and in special cases by its stockholders and by its mortgagee, to enjoin a State railroad commission and other State officers from executing an order unauthorized by law or an unconstitutional statute. Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Dinsmore v. Southern Exp. Co., 92 Fed. 714; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. ed. 1014. But see § 25, *supra.* Under extraordinary circumstances, to prevent irreparable injury by the destruction of business or a multiplicity of suits, a bill in equity to enjoin criminal proceedings may be sustained. Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169; Ex parte Young, March 23, 1908, 209 U. S. 123, 52 L. ed. 714; Hunter v. Wood, March 23, 1908, 209 U. S. 205, 52 L. ed. 747; *infra*, § 271. But see Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535. A bill may be filed for an injunction against irremediable injury to property pending an action of ejectment, although filed by a party out of possession. Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116. Equity will not entertain a bill to restrain the President of the United States from carrying into effect an unconstitutional act of Congress, in the discharge of duties "purely executive and political." Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437. Nor a bill to protect rights which are purely political, even though right of property may be thereby incidentally affected. Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Green v. Mills, C. C. A., 30 L.R.A. 90, 69 Fed. 852; Anthony v. Burrow, 129 Fed. 783; Dallas v.

Dallas Consol. El. St. Ry. Co. (S. C. Texas, June 1912) 148 S. W. 292. *Cf.* Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Clough v. Curtis, 134 U. S. 361, 33 L. ed. 945. But see People ex rel. Miller v. Tool (Colo. Sup. Ct.), 86 Pac. 224, defended by Henry J. Hersey before Colo. Bar Ass'n Sept. 27, 28, 1906, criticized 20 Harv. L. Rev. 157. Such are: a bill by a State to enjoin interference with its government by the President; Mississippi v. Johnson, 4 Wall. 475, or the Secretary of War; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721, or a general of the army; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; a bill by a citizen of a State on behalf of himself and others similarly situated to enjoin a State officer from the execution of a State registration law which he alleged denied him his rights under the Fifteenth Amendment, Green v. Mills, C. C. A., 30 L.R.A. 90, 69 Fed. 852, and a bill to enforce a right to a nomination for Congress. Anthony v. Burrow, 129 Fed. 783. But a taxpayer who was threatened with increased taxation was given an injunction against the canvass of the returns of an unauthorized election for the incorporation of a city. Smith v. Board County Com'rs Skagit County, 45 Fed. 725. Nor a bill to enforce an "abstract right" which the complainant asserts, and which he may never practically exercise; as, for example, the right to remove an obstruction from a navigable river, when he does not allege that he is about to navigate the same. Spooner v. McConnell, 1 McLean, 337. Nor a bill by the United States to enjoin a corporation from opening an exhibition upon Sunday, where Congress has made an appropriation toward the expense of the enterprise upon the express condition that it shall be closed on the first day of each week. World's Columbian Exposition v. U. S., 56 Fed. 654. Nor to enjoin an action at law to which the complainant has a clear legal defense. Grand Chute v. Winegar, 15 Wall. 373, 21 L. ed. 174; Francis v. Flinn, 118 U. S. 385; Hapgood v. Hewitt, 119 U. S. 226, 30 L. ed. 369. See Drexel v. Berney, 122 U. S. 241, 30 L. ed. 1219. Nor is it sufficient ground for the interference of a court of equity that the evidence in a cause is voluminous and tedious. Bowen v. Chase, 94 U. S. 812, 824, 24 L. ed. 184, 187. Nor solely because discovery is necessary, although the suit is brought upon a contract which provides for discovery. India Rubber Co. v. Consol. Rubber Tire Co., 117 Fed. 354. Nor, it has been said, upon the mere allegation of insolvency of the defendant. Strang v. Richmond, P. & C. R. Co., 93 Fed. 71, 74. Nor a bill by a coupon-holder, who does not allege that he is a taxpayer, to enjoin a State officer from refusing to receive his coupons in payment of taxes, as is required by a contract between the coupon-holder and the State. Marye v. Parsons, 114 U. S. 325, 29 L. ed. 205. See Parsons v. Slaughter, 63 Fed. 876. Nor, except in a very extraordinary case, a bill to enjoin slanders or libels. Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165; Baltimore Car Wheel Co. v. Bemis, 29 Fed. 95. *Contra*, Emack v. Kane, 34 Fed. 46; Fourgeres v. Murbarger, 44 Fed. 292. See *infra*, § 284. For a bill to enjoin the removal of an officer of the United States or of the State, or a municipality, In Re Sawyer, 124 U. S. 200, 31 L. ed. 402; White v. Berry, 171 U. S. 366, 376–378, 43 L. ed. 199.

right,[25] or compel the performance of a duty,[26] the commission or omission of which, respectively, would inflict such an irreparable injury upon a person, that a judgment for damages, or the cumbrous legal process of ejectment,[27] replevin,[28] detinue,

[26] Stribley v. Hawkie, 3 Atk. 275; Hugnenin v. Baseley, 15 Ves. 180; Hunt v. Rousmanier's Adm'rs, 1 Pet. 1, 7 L. ed. 27; Willard v. Tayloe, 8 Wall. 557, 19 L. ed. 501. But *not* a bill to compel a public officer to perform a ministerial duty. Craig v. Leitensdorfer, 123 U. S. 189, 31 L. ed. 114. Nor to fix the freight rates charged by railroads in intrastate commerce, Montana, W. & S. R. Co. v. Morley, 198 Fed. 991. Nor, in the absence of statutory authority for the collection of taxes, Preston v. Chicago, St. L. & N. O. R. Co., 175 Fed. 487, aff'd as Preston v. Sturgis Milling Co., C. C. A., 183 Fed 1. Nor a bill to compel municipal, county or State officers to levy a tax; Walkley v. Muscatine, 6 Wall. 481, 18 L. ed. 930, to issue bonds, even in the case of a contract; Smith v. Bourbon County, 127 U. S. 105, 32 L. ed. 73; or since the remedy, when it exists at all, is by mandamus. Nor a bill for the appointment of a receiver to levy taxes, or to collect taxes previously levied, Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. ed. 223; Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197. Nor a bill to enjoin an insolvent municipality from expending its funds for other municipal purposes, Thompson v. Allen County, 115 U. S. 550, 29 L. ed. 472, Safe Deposit & T. Co. v. City of Anniston, 96 Fed. 661, 663.

[27] A landlord, after cancelling a mining lease, may file a bill against his lessee, to establish his right to possession, and to enjoin the latter from committing waste, while mining ore upon the premises. Big Six Development Co. v. Mitchell, C. C. A., 1 L.R.A.(N.S.) 332, 138 Fed. 279. Independently of statute, it was held that a Federal court had jurisdiction of a bill to quiet title by a complainant out of possession; where the questions in issue included the establishment of the fact of an administratorship and the interpretation and effect of an administrator's deed, under which the complainant claimed. Butterfield v. Miller, C. C. A., 195 Fed. 200; and where the complainant alleged title to a tract of land embracing 147,000 acres against a number of defendants, each of whom claimed title to a separate portion thereof and was in possession of the same. Buchanan Co. v. Adkins, C. C. A., 175 Fed. 692. But see *infra*, § 141. But not solely for purposes that could be accomplished by an action in ejectment, Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Killian v. Effinghaus, 110 U. S. 568, 28 L. ed. 246; U. S. v. Wilson, 118 U. S. 86, 30 L. ed. 110; Speigle v. Meredith, 4 Bliss. 120. South Penn. Oil Co. v. Miller, C. C. A., 175 Fed. 729. Nor a bill for a partition filed by a tenant in common out of possession; who has been disseised by his co-tenant, Frey v. Willoughby, C. C. A., 63 Fed. 865; nor where the complainant's title is denied, American Ass'n v. Eastern Ky. Land Co., 68 Fed. 721, but

or account rendered,[29] would be no adequate remedy for the loss thereby occasioned; to prevent a needless multiplicity of

see Fuller v. Montague, 59 Fed. 212; except when the complainant's title is not recognized at common law, Hopkins v. Grimshaw, 165 U. S. 342, 358; nor to quiet the title to real estate when the complainant's rights are purely equitable. Frost v. Spitley, 121 U. S. 552: nor, in the absence of a State statute authorizing such a suit, when he is not in possession of the land, U. S. v. Wilson, 118 U. S. 86, 30 L. ed. 110: Frost v. Spitley, 121 U. S. 552. 30 L. ed. 1010; §§ 82, 83, *infra*. New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Co., 190 Fed. 861, but, in such a case, it may be presumed that the possession of unineloscd woodland follows the legal title, and in such a case equity has intervened, Graves v. Ashburn, 215 U. S. 331, 54 L. ed. 217.

[28] Since imported goods in the custody of the collector cannot be replevied, U. S. R. S., § 934, a bill in equity may be maintained to recover their possession, Pollard v. Reardon, 65 Fed. 848. But not usually, to restrain the seizure or to compel the return of personal property, Knox v. Smith, 4 How. 298, 11 L. ed. 983: Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453: Jones v. MacKenzie, C. C. A., 122 Fed. 390: but see Crane v. McCoy, 1 Bond, 422: unless its loss by the owner would result in irreparable injury by the destruction of his business and commercial credit, Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; North v. Peters, 138 U. S. 271, 34 L. ed. 936; or by rendering it impossible for him to manage his farm, Breeden v. Lee, 2 Hughes, 484; or on account of its unique value, Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389. But see Lawrence v. Times Printing Co., 90 Fed. 24, or if it be held in trust, New Orleans v. Morris, 105 U. S. 600, 26 L. ed. 1184; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934. That the value of the property is so great that the complainant is unable to give the bond required in an action of replevin affords no ground for the interference of equity. In re Oregon Iron Works, 4 Saw. 169, 170; s. c., 17 N. B. R. 404. Nor can a bill be sustained which seeks to recover damages for a conversion, Dumont v. Fry, 12 Fed. 21, nor to collect a note from its maker, Dowell v. Mitchell, 105 U. S. 430, 26 L. ed. 1142, or an indorsee, Shields v. Barrow, 17 How. 130, 15 L. ed. 158. Nor to collect the amount of an insurance policy, Graves v. Boston Marine Ins. Co., 2 Cranch, 419, 2 L. ed. 324. See Houston Oil Co. of Texas v. Drake, C. C. A., 182 Fed. 202.

[29] Gunn v. Brinckley C. W. & M. Co., 66 Fed. 382. Equity will entertain a bill to compel an accounting by persons standing in a trust relation to the plaintiff, Pacific R. of Mo. v. Atlantic & Pac. R. Co., 20 Fed. 277; Fowle v. Lawrason, 5 Pet. 494, 502, 8 L. ed. 204, 206; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Providence Min. & Mill Co. v. Nicholson, C. C. A., 178 Fed. 29: Morris & Co. v. Whitley, C. C. A., 183 Fed. 764, and by those against whom an action for account render would lie at common law. Cited with approval by C. C. A. of the Fifth Circuit, Morris & Co.

v. Whitley, C. C. A., 183 Fed. 764, 765. Mitchell v. Manufacturing Co., 2 Story, 648; Linson v. Hutton, 98 U. S. 79, 25 L. ed. 66; Fowle v. Lawrason, 5 Pet. 494, 502, 8 L. ed. 204, 206; U. S. v. National Bank, 73 Fed. 379; namely, guardians in socage, bailiffs, receivers, and merchants in their dealings with each other, Bispham's Equity, § 481; 1 Co. Litt. 90 b; 1 Co. Litt. 172 a; Bacon's Abr., Account, A.; Buller's Nisi Prius, 127; Earl of Devonshire's Case, 11 Coke, 89; but not otherwise, Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975; Consol. Safety Valve Co. v. Ashton Valve Co., 26 Fed. 319; Lord v. Whitehead, etc., Mach. Co., 24 Fed. 801; Gunn v. Brinckley Car Works & Mfg. Co., 66 Fed. 382, unless the accounts are mutual, Fenno v. Primrose, 116 Fed. 49; Fechteler et al. v. Palm Bros. & Co., C. C. A., 133 Fed. 462, or very complicated and intricate. Cited with approval by Judge Hazel, Harvey v. Sellers, 115 Fed. 757, 758, and by C. C. A. of the Fifth Circuit, Morris & Co. v. Whitley, C. C. A., 183 Fed. 764, 765. Kilbourn v. Sutherland, 130 U. S. 505, 32 L. ed. 1005; John Crossley Sons v. New Orleans, 20 Fed. 352; Pacific R. Co. v. Atlantic & Pac. R. Co., 20 Fed. 277; Gunn v. Brinckley C. W. & Mfg. Co., C. C. A., 66 Fed. 382; Baker v. Biddle Bald. 394; Blakeley v. Briscoe, Hempst. 114; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005. But see Lord v. Whitehead, etc., Mach. Co., 24 Fed. 801; Adams v. Bridgewater Iron Co., 26 Fed. 324; Hagenbeck v. Hagenbeck Zoo A. Co., 59 Fed. 14. U. S. v. Harsha, 188 Fed. 759, where it was held that equity could take jurisdiction of a suit by the United States against the clerk of a court for an accounting of transactions during a period of seven years, or the accounting is supplemental to some other equitable relief. Rubber Co. v. Goodyear, 9 Wall. 788; Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975. A bill for an accounting may be filed, under a contract between two large mercantile houses, requiring each to render to the other, an annual account of its entire business, and to pay a certain percentage of its gross profits. Fechteler v. Palm Bros. & Co., C. C. A., 133 Fed. 462. It has been held: that a factor, whose dealings with his principal were numerous, may file a bill for an accounting, Fenno v. Primrose, 116 Fed. 49. A bill cannot be maintained, to compel an account of profits made by a purchasing agent, who, it is charged, secretly sold to the complainant, large quantities of merchandise owned by himself at a price greatly in advance of what he paid for the same; although the agent was a director of the complainant corporation, and the suit is brought against his personal representatives after his decease; there being no charge in the bill that the agent's books were fraudulently kept, nor that any different evidence or information could be obtainable in equity than that obtained at law; there being, however, an allegation that the accounts consisted of many thousands of items, American Spirits Mfg. Co. v. Easton, 120 Fed. 440; where demurrers were sustained to both the original bill, filed against the agent and his partner, and an amended bill after the agent's death, filed against his personal representatives and his partner, who survived him. It has been said that, wherever the State practice authorizes a reference of a complicated account in an action at law,

suits;[30] and to compel the cancellation or execution of instruments,[31] the existence or want of which is a cloud upon, or an

the Federal court should take jurisdiction of the case in equity, McMullen Lumber Co. v. Strother, C. C. A., 136 Fed. 295. For patent cases, see *infra*, § 146. It has been held that there is jurisdiction in equity to open a closed account, although there is a remedy at law, in a case where, were the accounts still open, equity might have entertained a bill for an accounting. Bischoffsheim v. Baltzer, 20 Fed. 890.

[30] Freeman v. Pontrell, Chan. Cal. XIII; Earl of Bath v. Sherwin, 4 Bro. P. C. 373; Woods v. Monroe, 17 Mich. 238; Cummings v. National Bank, 101 U. S. 153, 25 L. ed. 903; Dodge v. Briggs, 27 Fed. 161; Hale v. Allison, 188 U. S. 56, 47 L. ed. 380; Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192.

[31] Pierce v. Webb & Stalker, note to Ryan v. Mackmath, 3 Bro. C. C. 15; Peake v. Highfield, 1 Russ. 559, and cases cited; Bunce v. Gallagher, 5 Blatchf. C. C. 481; Quinby v. Consumers' Gas Trust Co., 140 Fed. 362. To set aside a contract obtained by fraud, Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655. To set aside a conveyance obtained for a grossly inadequate consideration from a man in a state of intoxication, partly caused by the acts of the defendant, Thackrah v. Haas, 119 U. S. 499, 30 L. ed. 486. By a creditor of a decedent to set aside a fraudulent conveyance of his estate made after his death by the order of a court, Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547. By a single man to have declared null and void a paper purporting to be a marriage contract executed by him, Sharon v. Hill, 20 Fed. 1. To set aside an invalid tax deed, or a deed executed under a decree of a court which had no jurisdiction over the matter; when the invalidity or want of jurisdiction must be made to appear by facts not apparent upon the deed itself, Ritchie v. Sayers, 100 Fed. 520. But see Little Rock Junction Co. v. Burke, C. C. A., 66 Fed. 83; Morrison v. Marker, 93 Fed. 692. Bills in equity may be filed to set aside a land patent, issued in violation of a statute, when the bill is filed by the party entitled to the land, Southern Pac. R. Co. v. Wiggs, 43 Fed. 333, but not, it has been held, to decree a forfeiture of a land grant, and to recover the land so granted for a breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress or of express statutory authority from Congress to institute the suit, U. S. v. Washington Improvement & Development Co., 189 Fed. 674. *Cf.* U. S. v. Northern Pac. R. R. Co., 177 U. S. 435, 20 Sup. Ct. 706, 44 L. ed. 836. *Contra*, U. S. v. Whitney, 176 Fed. 593; For specific performance, Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. Rep. 900, 36 L. ed. 776; Western Union Tel. Co. v. Pittsburg, C., C. & St. L. Ry. Co., 137 Fed. 435. To procure an adjudication that a land patent, which has been obtained fro mthe United States through an error of law or a gross mistake of fact or fraud, belongs to the original owner of the equitable title of the land, Howe v. Parker, C. C. A., 190 Fed. 738; but not when the bill is filed by one who has never placed himself in privity with the United States by the acceptance of a grant, or settlement

apparent flaw in a person's title, or would render it difficult for him to resist an unjust demand, or to dispose of property by sale. It has been said: "To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title."[32] The inadequacy of the remedy at law which will justify relief in equity does not consist merely in its failure to produce the relief sought,—that is a not unusual result of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view.[33] Where a bill rightfully invokes the equitable jurisdiction of the court, the court cannot refuse to entertain it because of conditions that came into existence after it was filed.[34] He who seeks equity must come with clean hands.[35] This doctrine is most frequently enforced in trademark cases where a party whose trademark contains a fraudulent representation is denied relief.[36] It relates to the subject-matter of the suit only, and improper conduct by the complainant in matters not

and improvement, or occupation, entry or payment. Campbell v. Weyerhaeuser, C. C. A., 161 Fed. 332. A person whose application to purchase has been rejected by the Land Department cannot bring such a suit. Ibid. "It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a a bill in equity to quiet his right and possession." Gray, J., in Frost v. Spitley, 121 U. S. 552, 556, 30 L. ed. 1010; citing Carroll v. Safford, 3 How. 441, 463, 11 L. ed. 671; Van Wyck v. Knevals, 106 U. S. 360, 370, 27 L. ed. 201; Van Brocklin v. Tennessee, 117 U. S. 151, 169, 29 L. ed. 845, 851.

[32] Fussell v. Gregg, 113 U. S. 550, 554, 28 L. ed. 993, 994, per Woods, J.

[33] Miller, J., in Thompson v. Allen County, 115 U. S. 550, 554, 29 L. ed. 472, 473. *Cf.* Texas & P. Ry. Co. v. Marshall, 136 U. S. 393, 405, 34 L. ed. 385, 390.

[34] Carnegie Steel Co. v. Colorado Fuel & Iron Co., 165 Fed. 195.

[35] Primeau v. Granfield, C. C. A., 193 Fed. 911; Mathews v. Wayne Junction Tr. Co., 197 Fed. 237; Pickford v. Talbott, 225 U. S. 651, 56 L. ed. 1240; Dancigar v. Stone, 187 Fed. 853. It is no defense to a contract which has been performed by the promisee, that the promisor knew that the performance of the agreement might aid the former to violate public policy, when the two parties did not conspire to accomplish that result, nor share in the benefits of such a violation. Mechanics' Ins. Co. v. Hoover Distilling Co., C. C. A., 31 L.R.A.(N.S.) 873, 182 Fed. 590.

[36] Ubeda v. Zialcita, 226 U. S.

therewith connected will not bar equitable relief.[37] Except in an extraordinary case, it will not defeat a suit to enjoin the infringement of a patent because the complainant denies the public the right to use the invention which it protects,[38] nor because he uses the same in such a manner as to restrain trade in interstate commerce.[39] It has been held: that it does not apply to a case where, subsequent to suit brought, the complainant has been guilty of reprehensible conduct, which does not affect the cause of action,[40] and that plaintiff might recover at common law when he repudiated a contract to commit a fraud upon strangers and sued to recover the money he had paid thereunder, on the ground that he had been induced to enter into the same by fraud, since he was not *in pari delicto* with the defendant.[41] The doctrine does not apply to a defendant who does not seek affirmative relief.[42] "A man by committing a fraud does not become an outlaw and *caput lupinum*."[43] "He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so the courts will endeavor to do substantial justice so far as is consistent with adherence to law."[44] The

452, 57 L. ed. —. The doctrine has not been extended so as to deny the right to sue for the infringement of a trademark or unfair competition, by imitation thereof, when the trademark is a label which contains a notice of a copyright that does not exist.

37 Camors-McConnell v. McConnell, 140 Fed. 412; holding that a bill to enforce, by injunction, a contract for the sale of property and the good will therewith connected, should not be dismissed because the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade.

38 Continental Paper Bag Co. v. Eastern Paper Bag Co., (Paper Bag Patent Case) 210 U. S. 405, 430, 52 L. ed. 1122, 1133.

39 Henry v. A. B. Dick Co., 224 U. S. 1, 56 L. ed. 645.

40 Chute v. Wisconsin Chemical Co., 185 Fed. 115.

41 Stewart v. Wright, C. C. A., 147 Fed. 321.

42 Armour & Co. v. Renaker, 191 Fed. 48.

43 Stoffela v. Nugent, 217 U. S. 499, 501, 54 L. ed. 856, 858, per Holmes, J.

44 Ibid. Where municipal bonds have been issued to an amount beyond the constitutional limit, a bondholder may sue to obtain a judicial determination as to what part, if any, of the debt thus created can be enforced. Everett v. Independent School District, 109 Fed. 697, 702; Truman v. Inhabitants of Town of Harmony, 198 Fed. 557.

maxim that he who seeks equity must do equity does not apply to a defendant.[45]

§ 80. The distinction between law and equity in the Federal courts. The fact that those who framed the Constitution thought it necessary to mention law and equity separately, when blocking out the jurisdiction of the Federal courts, has caused some judges to think, and even to say in their opinions, that it was thereby intended that these branches of the law should always be kept apart.[1] The better opinion, however, seems to be that this distinction between law and equity is enforced by the Constitution only to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law. The Equity Rules of 1912 provide: "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."[3] "If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable without sending the case or question to the law side of the court."[4] Previously, it had been held that, where, in a suit for a partition, the defendant denied the title of complainant and pleaded sole seisin in himself, an issue was raised triable only at law, and that the suit in equity must be stayed to permit the plaintiff to bring an action at law for that purpose.[5]

§ 81. General rules affecting the jurisdiction in equity of the Federal courts. The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, sub-

[45] Columbus v. Mercantile Trust Co., 218 U. S. 645.

§ 80. [1] Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Bennett v. Butterworth, 11 How. 669, 674, 13 L. ed. 859, 861; Hipp v. Babin, 19 How. 271, at p. 277, 15 L. ed. 633, 634; Fenn v. Holme, 21 How. 481, 486; Costs in Civil Cases, 1 Blatchf. C. C. 652, 654; Butler v. Young, 1 Flip. 276, 278; Meade v. Beale, Taney, 339, at p. 361; Thompson v. Railroad Cos., 6 Wall. 134, 18 L. ed. 765; Reubens v. Joel, 13 N. Y. 488, p. 497. A similar remark is contained in the message of President Taft on Dec 7th 1909.

[2] Mr. Justice Matthews in Root v. Railway Co., 105 U. S. 189, 206, 26 L. ed. 975, 981. *Cf.* Ex parte Boyd, 105 U. S. 647, 26 L. ed. 1200.

[3] Eq. Rule 22.

[4] Eq. Rule 23.

[5] Gilbert v. Hopkins, 171 Fed. 704.

stantially the same as that of the English Court of Chancery in 1787, when the Federal Constitution was adopted;[1] though, in the absence of special statutory authority, they do not have those extrajudicial powers which were exercised over the persons and estates of infants, idiots, lunatics, and charities by the Lord Chancellor, as the representative of the sovereign and by virtue of the latter's prerogative as *parens patriæ*.[2] "The rule being that this equity power must be construed according to equity jurisdiction in England as exercised at the time of the adoption of the Constitution and of the judiciary act, any jurisdiction exercised by that court in its earlier history, but subsequently abandoned, and any enlargement of its jurisdiction by statute subsequent to 1789 are to be excluded."[3] The distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right; it does not follow that every right given by the English law, and which at the time the Constitution was adopted might have been enforced in the Court of Chancery, can also be enforced in a court of the United States. The right must be given by the law of the State or of the United States.[4] The Judicial Code provides that: "Suits in equity shall not be sustained in

§ 81. [1] Robinson v. Campbell, 3 Wheat. 212, at p. 221, 4 L. ed. 372, 375; Fenn v. Holme, 21 How. 481, at p. 484, 16 L. ed. 198, 199; Meade v. Beale, Taney, 339, at p. 361; Gordon v. Hobart, 2 Sumn. 401, at p. 405; Fletcher v. Morey, 2 Story, 555, at p. 567; Root v. Railway Co., 105 U. S. 189, at p. 207, 26 L. ed. 975, 981.

[2] Fontain v. Ravenel, 17 How. 369, at p. 391, 15 L. ed. 80, 89; Loring v. Marsh, 2 Clifford. 469, at p. 492; In re Barry, 42 Fed. 113; In re Burrus, Petitioner, 136 U. S. 586, 34 L. ed. 500; N. Y. Foundling Hospital v. Gatti, 203 U. S. 429, 439, 51 L. ed. 254, 259. As to their jurisdiction to inquire into the custody of the lunatic, see King v. McLean Asylum, C. C. A., 64 Fed. 325. Hoadley v. Chase, 126 Fed. 818. But see the Late Corporation of The Church of Jesus Christ of Latter Day Saints v. U. S., 136 U. S. 1, 51, 56, 34 L. ed. 478, 493, 495; s. c., 140 U. S. 665, 35 L. ed. 592.

[3] Alger v. Anderson, 92 Fed. 696; Fontain v. Ravenel, 17 How. 369, 394, 395, 15 L. ed. 80, 90, 91; per Taney, C. J. "The grant of power cannot be enlarged by resorting to a jurisdiction which the Court of Chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted."

[4] Taney, C. J., in Meade v. Beale, 339, 361.

either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."[5] The Supreme Court has construed a previous statute in the same words substantially as follows: The effect of this provision is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[6] "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class."[7] "Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson* v. *Sutherland,* 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits."[8] "By inadequacy of the remedy at

[5] Jud. Code, § 267, 36 St. at L. 1087, re-enacting U. S. R. S., 723.

[6] Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Insurance Co. v. Bailey, 13 Wall. 616, 621, 20 L. ed. 501, 503; Grand Chute v. Winegar, 15 Wall. 373, 375, 21 L. ed. 174, 175; Lewis v. Cocks, 23 Wall. 466, 470, 23 L. ed. 70, 71; Root v. Railway Co., 105 U. S. 189, 212, 26 L. ed. 975, 983; Killian v. Ebbinghaus, 110 U. S. 568, 573, 28 L. ed. 246; N. Y. Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 214, 27 L. ed. 484, 487, per Bradley, J.: "This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."

[7] Whitehead v. Shattuck, 138 U. S. 146, 151, 34 L. ed. 873, 874, per Field, J.

[8] Buzard v. Houston, 119 U. S. 347, 351, 352, 30 L. ed. 451, 452, 453, per Gray, J.

law is here meant, not that it fails to produce the money,—that is a very usual result in the use of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view."[9] "When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair or beyond the possibility of compensation and damages; but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law."[10] "If the remedy at law is adequate in theory it deprives equity of jurisdiction, although practically it may be inadequate to secure the collection of the claim sued on."[11] Equitable jurisdiction does not accrue to the Federal court because it is thought that the law as administered by it is more favorable to a party seeking its aid than the law as administered by the courts of a State in which he has been sued.[12] "There may consequently be cases over which the English courts of chancery would have taken jurisdiction, which are not cognizable by the Federal courts when sitting at equity."[13] The facts stated, and the relief sought in a first pleading, and not its form or name, determine whether it invokes the jurisdiction and commences a suit at law or in equity.[14] Where the complainant has a remedy at law by mandamus, the fact that a Federal court has no jurisdiction to grant the mandamus does not make the remedy at law inadequate.[15] The fact that a judgment can only be enforced by application to a court of equity does not take the case from the common-law side of the court.[16] "The adequate remedy at law which is the

[9] Thompson v. Allen Co., 115 U. S. 550, 554, 29 L. ed. 472, 473, per Miller, J.

[10] Chicago General Ry. Co. v. C., B. & Q. R. R. Co., 181 Ill. 605, 611; quoted with approval in Donovan v. Pennsylvania Co., 199 U. S. 279, 305, 50 L. ed. 192, 204.

[11] Safe Deposit & T. Co. v. City of Anniston, 96 Fed. 661, 663, per Shelby, J.

[12] Cable v. United States Life Insurance Co., 191 U. S. 288, 48 L. ed. 188.

[13] Buzard v. Houston, 119 U. S. 347, 352, 30 L. ed. 451, 453.

[14] Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199.

[15] Smith v. Bourbon Co., 127 U. S. 105, 32 L. ed. 73. *Contra*, Provisional Municipality of Pensacola v. Lehman, 57 Fed. 324, 331. As to the rule where the State courts give a remedy by *certiorari*, Ewing v. City of St. Louis, 5 Wall. 413, 18 L. ed. 657; Taylor v. Louisville & N. R. Co., 88 Fed. 350, 359.

[16] Thompson v. Northern Pac. Ry. Co., 93 Fed. 384.

test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress."[17] A State statute giving an adequate relief at law does not affect the equitable jurisdiction of a Federal court.[18] Whether the equitable jurisdiction is lost when a statute of the United States gives the same or adequate relief at law,—as, for example, in the case of discovery,—has not yet been settled.[19] If a statute of the United States creates a new right, the remedy will be in equity if the relief thereby afforded is in analogy with a species of relief ordinarily given by equity alone.[20] Thus, it has been held that a suit to enforce the individual liability of stockholders or directors to creditors of a corporation,[21] or to determine the question of the right of possession to land under section 2326 of the Revised Statutes when there are conflicting claims to patents before a land of-

[17] McConihay v. Wright, 121 U. S. 201, 206, 30 L. ed. 932, 933, per Matthews, J.

[18] Missouri, K. & T. Ry. Co. v. Elliott, 56 Fed. 772; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 37 L. ed. 853; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Lindsay v. First Nat. Bank, 156 U. S. 485, 39 L. ed. 505; Travelers' Protective Ass'n v. Gilbert, C. C. A., 55 L.R.A. 538, 111 Fed. 269. Borden's Condensed Milk Co. v. Baker, C. C. A., 177 Fed. 906, where the State statute gave relief in *certiorari;* Western Union Tel. Co. v. Trapp, C. C. A., 186 Fed. 114, a suit to enjoin the collection of taxes.

[19] Compare Vaughan v. Central Pac. R. Co., 4 Sawy. 280; Pratt v. Northam, 5 Mason, 95; Peters v. Prevost, 1 Paine, 64; Home Ins. Co. v. Stanchfield, 1 Dill. 424; Markey v. Mut. Ben. Life Ins. Co., 6 Ins. L. J. 537; Heath v. Erie R. Co., 9 Blatchf. 316; Drexel v. Berney, 14 Fed. 268; Post v. Toledo, C. etc. R. Co., 144 Mass. 341, 59 Am. Rep. 86, 4 New Eng. R. 221.

[20] Edgell v. Haywood, 3 Atk. 354; Hornor v. Henning, 93 U. S. 228, 23 L. ed. 879; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Manufacturing Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034; Doe v. Waterloo Min. Co., 43 Fed. 219.

[21] Hornor v. Henning, 93 U. S. 228, 23 L. ed. 879; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Manufacturing Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034; Stone v. Chisolm, 113 U. S. 302, 28 L. ed. 991; Goss v. Carter, C. C. A., 156 Fed. 746. But see as to the Maine statute, Alderson v. Dole, C. C. A., 74 Fed. 29. Under Kansas Gen. Stat., ch. 23, the creditor may proceed at law or in equity. N. Y. Life Ins. Co. v. Beard, 80 Fed. 66. As to proceedings under the Texas statute, see Thomson-Houston El. Ry. Co. v. Dallas Con. Tr. Ry. Co., 54 Fed. 1001. See notes to Rickerson Roller Mill Co. v. Farrell Foundry & M. Co., 75 Fed. 554, 23 C. C. A., 302; Scott v. Latimer, 33 C. C. A. 1.

fice,[22] must be brought in equity. A suit by the receiver of a national banking association, to recover dividends paid to stockholders when the corporation was insolvent, may be brought in equity.[23] It has been held: that suits by a trustee in bankruptcy, to recover money paid as a preference, should be brought in equity,[24] that a suit to foreclose a mechanic's lien must be brought in equity.[25] The proceeding under the act of Congress to prevent the unlawful occupancy of public lands[26] is a summary proceeding in the nature of a suit in equity and may be tried without a jury.[27] In the absence of express provisions to that effect, it was held that a statute directing the Attorney-General to take "proper proceedings to prevent any unlawful interference with the rights and equities of the United States under this act," and other acts of Congress, "and to have legally ascertained and firmly adjudicated all alleged rights" of persons claiming any control or interest in the property of a corporation and to have annulled all contracts beyond the corporate powers; did not authorize the joinder of applications for common-law and chancery writs in the same suit.[28]

A suit under section 5239 of the Revised Statutes to recover of a director of a national bank the damages sustained in consequence of excessive loans should be brought on the common-law side of the court.[29] It has been held: that a suit to collect the double liability imposed by the Constitution and statutes of Kansas, upon the stockholders of certain corporations, is contractual in its nature and runs to the creditors individually, not to the corporations; and that it can only be enforced in an action at common law, even when the petition charges that the

22 Doe v. Waterloo Min. Co., 43 Fed. 219.

23 Hayden v. Thompson, 71 Fed. 60.

24 Parker v. Black, C. C. A., 151 Fed. 18. But see § 644, *infra*.

25 Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199; Pioneer Min. Co. v. Delamotte, C. C. A., 185 Fed. 752. So *held* where there were conflicting liens to be adjusted, although the State statute gave a right of action at law. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

26 23 St. at L. 321.

27 Cameron v. U. S., 148 U. S. 301, 304, 37 L. ed. 459, 460; Duffield v. San Francisco Chemical Co., 198 Fed. 942.

28 Union Pac. Ry. Co. v. U. S., 59 Fed. 813.

29 Stephens v. Overstolz, 43 Fed. 771.

defendant and other stockholders have made a colorable and fraudulent transfer of their stock to another corporation for the purpose of escaping such liability.[30] A suit by the receiver of a New Jersey corporation,[31] or of a Nebraska bank,[32] to collect an assessment upon its stockholders may be brought in equity.

§ 82. State laws creating new rights are enforced by Federal courts at law or equity. If, however, the customary[1] or statute[2] law of a State has created a new right, the Federal courts will enforce the same at law or equity, if it falls within the remedies authorized by either branch of their jurisdiction. Such are statutes giving a mortgagor or his judgment creditors a certain time within which to redeem land after a foreclosure sale;[3] authorizing a suit to set aside the probate of a will, or a will itself, for fraud,[4] even though the statute provides that the suit shall be brought in a specified State court, and that an issue of fact therein shall be tried by a jury; since the Federal court of equity can empanel a jury for that purpose.[5] But this cannot be done unless the proceeding is an ac-

[30] Anglo-Am. Land M. & A. Co. v. Lombard, 132 Fed. 721.

[31] Brown v. Allebach, 156 Fed. 697.

§ 82. [1] Neves v. Scott, 13 How. 268, 271, 14 L. ed. 140, 142; Gaines v. Fuentes, 92 U. S. 10, 20, 23 L. ed. 524, 528; Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; Lorman v. Clarke, 2 McLean, 568, 577; Nichols v. Eaton, 91 U. S. 716, 729, 23 L. ed. 254, 258; Fisher v. Shropshire, 147 U. S. 133, 37 L. ed. 109; St. Louis & S. F. R. v. S. W. Tel. & T. Co., C. C. A., 121 F. 276.

[2] Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Fitch v. Creighton, 24 How. (U. S.) 159, 16 L. ed. 596; Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Mills v. Scott, 99 U. S. 25, 25 L. ed. 315; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 315; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733.

[3] Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Orvis v. Powell, 98 U. S. 176, 178, 25 L. ed. 238, 239; Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648.

[4] Broderick's Will, 21 Wall. 503, 519, 520, 22 L. ed. 599, 605, 606; Sawyer v. White, C. C. A., 122 Fed. 223 (Missouri Statute); Richardson v. Green, C. C. A., 61 Fed. 423; s. c., 159 U. S. 264, 40 L. ed. 142 (Oregon Statute); Williams v. Crabb, C. C. A., 59 L.R.A. 425, 117 Fed. 193, 204 (Illinois Statute); Wart v. Wart, 117 Fed. 766 (Iowa Statute). See § 54, *supra*.

[5] Williams v. Crabb, C. C. A., 117 Fed. 193, 204, 59 L.R.A. 425; Wart v. Wart, 117 Fed. 766. See Chicago, B. & Q. R. Co. v. Oglesby, 198 Fed. 153. But in Sexton Mfg. Co.

tion or suit *inter partes,* which relates to independent controversies, and not merely to those controversies which may arise upon an application for probate, or upon disputes concerning the setting aside of a probate of a will, when the remedy afforded by the court is a mere continuation of the probate proceeding, merely a method of procedure ancillary to the original probate allowed by the State court, for the purpose of giving to the probate its ultimate and final effect.[6] A Federal court of equity will follow a State statute authorizing a person in possession of land and unmolested;[7] or even one out of possession of vacant land,[8] to maintain a bill to determine in equity the title to the same or to recover possession thereof; but not a State statute authorizing one out of the possession of land without a trial by jury to obtain possession of the same when occupied by an adverse claimant.[9] It will follow a State statute

v. Singer Sewing Mach. Co., C. C. A., 194 Fed. 56; held that the section of the Mechanic's Lien Law of Illinois, which provided that the lien shall not be enforced to the prejudice of any other creditor, encumbrancer or purchaser, unless the contractor within four months after completion "shall either bring suit to enforce his lien therefor or shall file with the clerk of the circuit court in the county in which the building," &c., is situated, a claim of lien (Ill. L. 1903, p. 230; Ill. R. S. 1905, Hurd, p. 1319), was not complied with by bringing a suit in the Federal court within the prescribed time, when no notice was filed in the office of the clerk of the State Circuit Court.

[6] Farrell v. O'Brien, 199 U. S. 89, 50 L. ed. 101. See § 54, *supra.* But see Preston v. Chicago, St. L. & N. O. R. Co., 175 Fed. 487.

[7] Clark v. Smith, 13 Peters, 195, 10 L. ed. 123; U. S. Min. Co. v. Lawson, C. C. A., 134 Fed. 769; North Carolina Mining Co. v. Westfeldt, 151 Fed. 290; Kraus v. Congdon, C. C. A., 161 Fed. 18. *Contra,* Am. Ass'n v. Williams, C. C. A., 166 Fed. 17. See Woods v. Woods, 184 Fed. 159. A state statute giving a tenant under a lease for more than 10 years the right to maintain an action in his own name to remove a cloud upon title will be given effect by a federal court, and under such statute the lessor is not an indispensable party to a suit by a lessee for ninety-nine years, obligated by the terms of the lease to pay all taxes and assessments against the property, to set aside an assessment for local improvements on the ground of its invalidity. New York, N. H. & H. R. Co. v. City of New York, 145 Fed. 661.

[8] Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Southern Pac. R. Co. v. Stanley, 49 Fed. 263; Field v. Barber Asphalt Co., 117 Fed. 925; Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 Fed. 555.

[9] Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873; Wehrman v. Conklin, 155 U. S. 314, 325, 39 L.

imposing on stockholders individual liability to the creditors of their corporations;[10] making an assessment for opening streets a lien upon abutting lands, which can be foreclosed by the city or its assignee;[11] authorizing the appointment of a receiver under certain conditions, which in the Federal courts must then also be performed;[12] authorizing any creditor or stockholder to sue to wind up the affairs of a corporation which has become insolvent or suspended its ordinary business for want of funds,[12] but not a State statute authorizing a court of equity to dissolve a corporation;[14] authorizing a bill for a partition of an equitable claim to land the legal title to which is in the United States;[15] authorizing an injunction to be granted in a new class of cases,[16] where there is no dispute as to the legal title of the complainant, as in a taxpayer's suit to restrain the waste of municipal property.[17] But, it has been held, that a Federal court of equity cannot follow a State statute authorizing an injunction against the collection of a tax, in a case where equity, independently of statutory authority, would have no such jurisdiction.[18] Federal courts of equity have followed

ed. 167, 173; Giberson v. Cook, 124 Fed. 986; Union Pac. R. Co. v. Cunningham, 173 Fed. 90; Baum v. Longwell, 200 Fed. 450. See Klenk v. Byrne, 143 Fed. 1008; *Contra* Farr v. Hobe-Peters Land Co., C. C. A., 188 Fed. 10. It has been held that the bill is demurrable when it fails to allege affirmatively either that the plaintiff is in possession, or that both complainant and defendant are out of possession. So. Pac. R. Co. v. Goodrich, 57 Fed. 879.

10 Borland v. Haven, 37 Fed. 394.

11 Fitch v. Creighton, 24 How. (U. S.) 159, 16 L. ed. 596.

12 McGraw v. Mott, C. C. A., 179 Fed. 646. (§ 65 of N. J. Corp. Act, N. J. P. L. 1896, p. 298).

13 Flash v. Wilkerson, 22 Fed. 689; Fechheimer v. Baum, 2 L.R.A. 153, 37 Fed. 167; T. & W. M. Co. v. Shatto, 34 Fed. 380; Conklin v. U. S. Shipbuilding Ass'n, 123 Fed. 913; s. c., C. C. A., 126 Fed. 132; Land Title & Tr. Co. v. Asphalt Co., C. C. A., 127 Fed. 1. But see Scott v. Neely, 140 U. S. 106, 35 L. ed. 358.

14 Conklin v. U. S. Shipbuilding Co., 140 Fed. 219. *Contra*, Jacobs v. Mexican Sugar Co., 130 Fed. 589.

15 Aspen Mining & Smelting Co. v. Rucker, 28 Fed. 220.

16 Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Lanier v. Alison, 31 Fed. 100; Grether v. Wright, C. C. A., 75 Fed. 742; Weidenfeld v. Sugar Run R. Co., 48 Fed. 615, 619; St. Louis & S. F. R. Co. v. S. W. Tel. & T. Co., C. C. A., 121 Fed. 276. But see Davidson v. Calkins, 92 Fed. 230; Lehigh Valley C. Co. v. Hamblen, 23 Fed. 225.

17 Seccomb v. Wurster, 83 Fed. 856; Larabee v. Dolley, 175 Fed. 365.

18 Illinois Life Ins. Co. v. New-

statutes authorizing an action for the protection of a water right, in which all persons who have diverted water from the same stream or source are joined, and the court, in one judgment, settles the relative rights and priorities of all parties to the action;[19] empowering a guardian, with the permission of the State court, to mortgage his ward's estate, but not clauses providing that such a mortgage can only be foreclosed in the court which authorized its execution;[20] creating and providing for the enforcement of a mechanic's lien;[21] authorizing a bill by the debtor, to compel the return or cancellation of securities for a usurious loan, without payment or the offer of payment of the amount borrowed with the lawful interest[22]—but it has been held that a court of equity may allow interest upon an unliquidated claim, although, by the State practice, such interest is not allowed,[23] and although at common law the State rulings upon this point would be followed;[24] authorizing a State court of equity to enforce an order of the State railroad commissioners, when a bill was filed to restrain the enforcement of such order;[25] authorizing a court of equity after the destruction of the public records to enter a decree establishing and confirming the title of a landowner;[26] authorizing the assignee of an insolvent to apply for the dissolution of levies of attachments and executions against his property;[27] and they enforce a vendor's lien recognized by the State common law.[28] The United States Cir-

man, 141 Fed. 449. See, however, the authorities cited § 79, *supra*.

[19] Ames Realty Co. v. Big Indian Mining Co., 146 Fed. 166.

[20] Davis v. James, 2 Fed. 618.

[21] Idaho & O. L. I. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 579, 37 L. ed. 853, 856. But see as to attorney's lien, Sherry v. O. S. N. Co., 72 Fed. 565.

[22] Missouri, Kansas & Texas Tr. Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474; Olds v. Curlette, 145 Fed. 661. But see Matthews v. Warner, 6 Fed. 461, 465; affirmed without passing on this point, 112 U. S. 600, 28 L. ed. 851.

[23] Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 778, 779.

[24] Stephens v. Phœnix Bridge Co., C. C. A., 139 Fed. 248, 71 C. C. A. 374.

[25] Platt v. Lecocq, C. C. A., 15 L.R.A.(N.S.) 558, 158 Fed. 723.

[26] Gormley v. Clark, 134 U. S. 338, 33 L. ed. 909.

[27] Brochon v. Wilson, 91 Fed. 617.

[28] Fisher v. Shropshire, 147 U. S. 133, 37 L. ed. 109; Chilton v. Braiden's Adm'x, 2 Black, 458, 17 L. ed. 304; Wilson v. Plutus Min. Co., C. C. A., 174 Fed. 317.

cuit Court for the District of Connecticut followed the State statute, providing that "Courts of equity may pass the title to real estate by decree without any act of the respondent, . . . and such decree when recorded shall be as effectual as the adverse deed of respondent."[29] It has been held that the Federal courts in Ohio should follow the State statute authorizing a decree of specific performance against a non-resident not served within the State, provided that jurisdiction is obtained under the Revised Statutes of the United States;[30] that the summary method of foreclosing a mortgage under the Louisiana Code belongs on the equity side of the court;[31] and that the Louisiana statute authorizing a summary proceeding to set aside an incorrect assessment for taxation will be enforced pursuant to the chancery practice on the equity side of the court, and not in accordance with the State practice by a petition upon the common-law side.[32] The Massachusetts employers' liability act, which authorizes an action to recover damages for the death of an employee, "to be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable," is not a penal statute, in such a sense that an action based thereon may not be maintained in a Federal court at common law.[33] A State statute cannot give a Federal court jurisdiction in equity of a case in which there is an adequate remedy at common law.[34] A Federal court will not follow a State statute which authorizes a creditor's bill against an individual[35] or a corporation,[36] even against a stockholder where no accounting is required,[37] by a complainant who has not obtained a judgment establishing his claim; but a State statute was followed which gave such a remedy to the

[29] A. & W. Sprague Mfg. Co. v. Hoyt, 29 Fed. 421. See *infra*, § 441.

[30] Single v. Scott Paper Mfg. Co., 55 Fed. 553, 557.

[31] Fleitas v. Richardson, 147 U. S. 538, 37 L. ed. 272.

[32] Lindsay v. First Nat. Bank, 156 U. S. 485, 39 L. ed. 505.

[33] Malloy v. American Hide & Leather Co., 148 Fed. 482.

[34] Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873; Scott v. Neely, 140 U. S. 106, 35 L. ed. 358.

[35] Scott v. Neely, 140 U. S. 106, 35 L. ed. 358, Cates v. Allen, 149 U. S. 451, 37 L. ed. 804.

[36] Morrow Shoe Mfg. Co. v. New Eng. Shoe Co., 60 Fed. 341; Atlantic & F. R. Co. v. Western Ry. Co., C. C. A., 50 Fed. 790.

[37] Alderson v. Dole, C. C. A., 74 Fed. 29.

creditor of an insolvent decedent.[38] It has been held: that the New Jersey statute authorizing the inspection, by a stockholder, of the books of his corporation, cannot be enforced by a suit in equity;[39] and that the Federal court will not enforce the Massachusetts statute authorizing the holder of a tontine policy to maintain a bill in equity against the insurance company for an accounting.[40] The Federal court in that State refused to follow a statute of Virginia which gave the complainant in a creditor's bill a priority over other creditors of the same class.[41] Whether a mortgagee must sue at law or in equity to recover from one who by a covenant with the mortgagor has assumed the mortgage depends upon the law of the forum, not on the law of the place where the deed and mortgage were made and the land is situated.[42] When a State statute creating a new liability provides an exclusive remedy, such liability can be enforced in the Federal courts in no other manner.[43] When a State statute creates a new liability and provides that it can only be enforced in a specified State tribunal, the Federal courts will enforce the liability, and reject the clause respecting the exclusive jurisdiction.[44] Where, however, the suit authorized is one against the State itself, and the statute shows that the legislature contemplated that the State court alone should entertain the same, the Federal courts have no jurisdiction.[45] Otherwise, the exceptions made by the State statute will be usually recognized by the Federal court.[46]

[38] Lilienthal v. Drucklieb, C. C. A., 92 Fed. 753. In the District of Columbia such a bill may be maintained without statutory authority. Kennedy v. Creswell, 101 U. S. 641 (at p. 645), 25 L. ed. 1075, 1076; s. c., Creswell v. Kennedy, 3 MacArthur, 78. Other authorities in the District Court to the same effect are, Dunn v. Murt, 4 Mack, 289; Richardson v. Penicks, 1 App. D. C. 261, at p. 267; Offutt v. King, 1 MacArthur, 312. But see Thiel Detective Service Co. v. McClure, 130 Fed. 55.

[39] Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280.

[40] Peters v. Equitable Life Assurance Society, 149 Fed. 290.

[41] Talley v. Curtain, C. C. A., 54 Fed. 43.

[42] Willard v. Wood, 135 U. S. 309, 34 L. ed. 210.

[43] Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825; Flour City Nat. Bank v. Wechselberg, 45 Fed. 547.

[44] Davis v. James, 2 Fed. 618. *Cf.* Bowker v. Hill, 115 Fed. 528; Hale v. Tyler, 115 Fed. 833.

[45] Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129. *Infra*, § 105.

[46] Harrison v. Remington Paper

§ 83. State statutes cannot impair the jurisdiction nor regulate the practice of Federal courts of equity. No State Statute giving one of its courts—for example, a court of probate—exclusive jurisdiction of a certain class of litigation can impair the jurisdiction of the Federal courts.[1] No State statute enlarging the powers of courts of common law can impair the jurisdiction of a Federal court of equity.[2] No State statute diminishing or destroying an equitable remedy, or in any way regulating the practice in courts of equity, can have any effect upon the jurisdiction or practice of the Federal courts.[3] Such are statutes requiring a mortgagor to tender the debt secured by his mortgage before filing a bill to redeem the mortgaged premises;[4] requiring a bill to foreclose a mortgage given to secure a judgment to show that execution has been issued under the judgment and returned unsatisfied;[5] requiring leave to be obtained from a State court before a suit can be brought to enforce a judgment therein entered;[6] or the presentment of a claim to the comptroller[7] or city council[8] or the termination of an appeal to a specified State court from the decision of the municipal authorities upon such an appeal,[9] before a suit against the city; or the presentment of a claim to an executor

Co., C. C. A., 3 L.R.A.(N.S.) 954, 140 Fed. 385.

§ 83. [1] Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; Hull v. Dills, 19 Fed. 657; Semmes v. Whitney, 50 Fed. 666; Hershberger v. Blewett, 55 Fed. 170; Heaton v. Thatcher, 59 Fed. 731.

[2] McConihay v. Wright, 121 U. S. 201, 206, 30 L. ed. 932, 933; and cases cited. Borden's Condensed Milk Co. v. Baker, C. C. A., 177 Fed. 906, where the State statute gave relief in *certiorari;* Western Union Tel. Co. v. Trapp, C. C. A., 186 Fed. 114, a suit to enjoin the collection of taxes.

[3] Boyle v. Zacharie, 6 Pet. 648, 8 L. ed. 532; Bein v. Heath, 12 How. (U. S.) 168, 179, 13 L. ed. 939, 944; Noonan v. Lee, 2 Black, 499, 509, 17 L. ed. 278, 281; Thompson v. Railroad Cos., 6 Wall. 134, 18 L. ed. 765; Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Railway Co. v. Whitton's Adm'r, 13 Wall. 270, 285, 20 L. ed. 571, 576; Smith v. Railroad Co., 99 U. S. 398, 25 L. ed. 437. But see Massachusetts B. L. Ass'n v. Lohmiller, C. C. A., 74 Fed. 23.

[4] Gordon v. Hobart, 2 Sumn. 401. See Klenk v. Byrne, 143 Fed. 1008.

[5] Dow v. Chamberlin, 5 McLean, 281.

[6] Phelps v. O'Brien County, 2 Dill. 518.

[7] Gamewell F. A. Tel. Co. v. Mayor, etc., 31 Fed. 312.

[8] Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L.R.A. 761.

[9] Ibid.

before a suit thereupon can be revived against the estate of a decedent;[10] forbidding an injunction against the collection of illegal taxes;[11] requiring that a bond be given before an injunction can be granted; or regulating the form of the security then required or the proceedings to enforce the same;[13] regulating the fees in receiverships;[14] determining what shall constitute notice of a pending suit;[15] authorizing persons to agree upon a statement of facts, and to stipulate that the court take jurisdiction to try a cause and render a decree without pleadings;[16] authorizing an appearance by his general guardian, to bind an infant not personally served with process;[17] authorizing the examination of a party before trial;[18] or, in the absence of a Federal statute regulating the manner of taking depositions;[19] providing that a county can be sued only in a specified State court;[20] forbidding a foreign corporation to sue until it has complied with a statutory condition.[21] It has been said that proceedings for the foreclosure of a mortgage in a Federal court should proceed upon the ordinary lines of

[10] Pond v. U. S., C. C. A., 111 Fed. 989; Western Union Tel. Co. v. Trapp, C. C. A., 186 Fed. 114.

[11] In re Tyler, 149 U. S. 164, 189, 37 L. ed. 689, 697.

[13] Bein v. Heath, 12 How. (U. S.) 168, 13 L. ed. 939; Russell v. Farley, 105 U. S. 437, 26 L. ed. 1061; Meyers v. Block, 120 U. S. 206, 211, 30 L. ed. 642, 643.

[14] Guaranty Tr. Co. v. Galveston City R. Co., 107 Fed. 311. But see 25 St. at L. 436.

[15] McClaskey v. Barr, 48 Fed. 130, 132. *Contra*, Jones v. Smith, 40 Fed. 314; Gamble v. Rural Independent School Dist., 76 C. C. A., 539, 146 Fed. 113.

[16] Nickerson v. Atchison, T. & S. F. R. Co., 1 McCrary, 383.

[17] N. Y. Life Ins. Co. v. Bangs, 103 U. S. 780, 26 L. ed. 609.

[18] Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117; Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421; Harks Dental Ass'n v. International T. C. Co., 194 U. S. 303, 48 L. ed. 989. See *infra*, § 359.

[19] Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117; Dravo v. Fabel, 132 U. S. 487, 33 L. ed. 421; Harks Dental Ass'n v. International T. C. Co., 194 U. S. 303, 306, 48 L. ed. 989, 990; U. S. v. 50 Boxes and Packages of Lace, 92 Fed. 601; Tabor v. Indianapolis Journal Newspaper Co., 66 Fed. 423. See *infra*, §§ 284, 372.

[20] Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766. See Chicot County v. Sherwood, 148 U. S. 529, 37 L. ed. 546.

[21] Bank of N. A. v. Barling, 44 Fed. 641; affirmed, as Barling v. Bank of N. A., C. C. A., 50 Fed. 260; Vitagraph Co. v. Twentieth Century Optiscope Co., 157 Fed. 699.

such proceedings in the State courts.[22] But it has been held that equitable relief may be given on the submission, upon an agreed statement of facts, of an action of *assumpsit* brought on the common-law side of the court, and a stipulation that judgment should be rendered in accordance with the opinion of the court thereupon.[23] A State statute providing that if by mistake a suit was brought in equity which should have been at common law there should be no abatement, but that the cause be transferred to the common-law docket, was followed in the Federal court.[24] The New York statute providing that, upon the consolidation of two corporations, suits pending by or against either shall not abate, will be followed by the Federal courts at equity, "not because the State statute is operative to regulate the practice and procedure of Federal courts in equity suits, but because, so far as the litigated life of the artificial person (properly a party to the suit when brought) is concerned, there has been no change, the only power which could destroy it having scrupulously refrained from doing so." [25]

§ 84. Sources of Federal equity practice. The Revised Statutes provide: "The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty, by the Circuit and District Courts." [1] The several "District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the

[22] Deck v. Whitman, 96 Fed. 873; Knickerbocker Tr. Co. v. Penacook Mfg. Co., 100 Fed. 814. See, however, Nalle v. Young, 160 U. S. 624, 40 L. ed. 560.

[23] Knight v. Fisher, 58 Fed. 991.

[24] U. S. Bank v. Lyon County, 48 Fed. 632.

[25] Edison Electric Light Co. v. U. S. El. Light Co., 52 Fed. 300, 313; s. c., 3 C. C. A. 83, per Lacombe, J. See Marion Phosphate Co. v. Perry, 74 Fed. 425.

§ 84. [1] U. S. R. S., § 917.

taking of rules, the entering and making up of judgments by default, and other matters, in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."[2] These statutes are constitutional[3] and the rules thus promulgated, when not in conflict with the Federal Constitution or a statute of the United States, have the force and effect of law.[4] They bind the United States as well as individuals.[5] Under these provisions prior to the year 1912 the Supreme Court had from time to time promulgated ninety four rules of equity practice[6] and most of the inferior courts have also adopted rules of their own. The ninetieth equity rule of the Supreme Court, which was promulgated in March, 1842, provided that, "in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the

[2] U. S. R. S., § 918. This must be construed in connection with U. S. R. S., § 914, requiring the practice in actions at common law to conform as near as may be to the practice in the State courts of record; any rule of the court to the contrary notwithstanding. Importers' & Traders' Nat. Bank v. Lyons, 134 Fed. 510.

[3] Wayman v. Southard, 10 Wheat. 1, 6 L. ed. 253; Beers v. Houghton, 9 Peters, 338, 359, 9 L. ed. 149; White v. Toledo, St. L. & K. C. R. Co., 79 Fed. 133.

[4] Bank of U. S. v. White, 8 Peters, 262, 269, 8 L. ed. 938, 941; Seymour v. Phillips & Colby Const. Co., 7 Biss. 460, Fed. Cas. No. 12689; Northwestern Mut. Life Ins. Co. v. Keith, C. C. A., 77 Fed. 374; Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349; U. S. v. Barber Lumber Co., 169 Fed. 184. It was held that a Circuit Court of Appeals had no authority to promulgate a rule permitting the prosecution of appellate proceedings *in forma pauperis*. Bradford v. Southern Ry. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 178; *Re* Bradford's Petition, C. C. A., 139 Fed. 518, 71 C. C. A. 334; overruling Reed v. Pennsylvania Co., C. C. A., 111 Fed. 714, 49 C. C. A. 572. See *infra*, 413.

[5] U. S. v. Barber Lumber Co., 169 Fed. 184. The Equity Rules of 1822 are published in 7 Wheaton XVII., 5 L. ed. 375. The Equity Rules of 1842, in 1 Howard, XLI. The amendments thereto are to be found in the volumes of the reports, published about the time of their promulgation. For a criticism of the practice under these rules, see Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co., 194 Fed. 172. In minor particulars, many of the courts disregarded them. In C. C., W. D. Tenn., no entry was made in the order-book for more than seven years. Electrolibration Co. v. Jackson, 52 Fed. 773, 774. In E. D. Mo., for a long time no order-book was kept. Hopkins' Rules, 10.

[6] See Kelley v. T. L. Smith Co., C. C. A., 196 Fed. 466.

practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." The previous rule promulgated at the October term, 1822, was: "In all cases where these rules prescribed by this Court or the Circuit Courts, do not apply, the practice of the Ciruit Courts shall be regulated by the practice of the High Court of Chancery in England."[7] Judge Sawyer said: "The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the High Court of Chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice."[8] By reference to these sources and the decisions of the courts resulting from them, the practice at equity in the courts of the United States was formerly determined. In the district of New Jersey, where the Federal statutes and equity rules were silent, the State chancery rules were followed. At the October term of 1912, the Supreme Court promulgated eighty-one new rules of equity practice, which, although they retain many of the rules of 1842, omitted the ninetieth rule, which has just been quoted. What practice should be followed in cases where the present rules and statutes are silent has not yet been decided. The prudent practitioner will in such case follow the chancery practice in England as it existed in 1842 or previously.[9] Sine the alterations in the new rules are based to a large extent upon provisions in the English Rules of 1883, which in their turn were suggested by the New York Code of Procedure, written by David Dudley Field, where the construction of the equity rules of 1912 is doubtful, the decisions of the

[7] Rule XXXIII, 7 Wheaton, XIII.

[8] Lewis v. Shainwald, 7 Saw. 403, 405.

[9] The first American edition of Daniell's Chancery Practice and the second American edition of Smith's Practice, both of which were published in 1837, are the authoritative works which best explain the English chancery practice in 1841. Note by Mr. Justice Bradley in Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105, 107; Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280.

English courts since 1883 and of the courts of New York since 1848 should be consulted.[10]

[10] It is the duty of the courts as far as possible to mould procedure so as to meet the exigencies of the case. Davies v. André, 24 Q. B. D. 598, 607. They must not give to the rules a pleader's construction, but a construction consistent with common sense. Edwards v. Lowther, 24 W. R. 434. "Practical rules ought not to be construed according to mere grammar, if that which is an absurdity from a business point of view is thereby produced." Hannay v. Smurthwaite (1893), 2 Q. B. 412, 420, per Esher, M. R. Where one rule is general and another specific, the latter should prevail. Cavendish v. Strutt (1904), 1 Ch. 524, 526, 527, 531; Locke v. White, 33 Ch. D. 308.

CHAPTER III.

PERSONS WHO MAY BE PLAINTIFFS OR DEFENDANTS IN A SUIT IN EQUITY.

§ 85. General rule as to persons capable of being plaintiffs. All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, foreign corporations who have been deprived of the right by statute, and possibly those who by the laws of a State have been declared civilly dead.

§ 86. States as plaintiffs. A State may sue as plaintiff in any court of the United States which has jurisdiction of the case.[1] A State cannot sue in the Supreme Court of the United States to collect a judgment for a penalty recovered in the court of such State against a corporation chartered by another State.[2]

§ 87. Alien enemies as plaintiffs. Subjects of a country at war with the United States cannot sue in the State or Federal courts before the conclusion of peace, unless they are residents of this country or within the jurisdiction of one of our allies.[1] If a complainant become an alien enemy after a suit has been begun, the defense may be interposed by answer.[2] The effect of such a defense is then, however, merely to suspend the cause of action and suit, not to dismiss the bill.[3]

§ 86. [1] Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482; U. S. v. Louisiana, 123 U. S. 32, 31 L. ed. 69; *supra*, § 13. For the jurisdiction of suits brought in the name of a State *ex relatione*, see *supra*, § 40.

[2] Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 L. ed. 239.

§ 87. [1] Wilcox v. Henry, 1 Dall. 69, 1 L. ed. 41; Crawford v. The William Penn, 1 Pet. C. C. 106; Mumford v. Mumford, 1 Gall. 366; Clarke v. Morey, 10 Johns. (N. Y.) 69; 2 Kent's Com. 63.

[2] Bell v. Chapman, 10 Johns. (N. Y.) 183.

[3] Hutchinson v. Brock, 11 Mass. 119; Parkinson v. Wentworth, 11 Mass. 26; Levine v. Taylor, 12 Mass. 8; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Ex parte Boussmaker, 13 Ves. 71; Wilcox v. Henry, 1 Dall. 69, 1 L. ed. 41; Story's Eq. Pl., § 54. But see Mumford v. Mumford, 1 Gall. 366.

§ 88. Foreign corporations. The State statute cannot deprive a foreign corporation from suing in its courts upon a contract connected with interstate commerce.[1] To what extent it can deny a corporation of another State, not so engaged, equality of treatment with individual citizens, in respect to the right to sue and defend in its courts, is a doubtful question.[2] It may forbid a corporation of another State from making a contract within its borders which is not connected with interstate commerce, until it has complied with certain reasonable statutory provisions, such as the filing of a copy of its charter and the payment of an annual license fee; and may further direct that every contract made within the State before such conditions have been complied with shall be void;[3] but no statute can deprive such a corporation of the right to sue in a court of the United States held within such State.[4] And where the State statute provided, "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate";[5] this did not prevent the recovery upon such contract in the Federal court there held.[6]

§ 89. Married Women as Plaintiffs. A married woman originally could only sue when joined with her husband, unless he had deserted her, and was without the realm or civilly dead, when she could sue alone;[1] or unless the suit concerned her separate property, when she was obliged to sue by her next

§ 88. [1] International Textbook Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687; Buck Stove Co. v. Vickers, 226 U. S. 205, 214, 57 L. ed. —.

[2] International Textbook Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687.

[3] Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 L. ed. 328.

[4] David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 56 L. ed. 1177. In Boston Towboat Co. v. John H. Sesnon Co., 199 Fed. 445, it was held that when a suit was brought by such a corporation, which had no statutory right to sue, the court might adjudicate upon a counter-claim interposed by the defendant and allow it as a set-off against the plaintiff's demand, although it could not render an affirmative judgment in favor of the plaintiff for any excess.

[5] N. Y. Consol. Laws, Ch. 23, § 15.

[6] David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 56 L. ed. 1177.

§ 89. [1] Story's Eq. Pl., § 61; Countess of Portland v. Prodgers, 2 Vern. 104.

friend.[2] The next friend, however, was chosen by herself;[3] and the husband was then usually made a party defendant, that he might have an opportunity to assert any claim he might have to the subject-matter of the suit.[4] In the courts of the United States, however, the rule was early laid down as follows: "Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court."[5] In the District Courts held in the State of New York, where a married woman has substantially all the powers of a spinster, she may sue in equity, as if she were single, at least if she be a citizen of that State.[6] In the District Courts in the districts of California the rule is otherwise.[7] When a suit has been begun by a married woman alone who should have sued by her next friend, leave to amend by adding to the title the name of a next friend will always be granted.

§ 90. Suits on behalf of infants. The Equity Rules provide: "All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons." A guardian, as such, cannot maintain an action in a State other than in which he was appointed, in the absence of a statute of the forum permitting him to sue.[2] By the old Chancery practice, an infant could only sue by his next friend,[2a] who might be any person

[2] Wake v. Parker, 2 Keen. 70; Story's Eq. Pl., § 63.

[3] Story's Eq. Pl., § 61; Gamber v. Atlee, 2 DeG. & Sm. 745.

[4] Sigel v. Phelps, 7 Sim. 239; Wake v. Parker, 2 Keen. 70; Story's Eq. Pl., § 63.

[5] Mr. Justice McLean in Bein v. Heath, 6 How. 228, 240, 12 L. ed. 416, 421. See Douglas v. Butler, 6 Fed. 228.

[6] Lorillard v. Standard Oil Co., 2 Fed. 902. But see Taylor v. Holmes, 14 Fed. 499, 514; U. S. v. Pratt Coal & Coke Co., 18 Fed. 708; O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840.

[7] Wills v. Pauly, 51 Fed. 257.

[8] Douglas v. Butler, 6 Fed. 228; Taylor v. Holmes, 14 Fed. 499.

§ 90. [1] Eq. Rule 70; copied in substance from Eq. Rule 87, of 1842.

[2] Lawrence v. Nelson, 143 U. S. 215, 222, 12 Sup. Ct. 440, 36 L. ed. 130; *Re* Kingsley, 160 Fed. 275; Pulver v. Leonard, 176 Fed. 586.

[2a] Rule 87; Story's Eq. Pl. § 57; Dudgeon v. Watson, 23 Fed 161;

that would undertake the suit in his behalf, subject, however, to the costs and the censure of the court, if it were improperly brought.[3] The next friend might, at any time, be removed by the court either summarily or after a reference, if it seemed for the best interest of the infant to appoint another.[4] This is usually done if he is interested in the suit.[5] It was doubtful whether insolvency and consequent inability to respond for costs was, in itself, a ground for the next friend's removal.[6] That might, however, be a reason for an order directing him to give security for costs.[7] The court might, at any time, order a reference to a master, to determine the propriety of a suit; and, if it appeared to have been brought against the infant's interest, would stay proceedings in it or dismiss the bill, with costs to be paid by the next friend.[8] This could be done even without a reference.[9] No such reference would, it seems, be ordered at the request of the next friend himself,[10] unless there were another cause pending by reason of which the infant's property was subject to the control of the court, when such a reference might be ordered at the instigation of a next friend, and he be paid his costs out of the estate even if the bill were finally dismissed.[11] An application to dismiss a bill as improperly filed on behalf of an infant might be made by a person "as next friend for the purpose of this application,"[12] or by a defendant to the bill.[13] It seems that any motion clearly for the interest of an infant complainant could be made by a next friend for the purpose of the application, when the next friend who filed the bill refused to move.[14] If two suits were instituted on be-

Bradwell v. Weeks, 1 J. Ch. (N. Y.) 325.

[3] Campbell v. Campbell, 2 M. & C. 25, 30; Sale v. Sale, 1 Beav. 586; Starten v. Bartholomew, 6 Beav. 143.

[4] Nalder v. Hawkins, 2 M. & K. 243; Russell v. Sharpe, 1 Jac. & W. 482; Jarvis v. Crozier, 98 Fed. 753, 755.

[5] Jarvis v. Crozier, 98 Fed. 753, 755. See in Re Corsellis, 50 Law T. N. S. 703.

[6] Anon., 1 Ves. Jr. 409.

[7] Fulton v. Rosevelt, 1 Paige (N. Y.), 178, 180, 19 Am. Dec. 409.

[8] Da Costa v. Da Costa, 3 P. Wms. 140; Nalder v. Hawkins, 2 M. & K. 243; Sale v. Sale, 1 Beav. 586. See King v. McLean Asylum of Massachusetts General Hospital, 64 Fed. 325.

[9] Sale v. Sale, 1 Beav. 586.

[10] Jones v. Powell, 2 Mer. 141.

[11] Taner v. Ivie, 2 Ves. Sen. 466.

[12] Guy v. Guy, 2 Beav. 460.

[13] Fox v. Suwerkrop, 1 Beav. 583.

[14] Furtado v. Furtado, 6 Jur.

half of the same infant for the same purpose by two next friends, the court would direct a master to inquire which is most for the infant's benefit.[15] A bill might be filed by a next friend on behalf of a child still in its mother's womb.[16]

If an infant were made co-plaintiff with others, and it appeared that it would be more for his advantage that he should be made a defendant, an order to strike out his name as plaintiff, and to make him a defendant, might be obtained.[17] When a bill was filed on behalf of an infant, his coming of age did not abate the suit; but he might then elect whether he would proceed with it or not.[18] If he chose to go on with the case, all further proceedings could be carried on without any amendment or the filing of a supplemental bill.[19] He was then liable for all costs of the suit, as if he had filed the bill after he came of age.[20] Otherwise, he was not personally chargeable with costs;[21] unless he made a motion to dismiss the bill; which it seems could only be done upon the payment of costs by himself,[22] if he could not establish that the bill was improperly filed by his next friend.[23] If the next friend died during the infant's minority, and the latter took no step in the cause after he had come of age, the defendant might have the bill dismissed, but without costs, since there would then be no one living who was liable to pay them.[24] The suit is brought in the name of the infant, not in that of the next friend,[25] and the infant's citizenship is the test of the jurisdiction.[26] Where the bill shows that the suit was brought by a guardian in a representative capacity, but by the title it appears that he sues individually, the title, if necessary, may be amended.[27] A guardian ad litem for an infant, although appointed in a State court before the removal

227; Cox v. Wright, 9 Jur. (N. S.) 981; Guy v. Guy, 2 Beav. 460.

15 Calvert on Parties (2d ed.), 418.

16 Luterel's Case, cited Prec. Ch. 50; Musgrave v. Parry, 2 Vern. 710.

17 Tappen v. Norman, 11 Ves. 563; Jarvis v. Crozier, 98 Fed. 753.

18 Guy v. Guy, 2 Beav. 460.

19 Hoffman's Ch. Pr. 60; Daniell's Ch. Pr. (2d Am. ed.) 102.

20 Daniell's Ch. Pr. (2d Am. ed.) 102.

21 Waring v. Crane, 2 Paige (N. Y.), 79, 21 Am. Dec. 70.

22 Waring v. Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

23 Turner v. Turner, 2 Stra. 708.

24 Morgan v. Potter, 157 U. S. 195, 39 L. ed. 670.

25 Woolridge v. McKenna, 8 Fed. 650; *supra*, § 44.

26 Ibid.

27 Pulver v. Leonard, 176 Fed. 586.

of the cause, cannot without the approval of the court, bind the infant by a contract concerning the amount of the attorney's fees.[28]

§ 91. Suits on behalf of idiots, lunatics, and persons of weak mind. Idiots and lunatics sue by their committees or guardians, if they have any, otherwise by next friends.[1] It is the usual practice to join them as plaintiffs with their representatives, though it might be held unnecessary to do so when one has a committee authorized by statute to sue in his name.[2] If the interest of the committe be adverse to that of his ward, the latter should sue by a next friend.[3] Although the practice is unsettled, it would be advisable to have the next friend appointed by the court.[4] Where a volunteer applied for the writ of *habeas corpus* on behalf of a person whom he alleged to be wrongfully confined as a lunatic, the court appointed another guardian *ad litem* with the direction that he examine the facts and use his own discretion in determining whether to continue the proceeding.[5] If a plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings.[6] If a committee die and a new committee is appointed after a suit has been instituted by the former for the benefit of his idiot or lunatic, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.[7] In England, a committee usually before the institution of a suit prayed the sanction of the Lord

28 Ryan v. Philadelphia & Reading Coal & Iron Co., 189 Fed. 253.

§ 91. 1 Rule 87; Hoffman's Ch. Pr. 61.

2 See Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139; Harrison v. Rowan, 4 Wash. C. C. 202; Palmer, Attorney-General, v. Parkhurst, 1 Chan. Cas. 112; Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 24; Hoffman's Ch. Pr. 61; Story's Eq. Pl., § 65, and notes.

3 Compare Attorney-General v. Tiler, 1 Dick. 378; Hoffman's Ch. Pr. 61.

4 Compare Attorney-General v. Tiler, 1 Dick. 378; Hoffman's Ch. Pr. 61; Story's Eq. Pl., § 64, and notes.

5 King v. McLean Asylum, 26 L.R.A. 784, 64 Fed. 331.

6 See Brown v. Clark, 3 Woodeson's Lect. 378; Daniell's Ch. Pr. 108.

7 In re Reynolds, Shelf on Lun. 417; Daniell's Ch. Pr. 108.

Chancellor by a petition, which was often referred to a master.[8] Where a bill had been filed in the name of an alleged lunatic under an order of the court, and thereafter the plaintiff appeared by an attorney and moved to dismiss the bill, upon the ground that she was mentally competent; it was held, that the court was not ousted of its jurisdiction, but might inquire into the mental competency of the plaintiff.[9] It has been said: that in such a case, the issue concerning the mental competency should be determined by a jury; but that it may be decided by the court.[10] If a person of full age is neither an idiot nor a lunatic, and is yet incapable of managing his affairs, the court may appoint a next friend to sue for him.[11] If a bill has been filed in the name of a plaintiff, who, at the time of filing it, is in a state of mental incapacity, it may, on motion, be taken off the file,[12] but it has been held that a bill cannot be dismissed upon the motion of the defendant because the complainant was in filing the same dominated by another person, to such an extent that she was not free to exercise her will, when the complainant does not unite in the motion.[13] If, however, after a suit has been properly instituted, a plaintiff becomes imbecile, the bill cannot for that reason be taken off the file.[14]

§ 92. Capacity of foreign executors and administrators to sue. Foreign executors and administrators, under which term are included those appointed in other States than that where the court is held, cannot sue until they have taken out ancillary letters of administration,[1] unless the State statute au-

8 In re Webb, Shelf on Lun. 417; Daniell's Ch. Pr. 108.

9 Isle v. Cranby, 199 Ill. 39, 64 L.R.A. 513, 64 N. E. 1065.

10 Howard v. Skinner, 87 Md. 556, 40 L.R.A. 753; Pyott v. Pyott, 191 Ill. 280.

11 Wartnaby v. Wartnaby, Jac. 377; Owing's Case, 1 Bland (Md.), 370, 373, 17 Am. Dec. 311; Story's Eq. Pl. § 66.

12 Wartnaby v. Wartnaby, Jac. 377; Story's Eq. Pl. § 66.

13 Speckart v. Schmidt, C. C. A., 190 Fed. 499.

14 Wartnaby v. Wartnaby, Jac. 377.

§ 92. 1 Fenwick v. Sears, 1 Cranch, 259, 2 L. ed. 101; Dixon v. Ramsay, 3 Cranch, 319, 2 L. ed. 453; Doe v. McFarland, 9 Cranch, 151, 3 L. ed. 687; Kerr v. Moon, 9 Wheat, 565, 6 L. ed. 161; Mason v. Hartford, Providence & Fishkill R. Co., 19 Fed. 53; Duchesse d'Auby v. Porter, 41 Fed. 68; Johnson v. Powers, 139 U. S. 156, 158, 35 L. ed. 112, 113; *Re* Kingsley, 160 Fed. 275; J. B. & J. M. Cornell Co. v. Ward, C. C. A., 168 Fed. 51; Dodge

thorizes such suit; in which case the Federal Court will follow the State practice.[2] This rule forbids an action by a foreign administrator without ancillary letters to recover damages for the death of his intestate within the State where the suit was brought.[3] It has been held: that a foreign administrator, without ancillary letters, may sue to recover damages for the death of his intestate, within the State of his appointment; when the cause of action arises under a statute of such State;[4] but that a foreign administrator, appointed in the State of his decedent's domicile, cannot sue to recover damages for the death, under a statute of a State where the decedent died, which is different from those where the appointment was made and the suit is brought.[5] A foreign executor may sue without ancillary letters when the title is vested in him as trustee by devise.[6] A foreign executor or administrator, without ancillary letters, may sue to recover the proceds of the decedent's estate, which is in the hands of an agent of such personal representative.[7]

§ 93. Capacity of foreign receivers to sue. Ordinarily, a foreign receiver cannot sue to collect a cause of action that belongs to the corporation;[1] even when he brings a suit in the

v. Town of North Hudson, 177 Fed. 986; Watkins v. Eaton, C. C. A., 183 Fed. 384. An act of Congress authorizes them to sue without ancillary letters in the District of Columbia. 24 St. at L. 431; Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741; Brownson v. Wallace, Fed. Cas. No. 2,042, 4 Blatchf. 465. The omission is cured by the issue of ancillary letters at any time before the hearing. Hodges v. Kimball, C. C. A., 91 Fed. 845.

[2] Hayes v. Pratt, 147 U. S. 557, 37 L. ed. 279; Beaumont v. Beaumont, 144 Fed. 128, under New Jersey Statute.

[3] J. B. & J. M. Cornell Co. v. Ward, C. C. A., 168 Fed. 51; Dodge v. Town of North Hudson, 177 Fed. 986.

[4] McCarty v. N. Y., L. E. & W. R. Co., 62 Fed. 437.

[5] Maysville Street R. R. & Transfer Co. v. Marvin, C. C. A., 59 Fed. 91; Brooks v. Southern Pac. Co., 148 Fed. 986.

[6] De Forest v. Thompson, 40 Fed. 375.

[7] Moore v. Petty, C. C. A., 135 Fed. 668.

§ 93. [1] Booth v. Clark, 17 How. 322, 15 L. ed. 164; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380; Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163; Burr v. Smith, 113 Fed. 858; Hilliker v. Hale, C. C. A., 117 Fed. 220; *certiorari* denied 188 U. S. 739, 47 L. ed. 677; Edwards v. National Window Glass Jobbers Ass'n, 139 Fed. 795; Covell v. Fowler, 144 Fed. 535. It has been held: that this rule applies to a receiver appointed by a United States court of

name of the corporation itself.[2] A receiver can never sue in a foreign court, to enforce a cause of action, upon which he could not sue in the courts of the State where he was appointed.[3] It has been said: that a defendant to the suit, in which the foreign receiver was appointed, cannot, if he has been duly served with process, dispute the authority of the receiver to sue in a foreign court, at least where the judgment appointing the receiver expressly authorized him to sue in such foreign court.[4] The fact that the court, which appointed the receiver, gave him leave to sue in another district, does not authorize him there to sue without an ancillary appointment.[5] It has been held that a foreign receiver cannot obviate this objection by bringing a suit in the name of the corporation.[6] It has been said: that when the foreign receiver is the statutory successor of a corporation, he can sue in a foreign court without an ancillary appointment.[7] He can also do so when he has received a voluntary assignment of the assets of the insolvent;[8] and where the statute vests in him the right to sue for and collect an assessment upon the stockholders, he is a *quasi* assignee and can maintain such suit in another jurisdiction;[9] but it has been held that where he has recovered a judgment in another juris-

bankruptcy. In Re National Mercantile Agency, 128 Fed. 639.

[2] Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163. See, however, Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986.

[3] Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380.

[4] Burr v. Smith, 113 Fed. 858.

[5] Fowler v. Osgood, 4 L.R.A. (N.S.) 824, 141 Fed. 20.

[6] Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894; Strout v. United Shoe Machinery Co., 195 Fed. 313. See *infra*, §§ 304, 311.

[7] Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337 (where the statute upon the dissolution of an insurance company vested its assets in the superintendent of the insurance department and the latter was allowed to sue in a foreign jurisdiction); Bernheimer v. Converse, 206 U. S. 516; Avery v. Boston Safe Deposit & Trust Co., 72 Fed. 700; Rogers v. Riley, 80 Fed. 759; Hale v. Hardon, 89 Fed. 283, 287; Hale v. Coffin, 114 Fed. 567. But see Hale v. Allinson, 188 U. S. 56, 69, 47 L. ed. 380, 389.

[8] Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; Lewis v. Clark, C. C. A., 129 Fed. 570; (where the assignment was made by a foreign receiver to a receiver appointed in another State, who was allowed to sue in a third State).

[9] Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749; Irvine v. Putnam, 190 Fed. 321.

diction, he cannot sue to recover equitable assets until he has obtained a judgment in the State where they are situated;[10] even though he shows that the debtor has no other property. A receiver, appointed by a Federal court, can sue in the courts of the State where the Federal district is located.[11] It seems that a receiver, appointed by a State court, can sue in the Federal court in the same district.[12]

§ 94. Who may be defendants. All persons may be made defendants, except the United States, without their consent,[1] or a Territory thereof;[2] foreign States and sovereigns for acts done in a political capacity;[3] "one of the United States by citizens of another State, or by citizens or subjects of any foreign State;"[4] receivers appointed by State courts without the leave of such courts;[5] and foreign executors and administrators,[6] unless they have assets within the jurisdiction of the court where the bill is filed,[7] in which case they are liable, as trustees, to account for the same, to those entitled thereto.[8] Whether a suit can be brought against the President of the United States is undecided.[9]

§ 95. The United States as a defendant. In general. The United States cannot be sued in any court without their

[10] Trotter v. Lisman, 199 N. Y. 497.

[11] Grant v. Buckner, 172 U. S. 232, 238, 43 L. ed. 430.

[12] Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815.

§ 94. [1] Carr v. U. S., 98 U. S. 433, 25 L. ed. 209; Kansas v. U. S., 204 U. S. 331, 51 L. ed. 510, *infra*, §§ 94–97.

[2] Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834.

[3] Duke of Brunswick v. King of Hanover, 6 Beav. 1; Hullett v. King of Spain, 2 Bligh N. R. 31.

[4] Eleventh Amendment to Constitution.

[5] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Thompson v. Scott, 4 Dill. 508; Express Co. v. Railroad Co., 99 U. S. 191, 25 L. ed. 319. See § 314, *infra*.

[6] Vaughn v. Northrup, 15 Pet. 1, 10 L. ed. 639; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398; s. c., 135 Fed. 818; Lewis v. Parrish, C. C. A., 115 Fed. 285; Skiff v. White, 127 Fed. 175; Story's Eq. Pl., § 179, *infra*, § 311.

[7] Sandilands v. Inness, 3 Sim. 363; McNamara v. Dwyer, 7 Paige (N. Y.) 239, 32 Am. Dec. 627; Campbell v. Tousey, 7 Cow. (N. Y.) 64, *infra*, § 311.

[8] Lewis v. Parrish, C. C. A., 115 Fed. 285, *infra*, § 311.

[9] See Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; People ex rel. Broderick v. White, 156 N. Y. 136, 4 L.R.A. 231, 66 Am. St. Rep. 547, and cases cited.

consent.[1] A Territory of the United States, such as the Territory of Hawaii, has the same immunity.[2] The District of Columbia has not.[3] Neither has the city of Manila in the Philippines.[4] Even if there is no remedy adequate to the collection of a claim against a municipality when reduced to judgment, a plaintiff having a valid claim is entitled to maintain an action thereupon and to reduce the same to judgment against it.[5]

The United States may waive their exemption from suit by statute,[6] but not by the act of any of their officers.[7] A Terri-

§ 95. [1] Carr v. U. S., 98 U. S. 433, 25 L. ed. 209; Kansas v. U. S., 204 U. S. 331, 51 L. ed. 510.

[2] Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834.

[3] Metropolitan R. R. Co. v. District of Columbia, 132 U. S. 1, 33 L. ed. 231.

[4] Vilas v. City of Manila, 220 U. S. 345, 55 L. ed. 491.

[5] Mount Pleasant v. Beckwith, 100 U. S. 514, 530, 25 L. ed. 699, 703; Vilas v. City of Manila, 220 U. S. 345, 352, 55 L. ed. 491, 494. It has been held that the National Home for Disabled Volunteer Soldiers, in Tennessee, a charitable institution engaged as an agency of the Federal Government in the discharge of a governmental function, is not subject to an action sounding in tort to recover damages for the negligence of its officers in diverting and polluting the waters of plaintiff's spring; since the power "to sue and to be sued at law and in equity," conferred on the corporation by its charter (U. S. R. S., § 4825, Comp. St. 1901, p. 3337), is limited to matters within the scope of the other corporate powers with which it is vested. Lyle v. National Home for Disabled Volunteer Soldiers, 170 Fed. 842.

[6] U. S. v. Clarke, 8 Pet. 436, 8 L. ed 1001; The Siren, 7 Wall. 152, 19 L. ed. 129; Kawananakoa v. Polyblank, 205 U. S. 349, 353, 51 L. ed. 834, 836: per Holmes, J.: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. '*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*' Bodin, Republique, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, c. 3. *Nemo suo statuto ligatur necessitative. Baldus., De Leg. et Const., Digna Vox* (2d ed., 1496, fol. 5lb. Ed. 1539, fol. 61). As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive

tory waives exemption by failing to object to the jurisdiction.[8] When the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of any set-off, legal and equitable, to the extent of the demand made or property claimed.[9] No affirmative judgment can be entered by the defendant, upon his set off or counterclaim.[10]

The Revised Statutes provide: "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."[11] It has been held that this applies to all counterclaims against the United States.[12] When the United States proceed *in rem,* they open to consideration all claims and equities in regard to the property libeled.[13] Where property of the United States is involved in a litigation to which they are not technically parties, the attorney for the district where the suit is brought may intervene by way of suggestion; and in such a case the court will either stay the suit or adjust its judgment according to the rights disclosed

their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so."

7 Carr v. U. S., 98 U. S. 433, 25 L. ed. 209.

8 Kawananakoa v. Polyblank, 205 U. S. 349, 353, 51 L. ed. 834, 836.

9 Reeside v. Walker, 11 How. 272, 13 L. ed. 693; U. S. v. Kerr, 196 Fed. 503.

10 Reeside v. Walker, 11 How. 272, 13 L. ed. 693; New York v. Dennison, 84 N. Y. 272.

11 U. S. R. S., § 951.

12 U. S. v. Kerr, 196 Fed. 503.

13 Mr. Justice Field in The Siren, 7 Wall. 152, 154; Walker v. U. S., 139 Fed. 409. A more liberal rule against the government is suggested in Fifth Nat. Bank v. Long, 7 Biss. 502; Elliot v. Van Voorst, 3 Wall. Jr. 299; Briggs v. The Light Boats, 11 Allen (Mass.), 157; Stanley v. Schwalby, 162 U. S. 255, 272. In U. S. v. Ansonia Brass & Copper Co., 218 U. S. 452, it was held that certain stipulations made by a District Attorney of the United States, in order to obtain possession of vessels seized by judicial proceedings while in the course of construction, should not be construed as de-

on the part of the government;[14] but no judgment can then be entered against the United States for costs or divest them of their title to property.[15]

§ 96. Liability of the United States and officers thereof to suits for the recovery of money. The Judicial Code provides: District Courts of the United States shall have jurisdiction, "Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against

priving the Government of any rights asserted under the contracts for such construction.

[14] Stanley v. Schwalby, 147 U. S. 508, 513; The Exchange, 7 Cranch, 116, 147. But see Stanley v. Schwalby, 162 U. S. 255.

[15] Stanley v. Schwalby, 162 U. S. 255, 272. *Infra,* § 105.

the Government of the United States shall be allowed under this pragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."[1] This withholds from the District Courts jurisdiction over all claims against the United States which exceed ten thousand dollars and all cases brought to recover fees, salary or compensation for the services of officers. In such cases, suit must be brought in the Court of Claims;[2] but it has been held that the District Courts have jurisdiction of suits to recover disbursements made by marshals in payment of the services of court bailiffs.[3] Actions for similar causes may be brought in the District Court of the United States for Porto Rico.[4] It is doubtful whether an alien corporation can maintain such a suit in any court.[5] It has been said: that the words "in cases not sounding in tort" limit only the last part of the clause, and do not affect claims founded upon the Constitution of the United States or a law of Congress.[6] It has been held: that an action will lie against the United States for the recovery of duties illegally exacted upon merchandise, which is alleged not to have been imported from a foreign country, when the construction of the Constitution of

§ 96. [1] 36 St. at L. 1087, § 24, subd. twentieth. This is practically a re-enactment of the Tucker act, passed in 1887, as subsequently amended 24 St. at L. 505, 30 St. at L. 494.

[2] *Infra,* Chapter on Court of Claims.

[3] U. S. v. Swift, C. C. A., 139 Fed. 225.

[4] Hijo v. U. S., 194 U. S. 315, 48 L. ed. 994.

[5] Hijo v. U. S., 194 U. S. 315, 48 L. ed. 994.

[6] Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074; U. S. v. Lynah, 188 U. S. 445, 475, 47 L. ed. 539, 550.

the United States[7] or of an act of Congress,[8] was involved; to recover revenue taxes illegally exacted and paid under protest, when the payment was necessary to avoid stopping the business in which the plaintiff was engaged,[9] and fines illegally imposed, the non-payment of which would have prevented the clearance of vessels carrying the mails.[10] In such a case, the collector,[11] or a commissioner of internal revenue,[12] or other officer who has compelled the unlawful payment, may be sued personally, as well as the United States.[13] It has been held that an appeal to the Commissioner of Internal Revenue is not a prerequisite to an action against the collector.[14] The Act to simplify the laws in relation to the collection of the revenues provides: "That from and after the taking effect of this Act, no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on acount of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this Act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this Act."[15] The same statute directs the Secretary of the Treasury to refund and pay, out of any money in the treasury not otherwise appropriated, all moneys that are shown to his satisfaction to have been paid to or deposited with a collector of customs in any case of unascertained or estimated duties.[16] In

[7] Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074.

[8] Lincoln v. U. S., 197 U. S. 419, 49 L. ed. 816.

[9] Swift Co. v. U. S., 111 U. S. 22, 28 L. ed. 341; Christie Street Commission Co. v. U. S., C. C. A., 136 Fed. 326; reversing 129 Fed. 506. See N. Y. Consol. Card Co. v. U. S., 20 Ct. Cl. 174.

[10] Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 329, 53 L. ed. 1013, 1018.

[11] De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041.

[12] Ewers v. Weaver, 182 Fed. 713.

[13] Emery, Bird, Thayer Realty Co. v. U. S., 198 Fed. 242.

[14] Ewers v. Weaver, 182 Fed. 713.

[15] Act of June 10, 1890, § 24, as amended Aug. 5, 1909, 36 St. at L. 11, Pierce's Fed. Code, *§ 1032.

[16] Ibid., § 23.

case of his failure so to do, an action might lie against the United States to recover the same. It seems that a suit will lie against the United States to recover excess postage paid under protest.[17] It has been suggested that an action might lie against the postmaster under the same circumstances.[18] Suits cannot be brought against the United States to recover taxes paid voluntarily without any contemporary protest or notice of objection,[19] nor money paid for the purchase of revenue stamps under similar circumstances.[20] Neither a statute imposing a tax, nor execution thereunder, nor a mere demand for payment, constitutes duress; but where the statute contains self-operating provisions, by which non-payment of the tax results in heavy penalties and a forfeiture of the right to do business, payment by one within the class affected is not voluntary, but compulsory.[21] In such a case, payment by one not included in such class is not made under duress.[22] The refusal, by a recorder, to accept a deed without the revenue stamps,[23] and the refusal of the collector to give to a ship a clearance without such stamps;[24] do not constitute such duress as will authorize a suit to recover the taxes, when there was no contemporary protest or notice, although the statute made the omission of the stamps a misdemeanor.[25] A subsequent application to the internal revenue commissioner for a return of the money paid for stamps is not equivalent to a contemporary protest or notice.[26] The payment of an inheritance tax under protest, after a threat by the collector that, unless promptly paid, it would be collected with a penalty and interest of one per cent a month, was held to be involuntary and to justify a suit against the internal revenue collector to recover the

17 Lewis Pub. Co. v. Wyman, C. C. A., 182 Fed. 13, 17, 18.

18 Ibid.

19 Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432; U. S. v. New York & Cuba Mail S. S. Co., 200 U. S. 488, 50 L. ed. 569. But it seems that where one protest has been duly made, subsequent protests against similar exactions are not necessary. Johnson v. Herold, 161 Fed. 593.

20 Ibid.

21 Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510.

22 Ibid.

23 Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432.

24 U. S. v. N. Y. & Cuba Mail S. S. Co., 200 U. S. 488, 50 L. ed. 569.

25 Chesebrough v. U. S., 192 U. S. 253, 48 L. ed. 432.

26 Herold v. Kahn, C. C. A., 159 Fed. 608.

same.[27] Such has been held to be the payment of an illegal tax upon land for the purpose of obtaining possession of the same.[28] Suits may be brought against the United States to recover money paid under the void judgment of a military commission,[29] or a fine illegally imposed by a provisional court,[30] to recover taxes which a statute has directed the Secretary of the Treasury to refund.[31] Suits may be brought to recover money paid to a public officer under a mutual mistake of fact,[32] but not money paid under a mutual mistake of law;[33] to recover the purchase price paid upon void entries of public land;[34] to recover money paid a land officer as part payment for a certificate of entry which he refuses to deliver, the consideration for the payment thus failing;[35] to recover money of the claimant received by the United States for other purposes, and appropriated by them for the payment of an illegal tax;[36] to recover money of the claimant obtained and paid into the Treasury by a fraud perpetrated by an officer of the United States;[37] to recover the value of property delivered in pursuance of an express contract which is void;[38] to recover the damage to property leased by the government and injured by the want of reasonable care while in its possession;[39] to recover for salvage services,[40] including maritime services in saving property, upon which duties had been paid that the government might otherwise have been obliged to refund,[41] and for

27 Simons v. U. S., 19 Ct. Cl. 601.

28 Devlin v. U. S., 12 Ct. Cl. 266. But see Carver v. U. S., 111 U. S. 609, 28 L. ed. 540.

29 Basso's Case, 40 Ct. Cl. 202.

30 U. S. v. Shipley, C. C. A., 197 Fed. 265.

31 Nelson v. U. S., 35 Ct. Cl. 427; Ingram v. U. S., 32 Ct. Cl. 147;

32 U. S. v. Edmonston, 181 U. S. 500, 45 L. ed. 971; U. S. v. Wilson, 168 U. S. 273, 42 L. ed. 464; U. S. v. Lawson, 101 U. S. 164, 25 L. ed. 860.

33 Emmons v. U. S. 42 Fed. 26.

34 Slocum v. U. S., 35 Ct. Cl. 485; Anthracite Mesa Coal Min. Co. v. U. S., 38 Ct. Cl. 56, 63.

35 Johnston v. U. S., 17 Ct. Cl. 157.

36 U. S. v. State Bank, 96 U. S. 30, 24 L. ed. 647.

37 Heathfield v. U. S., 8 Ct. Cl. 213.

38 U. S. v. Bostwick, 94 U. S. 53, 24 L. ed. 65.

39 Bryan v. U. S., 6 Ct. Cl. 128; McGowan v. U. S., 20 Ct. Cl. 147.

40 U. S. v. Cornell Steamboat Co., 202 U. S. 184, 50 L. ed. 987; affirming, C. C. A., 137 Fed. 455.

41 Brown v. U. S., 15 Ct. Cl. 392.

the share of general average reasonably due;[42] by a contractor for extra work done by him under the direction of a government agent authorized to order the same, and for damages for an improper interference by such agent with the fulfillment of the contract.[43] When the government of the United States, by such formal proceedings as are necessary to bind the same, takes for public use land to which it asserts no claim or title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its true value,[44] unless Congress has provided for the payment of the same, in which case no more can be recovered, although the owner has protested.[45] It has been held: that an action will lie to recover damages to land, to which the Government obtains no title, if the same is permanently flooded by a work, such as a dam, built on adjoining land under the direction of an Act of Congress;[46] and that where the Government has agreed to furnish a coffer dam to a contractor for the construction of a public work, it is liable for damage caused by negligence in the construction of the dam, although there was no stipulation in the contract to the effect;[47] but that it is not liable for damages caused by temporary floods to land which was previously subject to overflow in time of freshets, although increased by a Government dam on adjacent land,[48] or by revetments erected by the Government along the banks of a river to prevent erosion from natural causes.[49] When damages for the flooding of land are allowed;

[42] Bowe v. U. S., 42 Fed. 761.

[43] Bowe v. U. S., 42 Fed. 761.

[44] Langford v. U. S., 101 U. S. 341, 25 L. ed. 1010. See Hill v. U. S., 149 U. S. 593, 37 L. ed. 862; Great Falls Mfg. Co. v. Att'y Gen., 124 U. S. 581, 31 L. ed. 527; U. S. v. Russell, 13 Wall. 623, 20 L. ed. 474; Grant v. U. S., 1 Ct. Cl. 41; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67, 28 L. ed. 901, 903; Mills v. U. S., 19 Ct. Cl. 79; Kettler v. U. S., 21 Ct. Cl. 175; Alexander's Case, 39 Ct. Cl. 383 (land used for a camp); Philippine Sugar Estates Development Co. v. U. S. 40 Ct. Cl. 33.

[45] Hooe v. U. S., 218 U. S. 322, 54 L. ed. 1055.

[46] U. S. v. Lynah, 188 U. S. 445, 47 L. ed. 539; U. S. v. Welch, 217 U. S. 333; U. S. v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135.

[47] Collins & Farwell v. U. S., 34 Ct. Cl. 294.

[48] Coleman v. U. S., 181 Fed. 599.

[49] Bedford v. U. S., 192 U. S. 217, 48 L. ed. 414. See Manigault v. Springs, 199 U. S. 473, 485, 50 L. ed. 274, 280; Mills v. U. S., 46 Fed. 738.

they include the value of a private right of way to other land of plaintiffs, which is thus destroyed,[50] and the loss and easement of access from other land of the plaintiff to a public road.[51] Whenever there has been an actual physical taking of part of a distinct tract of land, the compensation to be awarded includes not only the market value of so much as is actually appropriated, but also the damage to the remainder which therefrom results, including injury due to the probable use to which the part appropriated is to be devoted by the Government;[52] but damage resulting to adjacent but distinct parcels of land has been admitted.[53] In a proceeding to condemn the locks and dams of a corporation, the value of the franchise to take tolls for their use must be included in the compensation.[54] Before the Tucker act, it was held: that, when the United States takes possession of property, asserting a title hostile to that of the true owner, such owner cannot recover, in a suit in any court, the reasonable value of its use, or the reasonable value of the fee of the same.[55] Whether the Tucker act has changed this rule has not yet been authoritatively decided.[56] When the claim is not based upon the Constitution, or a law of the United States, or a department regulation, it must "be founded on a convention between the parties, a coming together of minds."[57] It has been said that to constitute an im-

[50] U. S. v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 19 Ann. Cas. 680.

[51] U. S. v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135.

[52] U. S. v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135. See Sharp v. U. S., 191 U. S. 341.

[53] Sharp v. U. S., 191 U. S. 341, 353, 48 L. ed. 211, 215.

[54] Monongahela Navigation Co. v. U. S., 148 U. S. 312, 315, 37 L. ed. 463, 464.

[55] Langford v. U. S., 101 U. S. 341, 25 L. ed. 1010.

[56] U. S. v. Lynah, 188 U. S. 445, 474, 47 L. ed. 539, 550; where Brown, J., with the concurrence of Shiras and Peckham, JJ., expressed the opinion: that a case of trespass upon real estate by the government, was a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States, and was the subject of an action under the Tucker act. See Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074; Hooe v. U. S., 218 U. S. 322, 54 L. ed. 1055. But see U. S. v. Lynah, 188 U. S. 445, 47 L. ed. 539; U. S. v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 19 Ann. Cas. 680; U. S. v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135.

[57] Harley v. U. S., 198 U. S. 229, 234, 49 L. ed. 1029, 1030. The retention without express rejection of a proposal, although the proposal

plied contract upon which a suit can be brought, "there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."[58] With the exception of claims for the proceeds of captured or abandoned property and others arising under special statutes, the courts have no jurisdiction of claims upon torts committed by the United States,[59] except where the claimant can waive the tort and sue upon an implied contract,[60] or where the case arises

purports to be an assignment, does not amount to an acceptance of the same, when it expressly states that it shall not bind the proposer unless accepted by the officer before a specified date, and it was an answer to an advertisement stating that the proposals were for investigation and estimate and that the advertising officer had no authority to contract for the expenditure of money. Beach v. U. S., 226 U. S. 243, 57 L. ed. —. See *infra*, § 168.

[58] Knote v. U. S., 95 U. S. 149, 157, 24 L. ed. 442, 444.

[59] "There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law. The reason of this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives." Miller, J., in Langford v. U. S., 101 U. S. 341, 25 L. ed. 1010.

Where a statute which authorized a suit against the United States for a continuous tort was repealed pending such a suit, it was held that the damages sustained up to the time of the repeal only could be recovered. Paine L. Co. v. U. S., 55 Fed. 854.

[60] Ingram v. U. S., 32 Ct. Cl. 147,

under the Constitution or a law of the United States.[61] The United States are not liable for injury resulting from the negligence of their officers to those who are not in a contractual or a *quasi*-contractual relation with them.[62] A person injured by the negligence of a government employee operating an elevator cannot waive the tort and sue the United States upon an implied contract to carry him with care.[63] Where the Register of the Treasury canceled registered bonds without authority of law, a party who bought them on the faith of such cancellation and subsequently was obliged to repay their value to the original owner, was not allowed to recover from the United States the amount for which he was thus muleted.[64] An action for the unlawful seizure of private property for the use of the army sounds in tort and the courts have no jurisdiction of the same.[65] Where a suit was brought by an army officer against the United States for indemnity because of his payment of a judgment recovered against him on account of his seizure and use of a boat for the benefit of the government under the orders of his superior officer; it was held that, if the liability of the United States was in tort, no action would lie, and that if the liability was upon an implied contract, it arose when the seizure was made, not when the judgment was recovered.[66] Damages have been awarded against the government for the use of a vessel impressed during the Spanish

162, per Nott, C. J.: "The common law reduces all civil actions between individuals to two simple classes, *ex contractu* and *ex delicto*. There are many subdivisions of the former, but generally it may be said that what is not *ex delicto* is *ex contractu*. It is the opinion of this court that Congress used the language 'upon any contract, expressed or implied,' with reference to this general classification of the common law. The meaning is that the court shall have jurisdiction of all actions *ex contractu* whether the contract be express or implied, but shall not have jurisdiction of actions *ex delicto*."

61 Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074; Lincoln v. U. S., 197 U. S. 419, 49 L. ed. 816.

62 German Bank of Memphis v. U. S., 148 U. S. 573, 37 L. ed. 564.

63 Bigby v. U. S., 188 U. S. 400, 47 L. ed. 519.

64 German Bank of Memphis v. U. S., 148 U. S. 573, 37 L. ed. 564.

65 Herrera v. U. S., 222 U. S, 558, 55 L. ed. 316.

66 Carpenter v. U. S., 42 Fed. 264.

War.[67] The liability of the United States and officers thereof for the infringement of patents, is subsequently considered.[68]

"The words 'hear and determine' are used four times,—once as applied to the Court of Claims, twice as applied to that court and to the Circuit and District Courts, and again as applied to any court, department, or commission. These words must be taken to be used in each instance in the same sense, and as implying an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act jurisdiction to hear and determine claims 'which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same,' must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of the parties, such as the approval by the Secretary of the Treasury of an account of expenses under the captured and abandoned property acts,[69] or the decisions of an international commission. Moreover, the Court of Claims, even before the passage of the Act of 1887, had jurisdiction of Claims under an act of Congress or under a contract, and could therefore hear and determine claims for legal salaries or fees.[70] We cannot believe that the Act of 1887, entitled 'An act to provide for the bringing of suits against the government of the United States,' the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."[71] Consequently, the rejection of a claim by the First

[67] Neal's Case, 36 Ct. Cl. 49. See U. S. v. Russell, 13 Wall. 623, 20 L. ed. 474.

[68] *Infra*, § 100, and chapter on Court of Claims.

[69] U. S. v. Johnson, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. R. 446.

[70] Meade v. U. S., 9 Wall. 691, 19 L. ed. 687.

[71] Meade v. U. S., 18 Ct. Cl. 281; s. c., 109 U. S. 146; Adams v. U. S., 20 Ct. Cl. 115; U. S. v. McDonald, 128 U. S. 471, 32 L. ed. 596; U. S. v. Jones, 131 U. S. 1, 13.

Comptroller of the Treasury, which is only conclusive within the Department of the Treasury, is not a bar to such a suit.[72]

§ 97. District Court practice in suits against the United States. The practice in such suits in the District Courts is as follows: The plaintiff must file a petition duly verified with the clerk of the respective courts having jurisdiction of the case, and in the district where the plaintiff resides.[1] Such petition should set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and must pray the court for a judgment or decree based upon the facts and the law.[2] The plaintiff must cause a copy of his petition, after filing the same, to be served upon the district attorney of the United States in the district wherein suit is brought, and must mail another copy by registered letter to the Attorney-General of the United States; and must thereupon file with the clerk of the court wherein the suit is instituted, an affidavit of such service and mailing.[3] The United States appears by the district attorney, and is allowed sixty days, or as much more time as the court may in its discretion allow, within which to file a plea, answer, or demurrer; "and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever; of the government in the premises: provided, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises." But the plaintiff cannot have a judgment or decree in his favor unless he establishes the same by proof satisfactory to the court.[4] It is the duty of the court to cause a written opinion to be filed in the cause, "setting forth the specific findings by the

[72] U. S. v. Harmon, 147 U. S. 268; s. c., as Harrison v. U. S. 41 Fed. 560; U. S. v. Rand, C. C. A., 53 Fed. 348; U. S. v. Jones, 131 U. S. 1, 13, 33 L. ed. 90.

§ 97. [1] 24 St. at L. Ch. 359, p. 505, § 5, 2 Fed. St. Ann. 80, Comp. St. 752, Pierce Fed. Code, § 7825.

[2] Mr. Justice Gray, Colt, J., concurring, in Harmon v. U. S., 43 Fed. 560, 564, 565.

[3] 24 St. at L. Ch. 359, p. 505, § 6, 2 Fed. St. Ann. 80, Comp. St. 752, Pierce Fed. Code, § 7826.

[4] Ibid.

court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon.[5] "That opinion is not to be regarded as the usual opinion of the trial judgment, but must be accepted as a part of the record."[6] "The purpose of the opinion is to enable the public and the Appellate Court, to find upon the record a formal statement of the findings of the Circuit Court, both upon questions of law and fact, and the reasons for such findings."[7] It seems that an agreed statement of facts, when filed, will be accepted as a part of the record.[8] Where a trial judge filed two papers, one entitled a decree for the petitioner, and the other the opinion of the court, the two setting out sufficient findings of fact to sustain its conclusions; it was held, that these papers were sufficiently formal to constitute a compliance with the statute.[9] A general refusal to comply with the Government's requests for several findings of fact and rulings of law was held to be as effectual as if the same were denied *seriatim*.[9a] "If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such court."[10] Judgment may be rendered in favor of the United States for the balance due upon a counterclaim.[11] If the United States puts in issue the right of the plaintiff to recover, the court may in its discretion allow costs to the prevailing party, which, however, cannot exceed what is actually incurred for witnesses, "and for summoning the same, and fees paid to the clerk of the court."[12] From the date of final judgment or decree against the government, interest is allowed "to be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment

5 Ibid., § 7, Pierce Fed. Code, § 7827. For findings concerning the services of a marshal, which were held not to be sufficiently specific to enable the appellate court to determine the Government's liability, see U. S. v. Tisdale, 114 Fed. 883.

6 U. S. v. Swift, C. C. A., 139 Fed. 225, 226.

7 Hyams v. U. S., 139 Fed. 997, 999.

8 U. S. v. Swift, C. C. A., 139 Fed. 225, 226.

9 U. S. v. Hyams, C. C. A., 146 Fed. 15.

9a Ibid.

10 U. S. v. Hyams, C. C. A., 146 Fed. 15, 24 St. at L. Ch. 359, § 7, p. 506.

11 U. S. v. Saunders, C. C. A., 79 Fed. 407; McElrath v. U. S., 102 U. S. 426, 26 L. ed. 189.

12 24 St. at L. 508, § 15. See U.

of the judgment or decree."[13] It has been held that no interest can be allowed before judgment, except upon a contract which stipulates for interest.[14] The plaintiff can appeal where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the court below[14a] for fraud in connection with its presentation or proof.[15] Before the creation of the Circuit Courts of Appeal, an appeal or writ of error under this act was heard by and returnable to the Supreme Court,[16] not to the Circuit Court.[17] Since the Evarts Act, unless a question of jurisdiction, a constitutional question, or the construction of a treaty is involved, the Circuit Court of Appeals is the first court of review,[18] except in cases of appeals from the Court of Claims.[19] A judgment in a suit to recover official fees, salary or compensation is ordinarily reviewable by writ of error, not by appeal.[20] A judgment in a suit to recover rent is reviewable by writ of error.[21] Such appeal or writ of error should be taken within ninety days after the judgment is rendered.[22] An appeal or writ of error may be taken, irrespective of the amount involved, by the district attorney, at the direction of the Attorney-General, within six months after the judgment or decree.[23] Otherwise, the practice in all courts in suits brought under this statute is similar to that in other suits,[23] with "such additions and modifications as said courts may adopt."[24]

S. v. Harmon, 147 U. S. 268, 282, 37 L. ed. 164, 169.

13 24 St. at L. 507, § 10.

14 Int. B. & S. Dock Co. v. U. S., 60 Fed. 523, 527; U. S. R. S., § 1091.

14a 24 St. at L. 506, § 9.

15 Jud. Code, § 182, re-enacting U. S. R. S., § 1086; U. S. R. S., § 707; U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94; Strong v. U. S., 40 Fed. 183.

16 U. S. v. Davis, 131 U. S. 36, 33 L. ed 93.

17 Strong v. U. S., 40 Fed. 183.

18 U. S. v. Morgan, C. C. A., 64 Fed. 4.

19 U. S. R. S., § 707.

20 U. S. v. Harsha, 172 U. S. 567, 43 L. ed. 556; U. S. v. Ady, C. C. A., 76 Fed. 359; U. S. v. Tinsley, C. C. A., 75 Fed. 369; U. S. v. Morgan, C. C. A., 64 Fed. 4; U. S. v. Fletcher, C. C. A., 60 Fed. 53.

21 Chase v. U. S., 155 U. S. 489, 39 L. ed. 234.

22 24 St. at L. 506, § 9; U. S. R. S., § 708. But see U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94.

23 24 St. at L., ch. 359, 507, § 10; U. S. v. Davis, 131 U. S. 36, 39, 33 L. ed. 93, 94; U. S. v. Yukers, 60 Fed. 641.

24 24 St. at L., ch. 359, 506, § 4.

§ 98. Suits against the United States for partition. The Judicial Code gives the District Courts jurisdiction "of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate."[1] The Act of May 17, 1898, of part of which this is a reenactment, further provides: "That when such suit is brought by any person owning an undivided interest in land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, or by mailing a copy of the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer or demurrer on the part of the government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property, or any part thereof, the Attorney-General of the United States may, in his discretion, bid for the same in behalf of the United States. And if the United States shall be the purchaser, the amount of the purchase-money shall be paid from the treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney-General."[2]

§ 99. Suits by Indians for allotments of land. The Judicial Code gives the District Courts of the United States juris-

§ 98. [1] 36 St. at L. 1087, § 24. [2] 30 St. at L. 416.
sub'd. twenty-fifth.

diction "of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."[1] The Act of August 15, 1894, of which this is a reenactment, further provides: "And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now held by enther of the Five Civilized Tribes nor to any of the lands within the Quapaw Indian Agency; provided, that the right of appeal shall be allowed to either party as in other cases."[2] This act gives the district courts jurisdiction to decree relief to an Indian, entitled under the law to an allotment of land, when he has been deprived of that right by the rulings of the Land Department.[3] The provision of the act, that the decree of the court, in favor of a claimant, shall have the same effect as an allotment allowed and approved by the Secretary of the Interior is a consent upon the part of the United States to be bound by such decree; and where the suit involves simply a question of priority of right between two claimants, the United States is not a necessary party.[4]

§ 100. Injunctions against officers of the United States. An officer of the United States,[1] even a cabinet officer,[2] may be enjoined from an act in violation of the complainant's rights, which is not discretionary and which is beyond the scope of his authority, such as the revocation of the approval by his predecessor of the maps of a right of way over public lands;[3] or the unlawful removal of imports from his district by a collector, acting under an order of the Secretary of the Treasury;[4] or the withholding of mail by a postmaster, under

§ 99. [1] 36 St. at L. 1087, § 24, subd. twenty-fourth.

[2] 28 St. at L. 286, 305.

[3] Hy-Yu-Tse Mil-Kin v. Smith, C. C. A., 119 Fed. 114.

[4] Ibid.

§ 100. [1] Caldwell v. Robinson, 59 Fed. 653, 660.

[2] Noble v. Union R. L. R. Co., 147 U. S. 165, 171, 37 L. ed. 123, 125. An injunction may be granted when the officer transcends the limits of his authority under a constitutional statute. Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. ed. 570.

[3] Noble v. Union R. L. R. Co., 147 U. S. 165, 37 L. ed. 123.

[4] Bruhl Bros. & Co. v. Wilson, 123 Fed. 457.

an order of the Postmaster General, when the plaintiff's rights are clear.[5] But an injunction to prevent the withholding of mail will rarely be granted, in a case where the Postmaster General has made a decision against the complainant upon a disputed question of fact or a mixed question of fact and law, which is committed by Congress to his judgment;[6] nor when his decision depends upon a doubtful question of law.[7] Where there has been a dispute as to the right to send publications through the mails as second-class matter, preliminary injunctions have been granted in return for a bond, given by the complainant, to pay the excess postage in case the controversy should ultimately be decided against him.[8] In such a case, where payments of postage had been made under protest, it was held that the complainant's right to recover the same was enforceable at common law and that upon a determination that it was not entitled to an injunction the bill should be dismissed without prejudice.[9] The Supreme Court took jurisdiction of a suit by a State, to enjoin the Secretary of the Interior from selling certain land upon the ground that the United States was a party and had given statutory consent to suits against it in

[5] Am. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90; New Orleans Nat. Bank v. Merchant, 18 Fed. 841; Hoover v. McChesney, 81 Fed. 472; Fairfield Floral Co. v. Bradbury, 87 Fed. 415; Davis v. Brown, 103 Fed. 909; Rosenberger v. Harris, 136 Fed. 1001; Donnell Mfg. Co. v. Wyman, 156 Fed. 415; Lewis Pub. Co. v. Wyman, 152 Fed. 787, where the complainant had been denied a full hearing before an order, excluding his publication from second class matter in the mails, was made. But see s. c., 168 Fed. 752; Aff'd. C. C. A., 182 Fed. 13. Lewis Pub. Co. v. Wyman, 168 Fed. 756; Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579. See a note to Timmons v. U. S., 30 C. C. A. 74.

[6] Bates & Gould Co. v. Payne, 194 U. S. 106, 48 L. ed. 894; Central Trust Co. v. Central Trust Co. of Illinois, 216 U. S. 251, 54 L. ed. 469; Enterprise Sav. Ann's v. Zumstein, C. C. A., 67 Fed. 1000; People's United States Bank v. Gilson, 140 Fed. 1; holding that upon the hearing, the person affected may be required to assume the burden of proof and to show affirmatively that his business is legitimate and honest. Appleby v. Cluss, 160 Fed. 984. People's United States Bank v. Gilson, C. C. A., 161 Fed. 286; Putnam v. Morgan, 172 Fed. 450; Branaman v. Harris, 189 Fed. 461.

[7] Smith v. Hitchcock, 226 U. S. 53, 57 L. ed. —.

[8] Lewis Pub. Co. v. Wyman, C. C. A., 182 Fed. 13.

[9] Ibid.

respect to the subject matter;[10] but where no such statutory consent had been given, that court refused to entertain jurisdiction of a similar case.[11] In the absence of the statutory consent of the United States, a suit cannot be brought to enjoin the Secretary of the Interior from executing an act of Congress, authorizing the sale of certain lands, the title to which is still in the government, in which the complainant claims an interest, and for an accounting of the proceeds of the same.[12] The Supreme Court has no jurisdiction of an action brought by a State against the Secretary of the Interior to establish title to lands and to prevent other disposition of the same, where there is a disputed question of law and fact concerning the ownership thereof by the United States.[13] An Indian agent may be enjoined against interfering with rights to lands which he claims belonged to an Indian tribe.[14] In general, no injunction will lie against an officer of a Department interfering with the discharge of his duties in the sale of public lands, so long as the title thereto remains in the United States.[15] An injunction was denied when prayed to prevent an army officer, acting under the orders of the Secretary of War and claiming statutory authority, from constructing in a proper manner a sewer upon Government lands which would injuriously affect other land on the stream into which the sewer emptied.[16] In a proper case, an injunction will lie against a marshal of the United States to prevent the enforcement of a judgment which is void for want of jurisdiction, when such want of jurisdiction does not appear upon the face of the writ;[17] but in such a case, no injunction will be granted against the United States or a

[10] Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954.

[11] Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935.

[12] Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113.

[13] State of Louisiana v. Garfield, 211 U. S. 70.

[14] Caldwell v. Robinson, 59 Fed. 653; Wadsworth v. Boysen, C. C. A., 148 Fed. 71. It has been held that an Indian agent was a proper, although not an indispensable party to a suit to determine rights under leases of Indian lands. Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

[15] Johnson v. Towsley, 13 Wall. 72, 87, 20 L. ed. 485, 458; Marquez v. Frisbie, 101 U. S. 473, 475, 25 L. ed. 800, 801; Humbird v. Avery, 195 U. S. 480, 503, 49 L. ed. 286, 296.

[16] Sheriff v. Turner, 119 Fed. 782.

[17] Kirk v. U. S., 124 Fed. 324; s. c., 131 Fed. 331. But see Buckley v. U. S., 196 Fed. 429, 431.

clerk of one of its courts.[18] Payment of a sum of money by the United States cannot be compelled by a suit against the Comptroller of the Treasury or other public officer.[19] An injunction will not be granted against an officer or agent of the United States forbidding the infringement of a patent right in the use of Government property.[20] The only remedy of the patentee in such a case is a suit in the Court of Claims against the United States to recover reasonable compensation for the use of the patent, in accordance with the Act of June 25, 1910,[21] except when the facts show an express or implied contract between the parties, when a suit will lie upon the same.[22] It has been held that no injunction will lie against an individual or corporation to prevent the infringement of a patent by the use of a chute used in the collection of the mail under the regulations of the Post Office Department and that an action for damages is the only remedy, if any, of the patentee, against the owner of the building where the same is used.[23]

§ 101. Ejectment against officers of the United States. An action of ejectment has been sustained against government officers sued as individuals for land, such as a soldiers' cemetery[1] and a pier[2] held by them for governmental purposes in

18 Buckley v. U. S., 196 Fed. 429.

19 Case v. Terrell, 11 Wall. 199, 20 L. ed. 134; Van Antwerp v. Hulburd, Fed. Cas. No. 16,827 (8 Blatchf. 282).

20 Cammeyer v. Newton, 94 U. S. 225, 235. 24 L. ed. 72, 75; Belknap v. Schild, 161 U. S. 10, 17, 40 L. ed. 599, 601; International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 L. ed. 1134, affirming 114 Fed. 509; *infra*, § 100. Crozier v. Fried, Krupp Aktiengesell-Schaft, 224 U. S. 290, 56 L. ed. 771.

21 36 St. at L. 851; Crozier v. Fried. Krupp Aktiengesell-Schaft, 224 U. S. 290, 56 L. ed. 771. See Chapter on the Court of Claims, *infra*.

22 U. S. v. Palmer, 128 U. S. 262, 32 L. ed. 442; The United States v. Societe Anonyme des Anciens Establissements Cail, 224 U. S. 309, 56 L. ed. 778; § 96, *supra*. But see Schillinger v. U. S., 155 U. S. 163, 39 L. ed. 108; Russell v. U. S., 182 U. S. 516, 45 L. ed. 1210; Harley v. U. S., 198 U. S. 229, 49 L. ed. 1029; Beach v. U. S., 226 U. S. 243, 57 L. ed. —. In the last three cases, it was held that the facts did not justify an inference of such a contract. So as to the use of copyright. Lauman's Case, 27 Ct. Cl. 260.

23 Cutler v. Maryland Hotel Co., 168 Fed. 931.

§ 101. 1 U. S. v. Lee, 106 U. S. 196, 27 L. ed. 171; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137. But see Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960.

2 Scranton v. Wheeler, C. C. A., 57 Fed. 803, 807.

the name of the United States; but the United States are not bound by any adjudication in such a suit.[3]

§ 102. Replevin against officers of the United States. Papers on file in a Government Department cannot be obtained by replevin.[1] Before the Tucker act, it was held that no suit would lie to compel the Treasurer and Comptroller of the United States to deliver to the complainant the surplus of bonds deposited as security for bank notes when the bank notes had been paid.[2] Since the Tucker act, it has been held that a suit thereunder will lie against the United States to recover taxes which a statute had directed the Secretary of the Treasury to refund,[3] but that no injunction should issue to prevent a collector from disposing of duties paid by the complainant, which the Board of General Appraisers and the court have held should be refunded.[4]

§ 103. Liability of a State to a suit by the United States. A State may be sued by the United States in any proper case, without consenting to the jurisdiction.[1] Such consent was given by the State when it was admitted into the Union, upon an equal footing with the other States.[2]

§ 104. Liability of a State to a suit by another State. The Constitution provides that "the judicial Power shall extend . . . to Controversies between two or more States, ... and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[1] The Eleventh Amendment has not taken away the liability of one of the United States to a suit by another such State or a foreign State. Such jurisdiction, however, is confined to controversies concerning rights affecting property; not to those merely affecting political

[3] U. S. v. Lee, 106 U. S. 196, 223, 27 L. ed. 171, 182; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259; s. c., 162 U. S. 255, 272, 40 L. ed. 960, 966; Scranton v. Wheeler, 57 Fed. 803, 807; Tindal v. Wesley, 167 U. S. 204, 223, 42 L. ed. 137, 143.

§ 102. [1] Van Antwerp v. Hulburd, Fed. Cas. No. 16,827 (8 Blatchf. 282). See Case v. Terrel, 11 Wall. 199, 20 L. ed. 134.

[2] Brent v. Hagner, 5 Cranch (C. C.) 71, 6 Opinions of Attorney General, 223.

[3] U. S. v. Shipley, C. C. A., 197 Fed. 265.

[4] Joannidis v. Loeb, 191 Fed. 93.

§ 103. [1] U. S. v. Texas, 143 U. S. 621, 36 L. ed. 285; Kansas v. U. S., 204 U. S. 331, 51 L. ed. 510.

[2] U. S. v. Texas, 143 U. S. 621, 646, 36 L. ed. 285, 293.

§ 104. [1] Art. III., § 2.

rights.[2] It includes controversies concerning boundaries between different States, even though the complainant claim no title other than that of sovereignty and jurisdiction over the lands in question.[3] For, "in this country, where feudal tenures are abolished, in cases of escheat the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."[4] If, however, in a bill which prays relief against a threatened invasion of rights purely political in their nature, a threatened injury to property be stated "only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief;" and "this matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief:" the bill will be dismissed.[5] A suit cannot be maintained when brought by one State against another to enforce the payment by the latter of its bonds originally held by citizens of the former State, and assigned by them to it solely for the purpose of collection.[6] But a State which owns absolutely the bonds of another State, although it has received them as a gift after they have been due, may sue the latter and recover a decree adjudging the amount due and directing the foreclosure and sale of shares of corporate stock owned by the defendant and mortgaged as security for the bonds.[7] A State

[2] Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848.

[3] Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; Missouri v. Iowa, 7 How. 660, 12 L. ed. 861; Florida v. Georgia, 17 How. 478, 15 L. ed. 181; Alabama v. Georgia, 23 How. 505, 16 L. ed. 556; Virginia v. West Virginia, 11 Wall. 39, 20 L. ed. 67.

[4] Georgia v. Stanton, 6 Wall. 50, 73, 18 L. ed. 721, 724.

[5] Georgia v. Stanton, 6 Wall. 50, 77, 18 L. ed. 721, 725.

[6] New Hampshire v. Louisiana, 108 U. S. 76, 27 L. ed. 656.

[7] South Dakota v. North Carolina, 192 U. S. 286, 48 L. ed. 448. Before the day fixed for the sale, the defendant paid the amount of the plaintiff's claim in full, namely, $27,400, with costs. The Committee of the North Carolina bondholders subsequently offered, to the Governor of South Dakota, other bonds of North Carolina, which with principal and interest aggregated $150,000. Governor Elrod wrote, in answer: "Your kind offer is declined, for the reason that it seems to me to be against public policy and good conscience." On January 8th, 1907, he recommended the passage of an act returning the money received from South Carolina, saying: "Mor-

may sue another State, and a municipal corporation of the latter, for an injunction against the excessive and unreasonable discharge of sewage into a river, which poisons the water supply of the inhabitants of the plaintiff and injuriously affects that portion of the bed of a river which lies within the plaintiff's territory.[8] A State may sue another State, to prevent the latter from authorizing the diversion of the waters of a stream flowing through both States, so as to deprive the plaintiff's in-

ally, we have no right to one cent of this money, and we ought to be brave enough and true enough to give it back. This money was clearly intended for our university. She can use it, but it is tainted money. I would send this money back to North Carolina for her university and appropriate a like sum for our splendid university. It will be no burden on our people. It is entirely plain that ingenious schemers are using our State for private ends. . . . It is plain that designing individuals would continue to use the good name of the State of South Dakota to collect questionable securities of other States. . . . It is clear to me that our State ought not to become a collecting agency, neither ought it to forget the doctrine of 'comity between States.' The decision in the case of the State of South Dakota v. the State of North Carolina opens up endless opportunities for States to deal in the bonds and other obligations of sister States. It is not possible to exaggerate the scandals, the corruption of Legislatures and State officials, and the possibilities of graft which would follow if States should start to trade on the power which the decision gives them. No State ought to be endowed with the power to speculate upon unenforceable claims of individuals against other States. Under the Federal Constitution individuals cannot sue States on such bonds, so the holder gives or sells them to us, and we can sue the State that issued the bonds. The decision in the above entitled case hangs entirely on the fact that South Dakota was the *bona fide* owner of the bonds in question. There is no magic in the fact that she got them as a gift. She would be equally the *bona fide* owner if she had bought them." The Sun, January 15th, 1907. Mr. Justice Brewer said: "I can but think her conduct far above that of the State of South Dakota, which willingly took a donation of bonds with the idea of collecting them from a sister State, in disregard of that generous feeling which should control all the States of the Union; and I do not wonder that the Governor of South Dakota, who retired from office last January, in his final message recommended that the Legislature appropriate the full amount of the money received and tender it back to North Carolina!" Report, p. 171, Mohonk Conference, A. D. 1907.

[8] Missouri v. Illinois, 180 U. S. 208, 45 L. ed. 497; s. c., 200 U. S. 496, 50 L. ed. 572; where the bill was dismissed without prejudice after a trial of the issues of fact.

habitants of the water, to which they were entitled;[9] and where the navigability of the stream is not affected, the United States has no right of intervention because of its alleged duty of legislating for the reclamation of arid lands.[10] A State cannot sue another State, to enjoin the enforcement of quarantine regulations, which impose unreasonable restraint upon commerce between ports of the two States.[11] A tribe of Indians domiciled within the borders of the United States does not constitute a foreign State within the meaning of the Constitution.[12]

§ 105. Liability of States to Suits by Private Persons. Under the Constitution of the United States as originally adopted, it was provided that the judicial power of the United States should extend to controversies "between a State and Citizens of another State."[1] This was held to subject a State to liability to an action by a citizen of another State.[2] The decision was opposed to the opinions of Marshall and others, as expressed in the conventions which ratified the Constitution,[3] and was repugnant to the feelings of the people. Consequently, the Eleventh Amendment was adopted. This enacted that "the Judicial Power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." A State cannot, without its consent, be sued by one of its own citizens, even on a cause of action arising under the Constitution

[9] Kansas v. Colorado, 185 U. S. 125, 46 L. ed. 838; where the bill was eventually dismissed, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river. Kansas v. Colorado, 206 U. S. 46, 117, 118, 51 L. ed. 956, 983.

[10] Kansas v. Colorado, 206 U. S. 46, 86, 51 L. ed. 956, 970.

[11] Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347. *Supra*, § 3.

[12] Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25.

§ 105. [1] Art. III., § 2.

[2] Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440.

[3] See Elliott's Debates. In Hans v. Louisiana, 134 U. S. 1, Bradley,

and laws of the United States.[4] It has been suggested, but not decided, that, in a case arising under the Fourteenth Amendment, the inhibition of the Eleventh Amendment may not apply.[5] It has been said: "The Constitution, with its amendments, is construed as one instrument, and the Eleventh Amendment cannot be applied to nullify the power conferred on Congress to regulate commerce among the several States. It is not a barrier to judicial investigation to ascertain whether other provisions of the Constitution have been disregarded by State action."[6] A corporation chartered by Congress cannot sue a State.[7] An action at law or a suit in equity or in admiralty, against a municipal corporation,[8] or against a county,[9] or any other political subdivision of a State,[10] is not a suit against a State and a State statute cannot divest a Federal court of jurisdiction over such a suit.[11] Where a State statute authorizes suits against the State only in a State court, the District Courts of the United States have no jurisdiction.[12] An action against a corporation, such as a railroad company, all the stock of which is owned by a State, is not an action against a State.[13] A State agricultural college may be sued for a tort.[14] It has been held at circuit, that a crossbill

J., speaking for the court, said that Chisholm v. Georgia was erroneously decided.

[4] Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842; North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849.

[5] Perkins v. Northern Pac. Ry. Co., 155 Fed. 445, 447; Ex parte Young, 209 U. S. 123, 150, 52 L. ed. 714, 725, 13 L.R.A.(N.S.) 932, 14 Ann. Cas. 764.

[6] Illinois Cent. R. Co. v. Mississippi Railroad Commission, C. C. A., 138 Fed. 327, 331; per Shelby, J. See also Southern Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. 82.

[7] Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140.

[8] Camden Interstate Ry. Co. v. Catlettsburg, 129 Fed. 421; U. S. v. Port of Portland, 147 Fed. 865.

[9] Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766.

[10] Hopkins v. Clemson Agricultural College of South Carolina, 221 U. S. 636, 55 L. ed. 890.

[11] Lincoln County v. Luning, 133 U. S. 529, 33 L. ed. 766.

[12] Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140; Smith v. Rackliffe, C. C. A., 87 Fed. 964.

[13] Southern Ry. Co. v. North Carolina R. Co., 81 Fed. 595, 599, 600; Simonton, J.: "When the State entered into this enterprise with private persons, she did not carry into it her functions of sovereignty; but stripped herself of them."

[14] Hopkins v. Clemson Agricultural College of South Carolina, 221 U. S. 636, 55 L. ed. 890. But a State court has held that an action

may be filed against a State, which has brought an original bill;[15] but it seems that no affirmative judgment can be rendered against the State in such case.[16] It has been held at circuit: that after the removal of a suit brought by a State, an injunction may be granted to stay further proceedings in the State court therein.[17] A State may waive its exemption from suit.[18] An appearance by the State attorney general, "for and on behalf of the State," under statutory authority was held to be a waiver, by the State, of its immunity from suit.[19] When the statute creating a State board makes it a body corporate, with power to sue and be sued without limitations, the State waives its immunity so far as such board is concerned.[20] A statute providing that a State officer should be made a party defendant to all actions to set aside tax sales of land held as State tax land, was held not to be a waiver, by the State, of its constitutional immunity from suit in a State court.[21] It has been held that the defense that the defendant is a State, which cannot be sued without its consent, may be raised for the first time upon an appeal.[22]

Where, in the regular course of judicial administration, property of the State, or in which the State has an interest, has come under the control of the court, without being forcibly taken from the possession of the government; the court will proceed to discharge its duty in regard to the same; and the State, if it choose to come in as plaintiff, as in prize cases, or to inter-

against a State industrial school in Alabama is an action against the State." Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

15 Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. 552. See the Siren, 7 Wall. 152, 154, 19 L. ed. 129, 130. *Supra*, § 95.

16 Reeside v. Walker, 11 How. (U. S.), 272, 13 L. ed. 693; New York v. Dennison, 84 N. Y. 272.

17 Abeel v. Culberson, 56 Fed. 329. See *infra*, §§ 268, 284, 361.

18 Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, 50 L. ed. 477; Interstate Const. Co. v. Regents of the University of Idaho, 199 Fed. 509.

19 Gunter v. Atlantic Coast Line R. R. Co., 200 U. S. 273, 50 L. ed. 477. See Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 114, 46 L. ed. 92, 110.

20 Interstate Const. Co. v. Regents of the University of Idaho, 199 Fed. 509.

21 Smith v. Reeves, 178 U. S. 436, 46 L. ed. 1140; Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129.

22 Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

vene in other cases where it has a lien or other claim upon the property, will be permitted so to do, subject, however, to the State's rights and will receive the same consideration as those of any other party interested in the matter, and will so far as its rights in such property are concerned be subjected in like manner to the judgment of the court.[23]

Cases have often arisen where, although a State was not a party to the record, it had rights which it claimed would be affected by the determination of the suit before the court. To determine accurately the jurisdiction of the Federal court in such cases has been a very difficult and delicate matter; and the questions which thus continually arise are hard to answer. The fact that a State is not named as a party to the record does not of itself remove a case from the terms of the Eleventh Amendment.[24] Whether a State is an actual party in the sense of the prohibition must be determined by a consideration of the nature of the case as presented by the whole record.[25]

An action at common law against a public officer who is sued as an individual and justifies under the authority of the State, is usually held to be an action against the State.[26] To make out his defense, he must show that his authority was sufficient in law to protect him.[27] It has been so held of an action of ejectment against a State officer, who held land in the name and for the uses of the State;[28] even when the defendant was sued as comptroller of the State;[29] and that after a judgment in ejectment against him, another State officer can-

[23] Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 452, 27 L. ed. 992, 994; citing The Siren, 7 Wall. 152, 157, 19 L. ed. 129; The Davis, 10 Wall. 15, 20, 19 L. ed. 875, 877.

[24] Elliott v. Wiltz, 107 U. S. 711, 27 L. ed. 448; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 27 L. ed. 992; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805; In re Ayers, 123 U. S. 443, 31 L. ed. 216; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535.

[25] Poindexter v. Greenhow, 114 U. S. 270, 287, 29 L. ed. 185, 191; In re Ayers, 123 U. S. 443, 492, 29 L. ed. 185, 191; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535.

[26] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 452, 27 L. ed. 992, 994.

[27] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 452, 27 L. ed. 992, 994.

[28] Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137.

[29] Saranac. L. & T. Co. v. Roberts, 68 Fed. 521.

not intervene and have the judgment opened upon an answer containing the same defense.[30] An action of detinue may be maintained against a State officer, to recover the possession of personal property, which he has seized under State authority.[31] A State officer may be sued in trespass for the seizure of personal property in obedience to an unconstitutional statute of the State;[32] but an action against a State treasurer, to recover taxes illegally exacted,[33] and an action against a County Dispensary Board to recover the price of supplies,[34] are suits against the State, and cannot be maintained. And, it has been held, that a State officer cannot be sued for damages under the Federal anti-trust law[35] for aiding the State in monopolizing interstate commerce.[36] When a State officer has a well defined duty in regard to a specific matter, which is not discretionary, and which does not affect the general powers or functions of the government; but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process, a writ of mandamus will usually issue against him; and it is ordinarily held, that an application for such a writ is not a suit against the State:[37] but an application for a writ of mandamus, to compel a State officer to pay money out of the treasury of a State, is a suit against the State and cannot be maintained.[38]

"Courts of equity proceed upon different principles in regard to parties."[39] A suit in equity cannot be maintained, in a

30 Vance v. Wesley, 85 Fed. 157.

31 Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185.

32 Virginia Coupon Cases, 114 U. S. 269, 29 L. ed. 185; McGahey v. Virginia, 135 U. S. 662, 684, 34 L. ed. 304, 312; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632.

33 Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140.

34 Carolina Glass Co. v. Murray, 197 Fed. 392, where the statute (25 St. at L., South Carolina, p. 463) provided for a purchase in the name of the State and "that the State should not be liable on any contract for the purchase thereof beyond the actual assets of the dispensary for which the purchase was made."

35 26 St. at L. 209.

36 Lowenstein v. Evans, 69 Fed. 908.

37 Board of Liquidation of McComb, 92 U. S. 531, 23 L. ed. 623; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 453, 27 L. ed. 992, 994. See Rolston v. Missouri Fund Commissions, 120 U. S. 390, 411, 30 L. ed. 721, 728.

38 Elliott v. Wiltz, 107 U. S. 711, 27 L. ed. 448.

39 Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 456, 27 L. ed. 992, 995.

case where the State would be an indispensable party if it were an individual similarly affected.[40] Consequently, a suit cannot be maintained against the officers of a State, to compel specific performance by them of its contract for the sale of land;[41] nor for the reformation of such a contract;[42] nor to compel its officers to pay out of the money in its treasury, taxes which have been assessed for the purpose of paying interest upon the plaintiff's bonds,[43] or to pay out of such treasury any money in discharge of its debts;[44] nor to establish a claim to property held by its officers claiming a title in the State thereto; although the relief prayed is a declaration that a sale,[45] or a deed in pursuance of a sale,[46] is void; nor to compel a railroad company to pay to the complainant dividends declared upon shares of the corporate stock standing in the name of a State; nor for a receiver of such stock; nor for its sale;[47] nor to compel State officers to redeem certain certificates of State indebtedness and accept the same in payment for taxes;[48] nor, it has been held, to compel a State officer to execute a trust vested by

[40] Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448; Walsh v. Preston, 109 U. S. 297, 27 L. ed 940; Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 456, 27 L. ed. 992; Hagood v. Southern, 117 U. S. 52, 29 L. ed. 805; Rolston v. Missouri Fund Com'rs, 120 U. S. 390, 30 L. ed. 721; Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 33 L. ed. 589; Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129; Preston v. Walsh, 10 Fed. 315; Brown University v. Rhode Island College, 56 Fed. 55; Morrill v. American Reserve Bond Co., 151 Fed. 305; Sanders v. Saxton, 182 N. Y. 477. But see Swasey v. N. C. R. Co., 1 Hughes, 17.

[41] Preston v. Walsh, 10 Fed. 315. See Walsh v. Preston, 109 U. S. 297, 27 L. ed. 940; Jobe v. Urquhart. 98 Ark. 525, 136 S. W. 663.

[42] Jobe v. Urquhart. 98 Ark. 525, 136 S. W. 663.

[43] Louisiana v. Jumal, 107 U. S. 711, 27 L. ed. 448. It has been held, however, that a State treasurer may be compelled to deliver to receivers of a corporation, securities deposited with him, to secure performance of the contracts of such company. Morrill v. American Reserve Bond Co., 151 Fed. 305.

[44] Ibid.

[45] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 27 L. ed. 992; (a foreclosure sale to the governor); Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129; (a tax sale where the auditor general was made defendant in pursuance of a State statute).

[46] Sanders v. Saxton, 182 N. Y. 477, 1 L.R.A.(N.S.) 727, 108 Am. St. Rep. 826.

[47] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 33 L. ed. 589. But see Swasey v. N. C. R. Co., 1 Hughes, 17.

[48] Hagood v. Southern, 117 U. S.

the statute in the State or in such officer, designated by his official title; [49] nor to abate a nuisance upon property belonging to the State,[50] nor to restrain the infringement in a county court house of a patent.[51] But a State is not an indispensable party to a suit against a private individual to cancel a contract between him and that State, by which the State acquired lands of the United States through mistake or fraud.[52] It seems, that a State is not an indispensable party to a stockholder's suit, to enjoin a corporation from obeying an unconstitutional State law.[53] A suit cannot be maintained against State officers for an injunction, which will indirectly compel the specific performance of a contract by a State through the prohibition of all acts which constitute breaches of the contract.[54] It has been held, however, that the State governor and the commissioner of its land office may be enjoined from the sale and delivery of patents for land, which the State has previously granted to the complainant.[55] A State board

52, 29 L. ed. 805. But see Rolston v. Chittenden, 120 U. S. 390, 30 L. ed. 721.

[49] Brown University v. Rhode Island College, 56 Fed. 55. *Contra*, Morrill v. American Reserve Bond Co., 151 Fed. 305, (a suit to compel the State treasurer to deliver to receivers security deposited to insure policy-holders against loss).

[50] Hopkins v. Clemson Agricultural College of South Carolina, 221 U. S. 636, 55 L. ed. 890.

[51] McCreery Engineering Co. v. Massachusetts Fan Co., 180 Fed. 115.

[52] Williams v. U. S., 138 U. S. 514, 516, 34 L. ed. 1026, 1028.

[53] Cotting v. Kansas City Stock Yards Co., 183 U. S. 79. 114, 46 L. ed. 92, 110; Poor v. Iowa Cent. Ry. Co., 155 Fed. 226.

[54] In Re Ayers, 123 U. S. 443, 502, 31 L. ed. 216, 228; Parsons v. Slaughter, 63 Fed. 876; Smith v. Alexander, 146 Fed. 106. An injunction was granted against the State governor and attorney general, to prevent their aiding in the violation of a contract by a railroad company, in which the State owned all the capital stock. Southern Ry. Co. v. North Carolina R. Co., 81 Fed. 595. A specific act, in violation of a contract, may be enjoined. Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363; University of the South v. Jetton, 155 Fed. 182.

[55] Davis v. Gray, 16 Wall. 203, 21 L. ed. 447. "It is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further." Miller, J., in Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 453, 27 L. ed. 992, 995. The original case was followed, however, in Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363; s. c., 43 Fed. 196, 339.

has been enjoined from exchanging new State bonds for a class of bonds previously issued, as to which the statute did not authorize such an exchange.[56] An injunction was granted against a State treasurer forbidding him from paying, to anyone but the plaintiff the income of a fund, to which the plaintiff had a contractual right.[57] To prevent irreparable injury, an injunction may be granted against a State officer, to prevent him from making a trespass by seizure of personal property in obedience to an unconstitutional State statute;[58] even when acting under the orders of the State court in a case of which the Federal court had prior jurisdiction;[59] from infringement of the copyright of an edition of the State statutes under express legislative authority;[60] from revoking a license to transact business in the State, which has been issued to a foreign corporation,[61] or from annulling the franchise of a corporation, in pursuance of an unconstitutional State statute;[62] but not, it has been held, from refusing to reissue an annual license to a foreign corporation, unless it complies with the terms of a statute which it claims is unconstitutional;[63] from levying an illegal tax;[64] or making an illegal assessment for taxation.[65] But where the defendant had no authority to compel the payment of the tax and had, previous to the suit, performed the last act within his official functions in connection with such collection; it was held, that the suit was one against the State and could not be maintained.[66] It has been held: that a Federal court of equity has no jurisdiction to enjoin State officers, acting under a State statute, from issuing a certificate of nomin-

56 Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623.

57 President, etc., of Yale College v. Sanger, 62 Fed. 177. See Chaffraix v. Board of Liquidation, 11 Fed. 638.

58 Scott v. Donald, 165 U. S. 107, 41 L. ed. 648.

59 In Re Tyler, 149 U. S. 164, 37 L. ed. 689.

60 Howell v. Miller, C. C. A., 91 Fed. 129. But see *supra*, § 100.

61 Met. Life Ins. Co. v. McNall, 81 Fed. 888; Chicago, R. I. & P. Ry. Co. v. Ludwig, 156 Fed. 152; Chicago, R. I. & P. Ry. Co. v. Swanger, 157 Fed. 783.

62 Chicago, R. I. & P. Ry. Co. v. Ludwig, 156 Fed. 152.

63 Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711, 716.

64 Osborne v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204.

65 Union Pac. Ry. Co. v. Alexander, 113 Fed. 347.

66 Coulter v. Weir, C. C. A., 127 Fed. 897.

ation to a candidate for Representative in Congress, or to require a State officer to certify the nomination of a certain candidate for such office.[67] A suit may be maintained to enjoin the State Attorney,[68] or any prosecuting officer,[69] or other State officer, except possibly the State governor, or State judges, or to enjoin a State board,[70] from bringing suits, whether civil or criminal, in its courts, in pursuance of a State statute, which is unconstitutional; or from enforcing the order of a State board in pursuance of such a statute;[71] or to enjoin a State railroad commission from suing to recover penalties for the violation of an order made by it, which was void as a regulation of interstate commerce.[72] It has been held that a Federal

67 Anthony v. Burrow, 129 Fed. 783.

68 Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. ed. 92; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584; Ex parte Young, 209 U. S. 123, 52 L. ed. 714; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747; Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 38 L. ed. 1014; St. Louis & S. F. R. Co. v. Hadley, 161 Fed. 419; Western Union Tel. Co. v. Julian, 169 Fed. 166. The late decisions have overruled a number of cases to the contrary. It was held in 1899: that such a suit could not be maintained in a case where the defendants were not specially charged with the execution of an unconstitutional statute, and were not, under the authority of the same, committing or about to commit some specific wrong or trespass, to the injury of the plaintiff's rights. Fitts v. McGhee, 172 U. S. 516, 529, 43 L. ed. 535, 541; Ball v. Rutland R. Co., 93 Fed. 513.

69 Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970; St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710.

70 Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; University of the South v. Jetton, 155 Fed. 182, approved as to this, reversed upon another point, 208 U. S. 489, 52 L. ed. 584. Scully v. Bird, 209 U. S. 481, 52 L. ed. 899. Western Union Tel. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430; Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970; St. Louis & S. F. R. Co. v. Hadley, 161 Fed. 419; Central of Georgia Ry. Co. v. Railroad Commission of Alabama, 161 Fed. 925; Kansas Natural Gas Co. v. Haskell, 172 Fed. 545; St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710; Louisville & N. R. Co. v. Railroad Commission of Alabama, 191 Fed. 757. An individual may be enjoined from suing, to recover a penalty or damages under a State statute, which is unconstitutional. McNeil v. Southern Ry. Co., 202 U. S. 543, 50 L. ed. 1142.

71 Smyth v. Ames, 169 U. S. 466, 42 L. ed 819; Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970.

72 McNeill v. Southern Ry. Co., 202 U. S. 543, 50 L. ed. 1142; affirming Southern Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. 82; Cen-

court cannot enjoin either criminal or civil proceedings pending in the State court when the bill is filed.[73] The earlier decisions hold: that a suit cannot be maintained to enjoin a State attorney general, or other prosecuting officer, from bringing suits to enforce a State statute, the constitutionality of which is conceded by the plaintiff.[74] In two State courts, it has been held: that a taxpayer's bill can be brought to prevent the payment of money from the State treasury, under an unconstitutional law.[75] It seems: that affirmative relief will not be granted to compel a State officer to perform an act forbidden by a State statute; even if such statute is unconstitutional.[76]

The Judicial Code provides: "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute or in the enforcement or execution of an order made by an administrative board on commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any District court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice

tral of Georgia Ry. Co. v. Railroad Commission of Alabama, 161 Fed. 925; Louisville & N. R. Co. v. Railroad Commission of Alabama, 191 Fed. 757.

[73] St. Louis & S. F. R. Co. v. Allen, 181 Fed. 710, citing U. S. R. S., § 720, Comp. St. 1901, p. 581. See *infra*, §§ 270, 271. Scully v. Bird, 209 U. S. 481, 52 L. ed. 899.

[74] Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399; Arbuckle v. Blackburn, C. C. A., 113 Fed. 616; Morenci Copper Co. v. Freer, 127 Fed. 199. Where State officers, under a statute which was constitutional, denied the complainant the equal protection of the laws by an arbitrary discrimination against it, upon its application for a racing license the court held, that it had jurisdiction to grant an injunction. Douglas Park Jockey Club v. Grainger, 146 Fed. 414.

[75] Lynn v. Polk, 76 Tenn. 121, 123, 125; Butler v. Ellerbe, 44 S. C. 256, 276, 283.

[76] Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 453, 454, 27 L. ed. 992, 994, 995; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363.

of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however*, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."[77] *It is further provided,* That if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State to enforce such statute or order, accomplished by a stay in such State court, of proceedings under such statute or order pending the determination

[77] § 266, 36 St. at L. 1087. As amd. by Act of March 4, 1913, P. L. No. 445. This amendment was necessary because of decisions of the Circuit Courts which held that a city ordinance, Sperry & Hutchinson Co. v. City of Tacoma, 190 Fed. 682, or the order of a State Railroad Commission, Chicago B. & Q. R. Co. v. Oglesby, 198 Fed. 153, was not a State statute within the meaning of this law, although the Federal court took jurisdiction to set it aside upon the ground that it was a law of the State.

of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the attorney general of the State that the suit in the State courts is not being prosecuted with diligence and good faith." It has been held that the statute forbids a single judge from denying a motion for such an injunction, and even from vacating such a restraining order previously issued by himself,[78] and that the Supreme Court may issue a mandamus to set aside such second order when made by him.[79] It has been held that mandamus will not issue to compel a court of first instance to dismiss a case, in which it is claimed that a State is a party, when such court has held that the State is not an indispensable party to the suit,[80] and that where the Supreme Court takes cognizance of a case dismissed as against a State for want of jurisdiction, it cannot determine whether the bill should have been dismissed because not presenting a case for equitable relief.[81] The Supreme Court of the United States has held that no such injunction should be granted against the enforcement of an order of the State court until such appeals therefrom as are authorized by the State statute have been exhausted.[82] It has been held that where a supersedeas upon such an appeal is denied, the injunction may be granted,[83] and where the court was of the opinion that the statutory power of review was unauthorized by the State constitution, such an injunction was sustained.[84]

§ 106. Suits against infants. An infant when sued should be provided by the court with a guardian *ad litem*.[1] For an omission to appoint a guardian *ad litem*, a decree against an

[78] *Ex parte* Metropolitan Water Co., 220 U. S. 539, 55 L. ed. 575.

[79] Ibid.

[80] *Ex parte* Nebraska, 209 U. S. 436, 52 L. ed. 876.

[81] Scully v. Bird, 209 U. S. 481, 52 L. ed. 899.

[82] Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

[83] Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; affirming Atchison, T. & S. F. Ry. Co. v. Love, 174 Fed. 59.

[84] Kankakee v. Am. Water Supply Co., C. C. A., 199 Fed. 757.

§ 106. [1] Rule 70; Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 8 L. ed. 890, 897. See Woolridge v. McKenna, 8 Fed. 650, 670.

infant will be reversed upon appeal.[2] An application for the appointment of a guardian *ad litem* for an infant should be made by petition, which, if the appointment of a particular person is desired, should state his name and his consent to act as such.[3] The court will usually appoint the infant's general guardian or "the nearest relative not concerned, in point of interest, in the matter in question;"[4] but the choice of the guardian rests in the sound discretion of the court, and only in an extraordinary case would a decree be reversed for an error in this respect.[5] The interests of an infant are guarded jealously by the court, which will not hold him bound by any admission made by him or in his behalf, whether in the pleadings[6] or otherwise;[7] but a decree by consent as the result of a compromise approved by the court may be made without a reference to a master,[8] although the safer practice is to have it referred. The guardian *ad litem* is responsible for the propriety of the defense.[9] He must pay costs for scandal;[10] and he may be removed by the court at any time.[11] This may be done if he is unable or unwilling to pay the expenses of the defense.[12] If no person of substance is willing to serve for the infants, the court "might suspend further proceedings until it could send a next friend or guardian *ad litem* to the State courts having jurisdiction of their person and property, to secure such guardian-

[2] O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840.

[3] Rhinelander v. Sanford, 3 Day (U. S. C. C. D. Conn.), 279.

[4] Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 8 L. ed. 890, 897; Story's Eq. Pl., § 70; Calvert on Parties, Book III., ch. xxxi.

[5] Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 8 L. ed. 890, 897. See Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047.

[6] Bank of U. S. v. Ritchie, 8 Pet. 128, 144, 145, 8 L. ed. 890, 897; Walton v. Coulson, 1 McLean, 125; s. c., Coulson v. Walton, 9 Pet. 62, 84, 9 L. ed 51, 60; Hawkins v. Luscombe, 2 Swanst. 375, 390; Savage v. Carroll, 1 Ball. & B. 553.

[7] Legard v. Sheffield, 2 Atk. 377; White v. Miller, 158 U. S. 128, 39 L. ed. 921. See also Kingsbury v. Buckner, 134 U. S. 650, 33 L. ed. 1047; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028.

[8] Thompson v. Maxwell L. G. & Ry. Co., 168 U. S. 451, 42 L. ed. 539.

[9] Knickerbacker v. De Freest, 2 Paige (N. Y.), 304.

[10] Daniell's Ch. Pr. (2d Am. ed.) 204.

[11] Russell v. Sharpe, 1 Jac. & W. 482.

[12] Ferguson v. Dent, 15 Fed. 771, 772.

ship as would protect them."[13] Infants may defend *in forma pauperis;* but, except under extraordinary circumstances, their expenses will not be advanced out of a fund in the hands of a receiver.[14] A guardian *ad litem* may recoup his expenses from the infant's property.[15] According to the English practice, an appearance could be entered for an infant before a guardian *ad litem* had been appointed.[16] It is the safer practice in this country to serve the infant with a subpœna before the appointment of a guardian *ad litem;*[17] but where a guardian *ad litem* has been appointed, it will be presumed, in the absence of evidence to the contrary, that the infant was duly served.[18] A decree against an infant is void unless he has been personally served with process, although a general guardian has appeared for him.[19] except in cases mentioned in section 738 of the Revised Statutes.[20]

§ 107. Suits against idiots, lunatics, and persons of weak mind. Idiots and lunatics defend by guardians *ad litem,* appointed for them by the court.[1] A committee will usually be appointted guardian *ad litem* of the person in his charge,[2] unless his interest be opposed to that of the idiot or lunatic,[3] or perhaps if he refuse to answer or defend.[4] The guardian *ad litem* is usually joined with the idiot or lunatic as co-defendant.[5] It was held by Chancellor Kent, that in New York the committee appointed in accordance with statute, and not the idiot or lunatic, is the proper party to the bill;[6] but the rule in the Federal courts seems to be otherwise.[7] "A person re-

13 Ferguson v. Dent, 15 Fed. 771, 772.

14 Ferguson v. Dent, 15 Fed. 771.

15 Ferguson v. Dent, 15 Fed. 771, 772.

16 Braithwaite's Pr. 322.

17 Smith v. Reid. 134 N. Y. 568; Settlemier v. Sullivan, 97 U. S. 444, 24 L. ed. 1110; *infra.* § 163.

18 Sloane v. Martin, 77 Hun (N. Y.), 249; *infra.* § 163.

19 N. Y. Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580.

20 *Infra,* § 166.

§ 107. 1 Rule 70; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

2 2 Story's Eq. Pl., § 70; Westcomb v. Westcomb, 1 Dick, 233; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

3 Snell v. Hyat, 1 Dick. 287; Story's Eq. Pl., § 70.

4 Lloyd v. ———, 2 Dick. 460.

5 Harrison v. Rowan, 4 Wash. C. C. 202.

6 Brasher's Ex'rs. v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

7 Harrison v. Rowan, 4 Wash. C. C. 202, 207.

duced by age or infirmity to a second infancy may defend by guardian."[8] It is said that the answer of a superannuated person, put in by guardian, may be read against him as an answer of one of full age put in in person; and that the difference in this respect between such answer and that of an infant put in by guardian is, because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day.[9]

§ 108. Suits against married women. In suits against a married woman by a third person, her husband, if not civilly dead or permanently absent from the State, should be joined with her as a co-defendant;[1] except in States where she has the same rights and liabilities as a spinster,[2] or when she is sued in a representative capacity.[3] She may, however, answer separately from her husband.[4] A bill filed in the name of a married woman suing alone, may be amended by the addition of a next friend, when necessary.[5]

§ 109. Foreign executors and administrators as defendants. Foreign executors and administrators are not subject to suit,[1] unless they have assets within the jurisdiction where the suit was filed.[2] In that case, they are liable, as trustees, to account for the same, to those entitled thereto.[3] But a Federal court has no power to require an executor or administrator to deliver a fund to an administrator appointed in another State.[4]

[8] Markle v. Markle, 4 J. Ch. 168.

[9] Daniell's Ch. Pr. (2d Am. ed.) 224, 225; citing Leving v. Caverly, Prec. Ch. 229.

§ 108. [1] Story's Eq. Pl., § 71; Calvert on Parties, Book III., ch. xxx; Hulme v. Tenant, 1 Brown, Ch. C. 16; Taylor v. Holmes, 14 Fed. 498, 514.

[2] Lorillard v. Standard Oil Co., 2 Fed. 902. But see Taylor v. Holmes, 14 Fed. 499, 514; Douglas v. Butler, 6 Fed. 228; U. S. v. Pratt Coal & Coke Co., 18 Fed. 708; O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840.

[3] Moore v. Meynell, 2 Vern. 614, note.

[4] Duke of Chandos v. Talbot, 2 P. Wms. 372.

[5] Douglas v. Butler, 6 Fed. 228.

§ 109. [1] Vaughn v. Northrup, 15 Pet. 1, 10 L. ed. 639; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398; s. c., 135 Fed. 818; Lewis v. Parrish, C. C. A., 115 Fed. 285; Skiff v. White, 127 Fed. 175; Lawrence v. Southern Pac. Co. 177 Fed. 547; Story's Eq. Pl., § 179.

[2] Sandilands v. Innes, 3 Sim. 363, McNamara v. Dwyer, 7 Paige (N. Y.), 239, 32 Am. Dec. 627; Campbell v. Tousey, 7 Cow. (N. Y.) 64.

[3] Lewis v. Parish, C. C. A., 115 Fed. 285. See Columbia Law Rev., June 1911, quoted in N. Y. L. J. June 8, 1911.

[4] Watkins v. Eaton, C. C. A., 183 Fed. 384.

CHAPTER IV.

PARTIES.

§ 110. General rule as to parties. In ordinary cases, all persons should be made parties to a suit in equity, who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree.[1] If interested in obtaining the relief prayed for, they should join as plaintiffs; unless some refuse to appear in that capacity, when the rest should make them defendants.[2] This rule has been also stated by the expressions: that "all persons interested in the subject of the suit should be before the court;"[3] and that "all persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties."[4]

"In determining who are proper parties to a suit, courts of equity are guided by two leading principles. One of them is a principle admitted in all courts of justice in this country, upon questions affecting liberty, or life, or property; namely, that no proceedings shall take place with respect to the rights of any one, except in his presence. Thus a decree of a court of equity binds no one who is not to be regarded, according to the rule of the court, either as a party, or else as one who claims under a party, to the suit. The second is a principle which in this country is peculiar to courts of equity; namely, that when a decision is made, it shall provide for all the rights which different persons have in the matters decided. For a court of equity

§ 110. [1] Calvert on Parties, Book I, ch. i, and cases there cited.

[2] Harding v. Handy, 11 Wheat. 103, 6 L. ed. 429; Wisner v. Barnet, 4 Wash. C. C. 631, 642; Fallows v. Williamson, 11 Ves. 313; Calvert on Parties, Book I, ch. viii. But see Hicklin v. Marco, 56 Fed. 549. For the rule in patent cases, see *infra*, § 44.

[3] Sir William Grant in Wilkins v. Fry, 1 Mer. 244, 262.

[4] Calvert on Parties (2d ed.), p. 13, and cases there cited. Iron Cliffs Co. v. Negaunee Iron Co., 197 U. S. 463, 49 L. ed. 836; Clagett v. Duluth Tp., 143 Fed. 824; holding that an injunction restraining a municipal corporation from buying bonds is no defense to an action

in all cases delights to do complete justice, and not by halves;[5] to put an end to litigation, and to give decrees of such a nature that the performance of them may be perfectly safe to all who obey them: *interest reipublicæ ut sit finis litium.* In this respect there is manifest distinction between the practice of a court of law and that of a court of equity. A court of law decides some one individual question which is brought before it; a court of equity not merely makes a decision to that extent, but also arranges all the rights which the decision immediately affects."[6] Thus, when a person who is charged with the payment of a sum of money is surety to another, the principal must be joined as defendant to the bill; as in the case of a suit against an heir for the performance of a covenant by his ancestor which binds him as well as the ancestor's personal estate, when the personal representative must also be joined. For "the court of equity in all cases delights to do complete justice, and not by halves: as, first to decree the heir to perform this covenant, and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets, which, for aught appears to the contrary, may be more than sufficient to answer the covenant; and when the executor and heir are both brought before the court, complete justice may be done by decreeing the executor to perform this covenant as far as the personal assets will extend, the rest to be made good by the heir out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the court. On the contrary, it would prevent a multiplicity of suits, which a court of equity ought to do."[7] The equity rules now provide: "All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants,

against it by a bondholder, who was not a party to that suit.

[5] Knight v. Knight, 3 P. Wms. 333.

[6] Calvert on Parties (2d. ed)., pp. 2. 3.

[7] Lord Chancellor Talbot in Knight v. Knight, 3 P. Wms. 331, 334.

but when any one refuses to join, he may for such reason be made a defendant."[8]

§ 111. Parties with no interest in the subject-matter of the suit. As a general rule, no person can be made a party against whom, if brought to a hearing, the plaintiff can have no decree.[1] The clerk of a court is not a proper party to a suit to enjoin the enforcement of a judgment entered in his office.[2] The English practice allowed strangers in certain cases to be made parties for the sake of discovery, and even in order to mulct them with costs. In a suit against a corporation, its officers, book-keeper, or members might be made parties for the sake of discovery concerning matters which had come to their knowledge while transacting the business of the corporation;[3] but not, it seems, to obtain discovery of such as they knew only through their participation in its formation.[4] It is held in the Federal courts that when an answer under oath is waived, it is improper to make the officers of a corporation parties to a suit against it, if no relief is asked against them; and a demurrer by them to such a bill making them parties defendant was sustained.[5] Officers of corporations, who have taken no part in an unlawful contract that it has made, are not proper parties to a suit for an injunction against its enforcement.[6] It has been held that officers of a corporation, who have committed no acts of infringement except in their official capacity, cannot properly be made defendants to a suit to enjoin the in-

[8] Eq. Rule 37.

§ 111. [1] Wych v. Meal, 3 P. Wms. 310, 311, note; Dan. Ch. Pr. (2d Am. ed. 342.)

[2] Buckley v. U. S., 196 Fed. 429.

[3] Wych v. Meal, 3 P. Wms. 310; Anon., 1 Vern. 117; Fenton v. Hughes, 7 Ves. 289; Glyn v. Soares, 1 Y. & C. 644; Many v. Beekman Iron Co., 9 Paige [N. Y.] 189; Doyle v. San Diego L. & Tr. Co., 43 Fed. 349; Virginia & A. Min. & Mfg. Co. v. Hale, 93 Ala. 542, 9 So. 256; Continental Nat. Bank v. Heilman, 66 Fed. 184; Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. Ry. Co., 69 Fed. 412; Calvert on Parties (2d ed.), 92–94. But see Boston W. H. Co. v. Star R. Co., 40 Fed. 167; Cleveland F. & B. Co. v. U. S. Rolling S. Co., 41 Fed. 476.

[4] McComb v. Chicago, St. L. & N. O. R. Co., 7 Fed. 426.

[5] Colonial & U. S. Mtg. Co., Ld., v. Hutchinson Mtg. Co., 44 Fed. 219; Matthews & W. Mfg. Co. v. Trenton L. Co., 73 Fed. 212. See Boston W. H. Co. v. Star Rubber Co., 40 Fed. 167.

[6] U. S. v. Standard Sanitary Mfg. Co., 191 Fed. 172.

fringement of a patent,[7] or trademark,[8] unless the corporation is insolvent;[9] or unless the officers took part in the formation of the corporation to continue infringements made by themselves in their individual capacity;[10] or under other special circumstances.[11] Where an officer of a corporation has actively participated in a tort,[12] or the violation of a contract by the corporation,[13] he may be joined with the latter in an action by the party injured. Where fraud or *ultra vires* is charged against them, the officers, directors and attorneys, of a corporation, are proper,[14] but not indispensable parties.[15] Stockholders who

[7] Loomis-Manning Filter Co. v. Manhattan Filter Co., 117 Fed. 325; Farmers' Mfg. Co. v. Spruks Mfg. Co., 119 Fed. 594; Greene v. Buckley, 120 Fed. 955; National Casket Co. v. Stolts, C. C. A., 135 Fed. 534; (a suit against the agent of a joint stock association); Glucose Sugar Refining Co. v. St. Louis, S. & P. Co., 135 Fed. 540; Weston El. Instrument Co. v. Empire Electrical Instrument Co., C. C. A., 177 Fed. 1006. *Contra*, Peters v. Union Biscuit Co., 120 Fed. 679, 685. See Saxlehner v. Eisner, C. C. A., 147 Fed. 189; s. c., 140 Fed. 938.

[8] Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982.

[9] Saxlehner v. Eisner, 140 Fed. 938.

[10] Wm. G. Rogers Co. v. International Silver Co., C. C. A., 118 Fed. 133; Simplex El. Heating Co. v. Leonard, 147 Fed. 744.

[11] Westinghouse El. & Mfg. Co. v. Mutual Life Ins. Co., 129 Fed. 213; Simplex El. Heating Co. v. Leonard, 147 Fed. 744; Weston El. Instrument Co. v. Empire Electrical Instrument Co., C. C. A., 177 Fed. 1006.

[12] Saxlehner v. Eisner, 140 Fed. 938; Favorite v. Cottrill, 62 Mo. App. 119; Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231; Cameron v. K-C Com. Co., 22 Montana 312, 56 Pac. 358, 44 L.R.A. 508, 74 Am. St. Rep. 602. It has been held that directors of a corporation cannot be held individually liable for the infringement of a patent by the company merely because they have signed a paper agreeing to save harmless from infringement suits purchasers who had previously bought the infringing devices. Am. Bank Protection Co. v. Electric Protection Co., 181 Fed. 350. Where the officers of a corporation were joined with it as defendants to a suit for the infringement, it was held that they were not liable to account for profits realized by the corporation alone. McSherry Mfg. Co. v. Dowagiac Mfg. Co., C. C. A., 160 Fed. 948.

[13] United Cigarette Mach. Co. v. Winston C. Mach. Co., C. C. A., 194 Fed. 947.

[14] Geer v. Mathieson Alkali Works, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625; Jones v. Missouri-Edison Electric Co., C. C. A., 144 Fed. 765; United Cigarette Mach. Co. v. Winston C. Mach. Co., C. C. A., 194 Fed. 947; Ferguson v. Wilson, L. R. 2 Ch. App. 77, 90; Clinch v. Financial Corporation, L. R. 4 Ch. App. 117.

[15] Sidway v. Missouri Ld. & L. S. Co., 116 Fed. 381; Geer v. Mathie-

have not taken part in the transactions of which complaint is made are improper parties defendant to a suit for an injunction;[16] not even, it has been held, in a stockholders' suit,[17] nor in the case of a corporation holding a majority of the stock of another corporation, which has taken part in an infringement;[18] but they may be joined when they have organized the corporation with a small capital for the purpose of the infringement.[19] A party, with whom a corporation has contracted to make the article which is charged to be an infringement of a patent, and another corporation, with whom he has contracted to have the same made, are properly joined as parties defendant to an infringement suit.[20] A party cannot be made defendant to a suit because he has contributed to the defense of the same.[21] Agents to sell, auctioneers, arbitrators, and attorneys, could, under the former practice, be made defendants for the purpose of discovery in any suits against their principals concerning transactions, with which they were connected;[22] but it is now held, that this cannot usually be done where their principals are peculiarly responsible.[23] And in a few cases of fraud it has been held that persons implicated in the fraud might be made parties merely to make them liable for costs.[24] An Indian agent is a proper, although not an indispensable party, to a suit to determine rights under leases of Indian lands.[25]

son Alkali Works, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; Hatch v. Chicago, Rock Island & Pac. R. R. Co., 6 Blatchf. 105, 114.

16 Westinghouse El. & Mfg. Co. v. Allis-Chalmers Co., 168 Fed. 91; Johns-Pratt Co. v. Sachs Co., C. C. A., 175 Fed. 70.

17 McCrea v. McClenahan, 114 App. Div. (N. Y.), 70.

18 Westinghouse El. & Mfg. Co. v. Allis-Chalmers Co., 168 Fed. 91.

19 Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co., 172 Fed. 225; s. c., 190 Fed. 323.

20 Nat. Mechanical Directory Co. v. Polk, 121 Fed. 742.

21 Parsons Non-Skid Co. v. E. J. Willis Co., 176 Fed. 176.

22 Fenton v. Hughes, 7 Ves. 288, 289; Dummer v. Corporation of Chippenham, 14 Ves. 252; Bowles v. Stewart, 1 Scho. & Lefr. 209; Brady v. McCorker, 1 N. Y. 214; s. c., 1 Barb. Ch. 343.

23 Seiferd v. Mulligan, 36 App. Div. (N. Y.) 33; Bowles v. Stewart, 1 Scho. & Lef. 209.

24 Taylour v. Rochford, 2 Ves. Sen. 281; Smith v. Green, 37 Fed. 424; Huggins v. King, 3 Barb. (N. Y.) 617; Hammond v. Hudson R. I. & N. Co., 20 Barb. (N. Y.) 386; Pritchard v. Palmer, 88 Hun, 412; Calvert on Parties (2d ed.), 96, and cases cited. See Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625.

25 Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

§ 112. Persons who on account of their interest need not be made parties to a suit in equity. No persons should be joined as parties to a suit in equity, either as co-plaintiffs or co-defendants, who are not directly interested in obtaining or resisting the relief prayed for in the bill[1] or who claim the property in question under inconsistent titles.[2] Thus, prior incumbrancers should not be made parties to a bill for the foreclosure of a mortgage,[3] unless it prays for a receiver,[4] or seeks to obtain a sale of the entire mortgaged property free from all liens,[5] or unless "there is substantial doubt respecting the amount of debts due prior lien creditors," in which case "there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing;"[6] or unless there are other peculiar circumstances making it necessary. Nor need a mortgagor who has sold his equity of redemption,[7] or a guarantor of the mortgage, even if he has paid interest,[8] be made a party to a foreclosure, unless relief is sought against him.[9] When, however, such relief is sought against the mortgagor or a grantee of the equity of redemption who has assumed payment of the mortgage, all grantees who have made such an assumption should ordinarily be joined as defendants in order that their respective rights may be determined.[10] Lessees are not necessary, al-

§ 112. [1] Calvert v. Parties (2d ed.), 6; Mare v. Malachy, 1 M. & C. 559; Seymour v. Farmers' L. & T. Co., C. C. A., 128 Fed. 907.

[2] Calvert on Parties (2d ed.), 105; Marquis Cholmondely v. Lord Clinton, 2 Jac. & W. 138; Saumarez v. Saumarez, 4 M. & C. 331; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; *infra*, § 141.

[3] Hagan v. Walker, 14 How. 29, 37, 14 L. ed. 312, 316; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Nalle v. Young, 160 U. S. 624, 40 L. ed. 560.

[4] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 306, 27 L. ed. 117, 125.

[5] Hagan v. Walker, 14 How. 29, 14 L. ed. 312; Jerome v. McCarter, 94 U. S. 734, 735, 24 L. ed. 136, 137; McClure v. Adams, 76 Fed. 899.

[6] Strong, J., in Jerome v. McCarter, 94 U. S. 734, 735, 736, 24 L. ed. 136, 137.

[7] Kanawha Coal Co. v. Kanawha & O. C. Co., 7 Blatch. 391, 416; Grove v. Grove, 93 Fed. 865. But see Matcalm v. Smith, 6 McLean, 416. As to receivers, *infra*, § 113.

[8] Columbia F. & Trust Co. v. Kentucky U. Ry. Co., 60 Fed. 794.

[9] Ayers v. Wisawall, 112 U. S. 187, 28 L. ed. 693.

[10] Skinner v. Harker, 23 Colo. 333; s. c., 48 Pac. 648. But see

though they are proper parties to a suit to foreclose a mortgage prior to their leases.[11] or to foreclose a vendor's lien.[12] Where part of the mortgaged premises had been sold to the sovereign power, which refused to waive its exemption from suit, and all the other parties in interest were joined; it was held, that the court could except the land so conveyed, decree a sale of the balance and enter a deficiency judgment, if the proceeds were insufficient.[13] To a suit by the holder of bonds secured by a trust mortgage to recover damages from the trustee for his negligent administration of the trust, the mortgagor need not be made a party, but it has been held that the bill must be filed on behalf of all the bondholders and not merely on behalf of those who are joined as complainants.[14] It seems: that in a suit to set aside attachments, attaching creditors, who have no joint interest with the defendants, may be omitted if their citizenship will oust the court of jurisdiction.[15] Where the receivers of a corporation had made an absolute assignment of a cause of action to the complainant; it was held, that neither the corporation nor its receivers were necessary parties to a bill to enforce that cause of action, although one of the receivers was entitled to one-quarter of the collection.[16] The personal representatives of a deceased partner are not necessary parties to a bill to vacate a decree in favor of the partner-

Kelly v. Ashford, 133 U. S. 610, 626, 33 L. ed. 667, 674; *infra*, § 120.

[11] Tyler v. Hamilton, 62 Fed. 187. It has been held that tenants under leases by a railway company, subject to mortgages of the property, are not necessary parties to a foreclosure suit, and that their rights are therefore extinguished by the foreclosure sale (Ibid.), and that when all the property is in the hands of the receivers, neither the first mortgagee, the mortgagor, nor any lessor, is a necessary party to the foreclosure of a second railroad mortgage covering leased lines, but not affecting the rights of the lessors. Grand Trunk Ry. Co. v. Central Vt. R. Co., 88 Fed. 622.

[12] Brisco v. Minah Consol. Min. Co., 82 Fed. 952. It was held in Mississippi, where a mortgagor had conveyed land to the children of his mortgagee, that the latter were not necessary parties to a suit by the mortgagor against the mortgagee for an injunction and an accounting. Lipscomb v. Jack (Miss., 1896), 20 S. R. 883.

[13] Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834.

[14] Frishmuth v. Farmers' L. & T. Co., 95 Fed. 5.

[15] Watson v. Bonfils, C. C. A., 116 Fed. 157, 160.

[16] Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co., 143 Fed. 152.

ship.[17] The United States are not necessary parties to a suit by a materialman upon a bond given to the Government for the benefit of the plaintiff and persons similarly interested.[18] So in suits for specific performance, it is a general rule that none are necessary parties but parties to the contract, or their representatives,[19] including in a proper case their heirs[20] and devisees;[21] unless there are other persons, such as the wife of the defendant,[22] with such an interest in the contract or the property agreed to be sold that their concurrence is necessary to the completion of the title, or that their rights would be prejudiced were a decree made in their absence.[23] In a suit to enforce a constructive trust in certificates of the stock of a corporation, neither the corporation nor the former owner of the stock is a necessary party.[24] In a suit by the pledgee of corporate bonds to protect the security from waste, seeking a receivership, the appointment of a new trustee and the termination of the company's business, the pledgor is a proper party.[25] Nor need the assignor of the whole interest in a thing in action be made a party to a suit by the assignee;[26] except in the case of a suit by the equitable assignee of a patent,[27] or

17 Perkins v. Hendryx, 149 Fed. 526.

18 Title Guaranty & Trust Co. of Scranton, Pa. v. Crane Co., 219 U. S. 24, 55 L. ed. 72.

19 Tasker v. Small, 3 M. & C. 63, 68; Calvert on Parties (2d ed.), Book III, ch. xvii.

20 Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. ed. 242.

21 Woodward v. Davidson, 150 Fed. 840.

22 Buck v. Buck, 11 Paige (N. Y.), 170.

23 Jones v. Lewis, 1 Cox, Eq. 199; Evans v. Jackson, 8 Sim. 217; Calvert on Parties, Book III, ch. xvii. Where the contract is made by an agent in his own name he is a necessary party to a suit by his principal for specific performance. Pennsylvania & N. J. R. Co. v. Byerson, 36 N. J. Eq. 112, 116. It has been held that in such a case he can sue without joining his principal although defendant knew that he acted as an agent only. Kelley v. Tracy, 102 Mo. 522.

24 Brissell v. Knapp, 155 Fed. 809.

25 State Nat Bank v. Syndicate Co., 178 Fed. 359.

26 Harris v. Johnston, 3 Cranch, 311, 2 L. ed. 450; Boon v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178; s. c., Chases' Dec. 475; Batesville Institute v. Kauffman, 18 Wall. 151, 21 L. ed. 775; Fulham v. McCarthy, 1 H. L. C. 703.

27 Stimpson v. Rogers, 4 Blatchf. 533; North v. Kershaw, 4 Blatchf. 70; Patterson v. Stapler, 7 Fed. 210; Goodyear v. Allen, 3 Fisher, 284. To a suit by the assignee of an applicant for a patent against

copyright,[28] or trade-mark[29] or by the licensee,[30] or mortgagor

the applicant and a corporation, to which the patent had been issued, later applicants, who were in interference with the first, are not necessary parties, although they have assigned their applications to the same company and received stock in return. Thompson v. Automatic Fire Protection Co., 197 Fed. 750. For transactions that passed the legal title see Am. Bank Protection Co. v. City Nat. Bank 181 Fed. 375.

[28] Colburn v. Duncombe, 9 Sim. 151; Chappell v. Purday, 4 Y. & C. 485, Calvert on Parties (2d ed.). 315.

[29] A singer, who receives a royalty on the number of mechanical records of his song that are sold, is not a necessary party to a suit by the patentee and owner of the records for an injunction against the sale of copies made by a reproduction of the same. Fonotipia Limited v. Bradley, 171 Fed. 951.

[30] Krauss v. Jos. R. Peebles Sons Co., 58 Fed. 585.

Waterman v. Mackenzie, 138 U. S. 252, 255, 256, 260, 261, 34 L. ed. 923, 925, 926, 927, 928, per Gray, J.: "The patentee or his assigns may, by instrument in writing, assign, grant and convey either, first, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right under the patent within and throughout a specified part of the United States. R. S., § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. R. S., § 4919; Gayler v. Wilder, 10 How. 477, 494, 495, 13 L. ed. 504, 511, 512; Moore v. Marsh, 7 Wall. 515, 19 L. ed. 37. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself." Adriance, P. & Co. v. McCormick H. M. Co., C. C. A., 56 Fed. 918; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577. Where the owner of the patent has been enjoined in another jurisdiction from suing alleged infringers of the same, the licensee may sue alone. Hurd v. James Goold Co., 197 Fed. 756. "Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary, to protect the rights of all parties, joining the licensee with him as a plaintiff. R. S., § 4921; Littlefield v. Perry, 21 Wall. 205, 223, 22 L. ed. 577, 579; Paper Bag Cases, 105 U. S. 766–771, 26 L. ed. 959–961; Birdsell v. Shaliol, 112 U. S. 485–487, 28 L. ed. 768, 769. And see Renard v. Levinstein, 2 Hem. &

Mil. 628. Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. Wilson v. Rousseau, 4 How. 646, 686," 11 L. ed. 1141, 1159. See D. M. Sechler Carriage Co. v. Deere & Mansur Co., 113 Fed. 285. "Where, however, the patentee reserved the right to use the inventions within the territory, for a specified purpose, and to make them therein for such use and for use outside of the territory, and the licensee agreed not to lease or sell any part of the inventions for use outside of the territory, without the patentee's consent; it was held, that the licensee could not sue in his own name." Bowers Hydraulic Dredging Co. v. Vare, 112 Fed. 63. "On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. Gayler v. Wilder, above cited, 10 How. 477, 13 L. ed. 504. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. Mitchell v. Hawley, 16 Wall. 544, 21 L. ed. 322. So is an instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. Hayward v. Andrews, 106 U. S. 672, 27 L. ed. 271. See also Oliver v. Rumford Chemical Works, 109 U. S. 75, 27 L. ed. 862." It has been held: that an allegation that a patentee assigned to complainant the exclusive right to make, use, and sell for use within the United States and its territories and foreign possessions, "in connection with wireless telephone work and wireless telephonic communication only, apparatus and equipment embodying said methods and apparatus under the patents hereinabove mentioned, or 'any other patent or patents now or hereafter owned or controlled" by the assignor or his assignee, did not show a conveyance to the assignee of the entire monopoly granted by the government to the patentee, but a mere license; and hence the assignee had no capacity to sue in his own name to restrain infringers. De Forest v. Collins Wireless Telephone Co., 174 Fed. 821. A patent-right is incorporeal

by a mortgage duly recorded at Washington,[31] or by an assignee under an assignment still executory,[32] or by an assignee, such as a pledgee, whose assignor has an equitable interest in the property,[33] when it is the safer practice to join, as plaintiff or defendant, the assignor, licensor, or mortgagee, as the case may be. The exclusive licensee of a patent for a specified territory has the implied authority, even against the will of the owner, to join him as a co-complainant in a bill to enjoin an infringement.[34] The patentee and his exclusive licensee may

property, not susceptible of actual delivery or possession; and the recording of a mortgage thereof in the Patent Office, in accordance with the act of Congress, is equivaleent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. . . . The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this, and that the plea, therefore, was rightly adjudged good." An applicant for a patent cannot sue for an injunction against an infringement before the patent is issued to him. Standard Scale & Foundry Co. v. McDonald, 127 Fed. 709.

[31] Waterman v. Mackenzie, 138 U. S. 252, 34 L. ed. 923.

[32] Land Co. of New Mexico v. Elkins, 20 Fed. 545.

[33] Hubbard v. Manhattan Trust Co., C. C. A., 87 Fed. 51, 57; Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470; Ackerson v. Long Branch & L. Co., 28 N. J. Eq. 542; Comptograph Co. v. Universal Accountant Mach. Co., 142 Fed. 539. *Contra*, Walker on Patents, § 400.

[34] Brush-Swan El. L. Co. v. Thomson-Houston El. Co., 48 Fed. 224; Brush El. Co. v. El. Imp. Co., 49 Fed. 73; Brush El. Co. v. California El. L. Co., C. C. A., 52 Fed. 945; Excelsior W. P. Co. v. Allen, C. C. A., 104 Fed. 553; Havens v. W. R. Ostrander & Co., 190 Fed. 199. It was held in Van Orden v. Nashville, 67 Fed. 331, that the part owner of a patent cannot sue at law for damages caused by an infringement without joining his fellow-owners as co-plaintiffs, and that he cannot make them defendants when they refuse to sue. Where, in consideration of the assignment of applications, the assignee agreed to prosecute the same and also proposed interference proceedings between them and a patent issued to a stranger, together with an infringement suit against the latter in case patents issued; it was held that the assignor was not liable to reimburse the assignee for expenses paid in such prosecution, although the issue of the patents was refused because the assignor refused so to amend his application as to cancel rejected claims. Strauss v. Dilg, 140 App. Div. (N. Y.) 424.

join in a suit to enjoin the infringement of a patent,[35] but the patentee and a licensee whose license is not exclusive cannot.[36] Such a licensee is ordinarily not a proper party plaintiff.[37] Where the bill alleges, that the licensee has an interest in the inventions which is capable of being impaired by the infringement, the licensee may properly be joined as a complainant.[38] A former licensee cannot join as a co-plaintiff, unless all subsequent licensees and assignees of the license are also joined.[39] An exclusive licensee need not ordinarily be joined as complainant with the patentee.[40] When the patentee sues alone, he cannot recover profits which, but for the infringement, would have enured to the sole benefit of the licensee.[41] The assignee of the whole of a patent, so far as a particular territory is concerned, need not be made a party to a suit by the assignor to enjoin infringements elsewhere.[42] It has been held that an inventor, who has assigned his application, may maintain a suit in his own name to compel the issue of the patent.[43] It has been held that any party against whom an order fixing rates is made by the Interstate Commerce Commission, may apply to the proper court for relief without joining other parties to the order, since the injury was said to be several and not joint.[44]

It has been held at Circuit that a tax collector is not a proper party to a bill to set aside a conveyance made by him.[45] And, as has been said before, no persons should be joined as plain-

35 Ibid., Havens v. W. R. Ostrander & Co., 190 Fed. 199.

36 Blair v. Lippincott Gl. Co., 52 Fed. 226.

37 Ibid.

38 Daimler Mfg. Co. v. Conklin, 145 Fed. 955.

39 Victor Talking Machine Co. v. Am. Graphophone Co., 118 Fed. 50.

40 Union S. & S. Co. v. Johnson R. R. Signal Co., 52 Fed. 867: Gayler v. Wilder, 10 How. 477, 13 L. ed. 504. "In the case of Waterman v. MacKenzie, 138 U. S. 252, 34 L. ed. 923, 11 Supr. Ct. R. 334, the Supreme Court held that a licensee might sue in his own name when it was necessary to prevent an absolute failure of justice. This is the effect, I take it, of the language of the court there used." Knowles, D. J., in Brush El. Co. v. California E. L. Co., C. C. A., 52 Fed. 945, 961.

41 Bredin v. Solmson, 145 Fed. 944.

42 Canton S. R. Co. v. Kannenberg, 51 Fed. 599, 600.

43 Wende v. Horine, 191 Fed. 620. *Contra*, Smith v. Thompson, 177 Fed. 721.

44 Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 Fed. 449.

45 West v. Duncan, 42 Fed. 430.

tiffs,[46] or defendants,[47] who claim the property in question under inconsistent titles. For example, a mortgagee cannot maintain a bill against the mortgagor for a foreclosure, which at the same time seeks to enjoin a claimant adverse to both mortgagor, and mortgagee from asserting his title to the mortgaged property.[48] An interest in the question of law involved is not sufficient to make a person a necessary or even a proper party,[49] except when a bill of peace is filed. The equity rules, following the English Orders in Chancery, also provide that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."[50] This rule, however, only applies when the demand is both joint and several, not when it is merely joint;[51] and when one of two or more jointly and severally indebted is the principal debtor, to whom the others are sureties, it must, it seems, always be joined in a bill filed by the creditor to enforce a security against either of the latter.[52] Concerning the chancery order from which the rule was copied, Vice-Chancellor Shadwell said that it "applied to cases where several persons were liable in different characters,—that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties."[53]

46 Marquis Cholmondeley v. Lord Clinton, 2 Jac. & W. 1, at p. 135. Saumarez v. Saumarez, 4 M. & C. 331, 336. See Parsons v. Lyman, 4 Blatchf. C. C. 432; *infra*, § 141.

47 Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; *infra*, § 141.

48 Ibid. But see Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 31 L. ed. 309.

49 Valette v. Whitewater Valley Canal Co., 4 McLean, 192.

50 Eq. Rule 42; copied from Rule 51, of 1842, which was copied from the 32d Order in Chancery of August, 1841. David v. McRae, 183 Fed. 812.

51 Pierson v. Robinson, 3 Swanst. 139, n.

52 Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178; Wilson v. City Bank, 3 Sumn. 423; Allen v. Houlden, 6 Beav. 148; Pinkus v. Peters, 5 Beav. 253.

53 Lloyd v. Smith, 13 Sim. 457, 458, 459.

§ 113. Cases where the law has furnished a representative. On account of the inconvenience which would be caused if the general rule were enforced in all cases, there are several classes of exceptions to it.[1] The first of these exists when the law has furnished a representative of the interest in question. In such a case, those whom he represents are not usually necessary parties to the suit.[2] The equity rules now provide: "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."[3] Thus, until they have distributed the decedent's estate,[4] executors and administrators are deemed sufficiently to represent all legatees, creditors, and next of kin in suits brought by or against them in their representative capacity,[5] except when they are made defendants to a suit by a residuary legatee for his share of the estate,[6] or when the rights of the legatees or next of kin between one another are in question,[7] or in a suit to obtain a construction of the will;[8] or where they are sued for collusion with a legatee who should then be made a party,[9] or, perhaps, when an executor or administrator is charged with a breach of trust and an accounting is required; but the executors do not represent the heirs at law

§ 113. [1] Wallworth v. Holt, 4 M. & C. 619; Powell v. Wright, 7 Beav. 449.

[2] Calvert on Parties (2d ed.), 22. See Hopkins v. Page, 2 Brock. 20, 42.

[3] Eq. Rule, 37.

[4] Carey v. Roosevelt, 81 Fed. 608.

[5] Brown v. Dowthwaite, 1 Madd. 448; Potter v. Gardner, 12 Wheat. 499, 6 L. ed. 706; Burton v. Smith, 4 Wash. C. C. 522; Dandridge v. Washington's Ex'rs, 2 Pet. 370, 377, 7 L. ed. 454, 457; Wainwright v. Waterman, 1 Ves. Jr. 313; Anon., 12 Mod. 522; Glover v. Patten, 165 U. S. 394, 41 L. ed. 760.

[6] Atwood v. Hawkins, Rep. temp. Finch, 113; Faithful v. Hunt, 3 Anst. 751; Calvert on Parties (2d ed.), 206, 208. But see McArthur v. Scott, 113 U. S. 340, 345, 28 L. ed. 1015; Martin v. Fort, 83 Fed. 19.

[7] Kendall v. Hardenbergh, 94 Fed. 911; Stevens v. Smith, C. C. A., 126 Fed. 706.

[8] Stevens v. Smith, C. C. A., 126 Fed. 706. *Cf.* Toms v. Owen, 52 Fed. 417.

[9] Attorney-General v. Wynne, Mos. 126.

in a suit affecting the real estate,[10] and the devisees were held to be indispensable parties to a suit to foreclose a mortgage made by an executor.[11] It has been held that where a suit is brought to determine the ownership of a fund in the hands of the trustee of an intestate, an administrator of the decedent's estate must first be appointed, and it is error to decree that the fund be paid "to such person as may hereafter be appointed administrator,"[12] So a bankrupt or insolvent debtor[13] and his creditors[14] are not usually necessary parties to a suit brought by or against his trustee or assignee. An assignment by the owners of a number of claims against the same party, to an attorney, under an agreement that he shall receive for his services a certain percentage of the amount collected, will support an action by the assignee in his own name where there is no agreement that he shall pay the costs of the litigation.[15] A stockholders' agent, elected at a meeting of shareholders in pursuance of statute, may after he has qualified sue on their behalf directors to recover money by malfeasance or misfeasance upon the part of the latter.[16] It has been held improper for a creditor of an estate to join with its receiver in a suit concerning it.[17] A corporation need not be, although it usually is, joined as a co-defendant to a suit against its receiver to foreclose a lien upon its property where no personal relief is sought against it.[18] It has been held that the Comptroller of the Currency and the Treasurer of the United States are not necessary parties to a suit to recover from the receiver of a national bank, appointed by the Comptroller, the amount of an assessment erroneously made by the Comptroller, paid by the complainant to the receiver, and paid by him into the Treasury.[19]

10 Wooslin v. Cooper (N. J. Ch., 1897), 36 Atl. 281. See § 119, *infra*. But see Alger v. Anderson, 78 Fed. 729, 733.

11 Detweiler v. Holderbaum, 42 Fed. 337.

12 Read v. Bennett (N. J. Errors & Appeals, 1897), 37 Atl. 75; *infra*, § 126.

13 De Wolf v. Johnson, 10 Wheat. 367, 384, 6 L. ed. 343, 347; Van Reimsdyk v. Kane, 1 Gall. 371; Calvert on Parties (2d ed.), 24.

14 Spragg v. Binkes, 5 Ves. 587.

15 Northwestern S. S. Co. v. Cochran, C. C. A., 191 Fed. 146.

16 McKinnon v. Morse, 177 Fed. 576.

17 Doggett v. Railroad Co., 99 U. S. 72, 25 L. ed. 301.

18 Central Trust Co. v. Chicago, K. & T. Ry. Co., 54 Fed. 598.

19 Brown v. Tillinghast, 84 Fed. 17.

It has been held that a receiver appointed upon a creditor's bill should not be made a defendant to an ancillary foreclosure suit;[20] that a receiver of a corporation is a necessary party to a suit to enforce a corporate right of action;[21] that a receiver of a bank is a proper, but not a necessary, party to a suit in equity instituted before his appointment to recover from the bank money obtained by it through fraud;[22] that a receiver is an improper party to an action at law for a tort committed before his appointment,[23] but that he is a necessary party to such an action when he holds a policy insuring the corporation from loss by the tort and the plaintiff has joined the insurer with the receiver's corporation as a co-defendant;[24] and that he and the corporation may be joined as defendants to a bill to enjoin infringements of a patent and for an accounting of the profits made by infringements before and after his appointment;[25] that the creditors of an insolvent bank are necessary parties to a suit by a stockholder against the bank and its receiver to have his certificate cancelled;[26] and that after the discharge of a receiver and the transfer of the property to a corporation, which as part consideration for the purchase, agreed to pay all valid claims against the receiver, the purchaser is the only proper defendant to a suit to collect such a claim.[27] It has been held: that the treasurer of a corporation may sue his predecessor in office for an accounting of the corporate funds, without joining the corporation.[28] Ordinarily, a corporation represents the stockholders thereof in all litigation affecting corporate rights;[29] and when a statute imposes

[20] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642.

[21] Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815. But see Palestine W. & P. Co. v. City of Palestine, 91 Tex. 540, 40 L.R.A. 203; s. c., 44 S. W. 814; s. c., 40 L.R.A. 203.

[22] Denton v. Baker, C. C. A., 79 Fed. 189; Speckart v. German Nat. Bank, 85 Fed. 12.

[23] Northern Pac. R. Co. v. Heflin, C. C. A., 83 Fed. 93.

[24] Moore v. Los Angeles I. & S. Co., 89 Fed. 73. But see Palestine W. & P. Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814; s. c., 40 L.R.A. 203.

[25] Union S. & S. Co. v. Philadelphia & R. R. Co., 69 Fed. 833.

[26] Dunn v. State Board, 59 Minn. 221, 61 N. W. 27.

[27] Thompson v. Northern Pac. Ry. Co., 93 Fed. 384.

[28] Hunter v. Robbins, 117 Fed. 920.

[29] It has been held that a corporation is so far a representative of its stockholders that none of them need be joined in a suit for an accounting, under a lease which pro-

a tax upon shares of its capital stock and directs it to pay the same, it may sue to test the validity thereof;[30] but where a question arises affecting the respective rights of different classes of stockholders, the members of each class or representatives thereof, as well as the corporation, must be joined in the suit.[31] In a suit against a corporation to enforce specific performance of a contract made by it in behalf of subsidiary companies, which it controlled through ownership of their stock, it was held that such subsidiary companies were not indispensable, nor even necessary, parties.[32] It has been held that a State statute authorizing one or more officers of an unincorporated association to represent the others in the courts, when suing or being sued about a matter concerning their common interest, will be followed by a Federal court of equity, and the members conclusively presumed to have the same citizenship as such officers.[33] In suits by or against strangers affecting the partnership property, surviving partners need not have joined with them the personal representatives of their deceased associate.[34] and firm creditors may proceed directly against the personal representative of a deceased partner without asking for judgment against the firm or the surviving partners, although the surviving partners must be made parties, since they are interested in taking the account.[35] It has been held that a city and county sufficiently represents gas consumers within their territory as to justify, in a suit in which the former are made parties defendant, an injunction against the

vides for the payment of dividends directly to its stockholders, Pacific R. of Mo. v. Atlantic & P. R. Co., 20 Fed. 277. See Witherbee v. Bowles, 201 N. Y. 427, 435; Weidenfeld v. Northern Pac. R. Co., C. C. A., 129 Fed. 305, 311.

30 Cummings v. Nat. Bank, 101 U. S. 153, 157, 25 L. ed. 903; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 75, 113, 49 L. ed. 669; Charleston Nat. Bank v. Melton, 171 Fed. 743.

31 Baltimore, C. & A. Ry. Co. v. Godeffroy, C. C. A., 182 Fed. 525; Carpenter v. Knollwood Cemetery, 198 Fed. 297. But see Witherbee v. Bowles, 201 N. Y. 427.

32 Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

33 Fargo v. Louisville, N. A. & C. Ry. Co., 6 Fed. 787; Whitman v. Hubbell, 30 Fed. 81; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. ed. 1029. But see Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, and *supra*, § 46.

34 Pagan v. Sparks, 2 Wash. C. C. 325.

35 U. S. v. Hughes, 161 Fed. 1021, 1023; Story on "Partnership," § 362.

latter, although not formally joined.[36] The United States may, without joining the allottee Indians, sue to set aside their conveyances of lands within the statutory period of restriction,[37] and may sue upon the official bond of the clerk of a Federal court to recover deposits made by litigants as security for costs without joining any of the persons entitled to share in the fund.[38] The English rule was that "a court of equity in many cases considers the tenant in tail as having the whole estate vested in him, at least for the purposes of suit; and for these purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land."[39] "Those in remainder were considered as cyphers."[40] "It appears that this rule was originally founded upon analogy to common law. As a tenant in tail might bar subsequent remaindermen,—in fact, might at any moment make himself master of the entire estate,—it was considered by the court that he might be assumed to offer a satisfactory defense for all those subsequent interests. The court has, however, gone one step farther, and has treated infants as sufficient representatives of the inheritance, although they are unable, by reason of infancy, to bar remaindermen. In truth the court has gone to the full extent which is requisite for convenience in practice."[41] It has been held that a tenant for life and the contingent remainderman in fee may represent the inheritance in a bill for specific performance, if the children of the remainderman will inherit if he does not.[42] But the court refused to decide whether a will conveyed a fee or a life estate, when the parties were not in existence who would take the remainder if the estate were for life only.[43] Lord Eldon said that in most cases respecting trust property the beneficiaries of the trust were necessary parties.[44] The expression naturally suggests the inquiry, In what cases are they not to be made parties? There are some

36 San Francisco Gas & El. Co. v. City and County of San Francisco, 164 Fed. 884, 887.

37 Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820.

38 U. S. v. Abeel, C. C. A., 174 Fed. 12.

39 Lord Eldon in Lloyd v. Johnes, Ves. 65.

40 Lord Camden in Reynoldson v. Perkins, Ambler, 564.

41 Calvert on Parties (2d ed.), 56.

42 Sohier v. Williams, 1 Curt. 479.

43 Talor v. Fisk, 94 Fed. 242.

44 Adams v. St. Leger, 1 B. & B. 182.

cases in which the existence or enjoyment of property is affected by the prayer of the suit. There are others in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees.[45] In the latter cases the beneficiaries of the trust need not,[46] although it seems they may be made parties.[47] In the former, when not too numerous, their presence was always required, before the equity rules.[48] The former equity rules, following an English Chancery order,[49] provided that: "In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit, but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."[50] "It seems doubtful, however," says Daniell of the English order, "whether this order will apply to cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subjects to such trusts."[51] Trustees under a railroad mortgage,[52] or under any other trust-deed of a

[45] Calvert on Parties (2d ed.), 277.

[46] Franco v. Franco, 3 Ves. 76; Carey v. Brown, 92 U. S. 171, 23 L. ed. 469; Calvert on Parties (2d ed.), 277, 278.

[47] Harrison v. Rowan, 4 Wash. C. C. 202; McCampbell v. Brown, 48 Fed. 795; Hayes v. Pratt, 147 U. S. 557, 37 L. ed. 279; In re E. T. Kenney Co., 136 Fed. 451. *Contra*, Consolidated Water Co. v. City of San Diego, 92 Fed. 759; Perkins v. Hendryx, 149 Fed. 526.

[48] Whistler v. Webb, Bunb. 53; Greene v. Sisson, 2 Curt. 171; Oliver v. Platt, 3 How. 333, 11 L. ed. 622; s. c., 2 McLean, 268; Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515. See Pollitz v. Wabash R. R., Bischoff, J., N. Y. Sup. Ct. Sp. Tm., N. Y. L. J. Sept. 19, 1912.

[49] 30th Order of August, 1841.

[50] Rule 49, of 1842.

[51] Daniell's Ch. Pr. (2d Am. ed.) 304. See also Whilton v. Jones, 2 Y. & C. 244; Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515.

[52] Shaw v. Railroad Co., 100 U. S. 605, 611, 25 L. ed. 757, 758; Beals v. Illinois, Mo. & T. R. Co., 133 U. S. 290, 33 L. ed. 608; Elwell

similar nature securing the rights in real property of a large number of beneficiaries,[53] are held, in all proceedings affecting the property which they thus hold, adequately to represent the latter, who will be bound, in the absence of fraud, by notice given to, or a decree entered against trustees, although the court may in its discretion make any of such beneficiaries a party to the suit at his application[54] but he cannot maintain an action at law upon the bonds, and they are not merged in a deficiency judgment taken by him in a foreclosure suit.[55] A bondholder cannot sue to foreclose where there is a trustee under his mortgage in existence without making the trustee a defendant and alleging the latter's refusal to sue, or at least his unwillingness to sue, and such a state of facts as to make the request an idle ceremony.[56] Even where the mortgage can only be foreclosed at the request of a majority of the bondholders, the trustee need not join with him in the suit any of those who have made the request.[57] In such a case, the trustee is bound to recognize the rights of the holders of all bonds that are *prima facie* valid and to act on their request to foreclose when made by the requisite number.[58] A provision requiring the request of the holder of one-fourth of the bonds before a foreclosure was held not to prevent a foreclosure at the suit of holders of a smaller number, when more than three-fourths were

v. Fosdick, 134 U. S. 500, 33 L. ed. 998; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co., 134 U. S. 688, 33 L. ed. 1064; Allen-West Commission Co. v. Brashear, 176 Fed. 119.

[53] Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; McKee v. Lamon, 159 U. S. 317, 40 L. ed. 165; Dalton v. Hazelet, C. C. A., 182 Fed. 561; Carpenter v. Knollwood Cemetery, 198 Fed. 297. The power of a trustee to sue to protect the trust estate, by the foreclosure of a mortgage or otherwise, cannot be restricted by agreement of the parties. N. Y. Tr. Co. v. Michigan Traction Co., 193 Fed. 175.

[54] Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; Thomas v. Brownville, F. K. & P. R. Co., 109 U. S. 522, 27 L. ed. 1018; *infra*, § 258.

[55] Mackay v. Randolph Macon Coal Co., C. C. A., 178 Fed. 881.

[56] Consol. Water Co. v. San Diego, 89 Fed. 272. It was held that a bondholder cannot be joined as a co-plaintiff with the trustee. Consol. Water Co. v. San Diego, 92 Fed. 759.

[57] Grand Tr. Ry. Co. v. Central Vt. Ry. Co., 88 Fed. 622. See N. Y. S. & Tr. Co. v. Lincoln St. Ry. Co., 74 Fed. 67.

[58] Central Tr. Co. v. Cincinnati, H. & D. Ry. Co., 169 Fed. 466.

held by a party who had caused the default by misappropriating the earnings of the railroad.[59] The power of the trustee to sue to preserve the trust estate cannot be abridged or restricted, even by agreement of the parties.[60] In a foreclosure suit brought by holders of a minority of bonds, where there is a claim that the consent of the holders of a majority is required, it is proper to join the majority as defendants.[61] The fact that the trustee represents conflicting interests does not incapacitate him from bringing a suit to protect the trust estate,[62] although that might make it proper for the bondholders or for beneficiaries to be joined as parties to the suit.[63] In certain cases committees of bondholders have been made parties to railroad foreclosures.[64] Under a railroad lease by which the lessee covenanted to pay to a bank selected by the lessor a sum sufficient to pay the interest upon the lessor's mortgage bonds and taxes, it was held that the bondholders might present their claim directly against the receivers of the lessee without the joinder of the receiver of the lessor who had been appointed by a State court.[65] It was held that a trustee appointed by a railway company to hold mortgage bonds, pledged as security for negotiable notes of the corporation, was the agent of the latter only and not of the note holders, and did not represent them in a suit affecting the validity of the notes.[66] It has been held that to a bill against the heirs of a trustee to quiet the title to property conveyed by the trustee to the complainant, the beneficiary of the trust need not be joined as a party;[67] but that the beneficiaries must be made parties to a bill by a

59 Linder v. Hartwell R. Co., 73 Fed. 320. See Hubbard v. Galveston, H. & S. A. Ry. Co., C. C. A., 200 Fed. 504, 509.

60 N. Y. Tr. Co. v. Michigan Traction Co., 193 Fed. 175, 180; citing Old Colony Tr. Co. v. City of Wichita, 123 Fed. 762; Guaranty Tr. Co. v. Green Cove Springs Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116.

61 Toler v. East Tenn. & C. Ry. Co., 67 Fed. 168.

62 Central Tr. Co. v. Cincinnati, H. & D. Ry. Co., 169 Fed. 466.

63 Farmers' L. & H. Co. v. Northern Pac. R. Co., 66 Fed. 169.

64 Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. 38 (by intervention).

65 Mercantile Tr. Co. v. Baltimore & O. R. Co., 94 Fed. 722.

66 Central Tr. Co. v. Cincinnati, H. & D. Ry. Co., 169 Fed. 466.

67 Gridley v. Wynant, 23 How. 500, 16 L. ed. 411.

stranger to set aside the deed of trust for fraud,[63] and to a suit by one of several stockholders to set aside an agreement to pool their stock by depositing the same with trustees the other stockholders, as well as the trustees, are necessary parties.[69]

§ 114. Class suits. When a number of persons have a common interest in a thing which is the subject of litigation, and, in some instances, when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: "(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole;" and (2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole."[1] But there seems to be no reason for treating the two classes separately. They are called "class suits," "creditors' suits," or "stockholders' suits," as the case may be.[2]

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[3] When one or more thus file a bill on behalf of themselves and others similarly interested, they should state in the title of their bill that they so sue, and show that the others are numerous or unknown.[4] Any others of the class have the right to join with them in the suit at any time before its settlement or termination upon payment of their share of the costs,[5] and counsel fees[6] which have been then paid or incurred, provided they do not seek to act in hostility to

[68] Collin Mfg. Co. v. Ferguson & Hutter's Trustee, 54 Fed. 721. *Contra*, Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400.

[69] Ryan v. Seaboard R. Co., 89 Fed. 397.

§ 114. [1] Story's Eq. Pl. § 97.

[2] Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 96.

[3] Eq. Rule 38.

[4] Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762.

[5] Ogilvie v. Knox Ins. Co., 2 Black. 539, 17 L. ed. 349; s. c., 22 How. 380, 16 L. ed. 349; Ex parte Jordan, 94 U. S. 248, 24 L. ed. 123; Hallett v. Hallett, 2 Paige (N. Y.), 15; Leigh v. Thomas, 2 Ves. Sen. 313; Ransom v. Davis, 18 How. 295, 15 L. ed. 388; Story's Eq. Pl., § 99.

[6] Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

the original complainants,[7] in which case the court may in its discretion allow them to intervene.[8] If their joinder as plaintiffs would oust the court of jurisdiction, they may be brought in as defendants.[9] Such a bill may be filed even when a majority of those interested object to the suit.[10] "For where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit."[11] To such a bill it is not necessary to make defendants all who object to its being filed, provided that enough are brought before the court to sufficiently represent their interest.[12] It was originally held that no one could sue on behalf of others who claimed for himself an interest in the matter in controversy distinct from that of those whom he sought to represent; for example, a mortgagee was not allowed to sue in behalf of general creditors while enforcing his mortgage,[13] but recent authorities seem to have changed this doctrine.[14] All on whose behalf one sues must appear to have an interest in the relief prayed for by him.[15] In such a suit, the bill may be dismissed at any time before decree by the consent of those who are then joined as plaintiffs,[16] but not afterwards, since by the decree a right becomes vested in the others.[17] The court will nearly always allow a bill filed by an individual in his own right to

[7] Forbes v. Memphis, El Paso & Pacific R. Co., 2 Woods, 323.

[8] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478, 20 L. ed. 205.

[9] Brown v. Pacific Mail S. S. Co., 5 Blatchf. C. C. 525, 535. But see Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329.

[10] Bromley v. Smith, 1 Simons, 8; Taylor v. Salmon, 4 Myl. & Cr. 134; Story's Eq. Pl., § 114. But see Jones v. Garcia del Rio, 1 Turn. & Russ. 300.

[11] Bromley v. Smith, 1 Simons, 8, 11.

[12] Clinch v. Financial Corporation, L. R. 4 Ch. App. 117, at p. 122; Story's Eq. Pl., §135b.

[13] Burney v. Morgan, 1 Sim. & S. 358, 362; Palmer v. Foote, 7 Paige (N. Y.) 437; White v. Hillacre, 3 Y. & C. 597.

[14] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Mason v. Bogg, 2 Myl. & Cr. 443; Story's Eq. Pl., § 101, and cases there cited.

[15] Newton v. Earl of Egmont, 4 Simons, 574, 585; Jones v. Garcia del Rio, 1 T. & R. 297.

[16] Handford v. Storie, 2 Sim. & S. 196; Hubbell v. Warren, 8 Allen (Mass.), 173; Hirshfeld v. Fitzgerald, 157 N. Y. 166, 46 L.R.A. 839; § 361, *infra*.

[17] Handford v. Storie, 2 Sim. & S. 196; York v. White, 10 Jurist, 168; Innes v. Lansing, 7 Paige (N. Y.), 583.

be amended, so as to allow him to sue on behalf of himself and other members of a class.[18] The ordinary cases of bills filed by one person of a class on behalf of others similarly situated are bills by stockholders of corporations;[19] by members of unincoporated associations;[20] by railroad bondholders,[21] of whom one holding bonds secured by successive mortgages may, after the death of all the trustees, sue for a foreclosure on behalf of himself and the holders of each class of the bonds which he owns;[22] and bills by creditors.[23] It was held that such a suit could not be filed by a stockholder of an insolvent railroad company, to compel the issue to him of stock, which he claimed under a reorganization agreement, when he alleged: "Your orator does not know how many others are similarly situated; but he avers, upon information and belief, that there are many other stockholders of the Georgia Pacific Railway similarly situated, and that their stock amounts to at least $500,000."[24] In a case where a railroad mortgaged its property directly, without the intervention of a trustee, to fifteen bondholders, naming them, and the adequacy of the security was doubtful, it was held that one could not sue on behalf of the rest, but that all the bondholders must be joined as parties to the bill.[25] Where there were one hundred and twenty bonds of $500 each, secured by a mortgage to a trustee, and all the bonds were held by three persons, it was held that all the bondholders were indispensable parties to a bondholder's foreclosure suit, although the plaintiff's bond-

[18] Johnson v. Compton, 4 Simons, 47; Lloyd v. Loaring, 6 Ves. 773; Daniell's Ch. Pr. (5th Am. ed.) 236, note 6, and 245, and cases cited.

[19] Bacon v. Robertson, 18 How. 480, 15 L. ed. 499; Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 86; Wallworth v. Holt, 4 Myl. & Cr. 619; Taylor v. Salmon, 4 Myl. & Cr. 134; Hichens v. Congreve, 4 Russell, 562; Gray v. Chaplin, 2 Sim. & S. 267; Crease v. Babcock, 10 Met. (Mass.) 532; Noble v. Gadsden L. & Imp. Co., 133 Ala. 250, 91 Am. St. Rep. 27; s. c., 31 So. 856.

[20] Bainbridge v. Burton, 2 Beavan, 539.

[21] Trustees of the Wabash & Erie Canal Co. v. Beers, 2 Black, 448, 17 L. ed. 327; Galveston R. Co. v. Cowdrey, 11 Wall. 459, 20 L. ed. 199; Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915.

[22] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478, 20 L. ed. 199, 205.

[23] Fink v. Patterson, 21 Fed. 602.

[24] Motley v. Southern Ry. Co., 184 Fed. 956, 958.

[25] Railroad Co. v. Orr, 18 Wall. 471, 21 L. ed. 810.

holder filed his bill on behalf of the others as well as of himself.[26] It was held that such a suit could not be brought by the holder of a certificate of stock which had not been transferred on the books of the corporation to his name.[27] Such bills may also be filed by one or more legatees,[28] at least if not residuary legatees;[29] by one of several next of kin;[30] by one of several beneficiaries of a trust fund,[31] by one of many partners;[32] by one of a class for the benefit of which a charity was founded:[33] by one of the crew of a privateer seeking an account from a defendant who has collected their joint prize money;[34] by one or more taxpayers,[35] or property owners; subject to an assessment;[36] but not by one of several importers to enjoin the seizure of their different imports under an unconstitutional statute.[37] Where none of the complainants in the class suit are entitled to relief, the court cannot grant relief to persons who have not been joined as parties, on whose behalf it is claimed the suit was brought.[38]

§ 115. Suits against one or more of a class. Similarly, where persons who are jointly liable are very numerous, some may be sued instead of all, provided that the manner in which they are sued, and the fact that they are numerous, are stated in the bill.[1] Ordinarily, the complainant selects such of the class as he chooses to represent the rest. The persons thus selected may be a committee chosen by the rest of the class to

26 Mangels v. Donau Brewing Co., 53 Fed. 513.

27 Brown v. Duluth & N. Ry. Co., 53 Fed. 889, 894. But see § 145, *infra*.

28 Bennett v. Honywood, Ambler, 708; Story's Eq. Pl. § 104, and cases cited.

29 Upon this point there is a conflict of authority. Compare Brown v. Ricketts, 3 J. Ch. (N. Y.) 555, and Davone v. Fanning, 4 J. Ch. (N. Y.) 199, with Kettle v. Crary, 1 Paige (N. Y.), 417, note. See also Story's Eq. Pl., § 89.

30 Story's Eq. Pl., § 105.

31 Watson v. National Life & Tr. Co., C. C. A., 162 Fed. 7.

32 Chancey v. May, Prec. Ch. 592; Small v. Atwood, 1 Younge, 407.

33 Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942.

34 Good v. Blewitt, 13 Ves. 397; West v. Randall, 2 Mason, 181, 194.

35 Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070.

36 McIntosh v. Pittsburg, 112 Fed. 705.

37 Scott v. Donald, 165 U. S. 107, 41 L. ed. 648.

38 Watson v. National Life & Tr. Co., C. C. A., 189 Fed. 872.

§ 115. 1 Story's Eq. Pl., §§ 116, 117; McArthur v. Scott, 113 U. S. 340, 395, 28 L. ed. 1015, 1032; Baltimore, C. & A. Ry. Co. v. Godeffroy,

act for them in the matters complained of, such as a reorganization, or a protective, committee of stockholders and bondholders,[2] or the managing committee of a clearing-house association.[3] It is proper, however, to name all of the class in the title to the bill, and then have the court select some of these to be served and to defend for the rest.[4] This rule has been applied to members of a club,[5] or of another unincorporated association when sued for the collection of its debts, or to enjoin a violation of the anti-trust act;[6] to members of a trades union engaged in a strike;[7] and to the stockholders of a corporation in a suit brought by a creditor after its dissolution to recover the amount of its capital stock which has been divided among them.[8] It has been held: that in a suit for an injunction, against a voluntary association with numerous members, the whole association will be brought before the court, by service upon its president, secretary, manager and superintendents.[9] It has been said that "this rule has always been understood to modify somewhat the general doctrine in England, that parties, not formally served with process, may yet be bound on the principle of representation to the fullest extent that those are bound who are their representatives in the suit. The language of the reservation is that in such cases the decree shall be without prejudice to the rights and claims of all absent parties. The rule especially is framed to allow a suit to proceed without having all the members of an association or of a class of defendants formal parties; but, while

C. C. A., 182 Fed. 525; Carpenter v. Knollwood Cemetery, 198 Fed. 297.

[2] Railroad Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Carpenter v. Knollwood Cemetery, 198 Fed. 297.

[3] Yardley v. Philler, 58 Fed. 746.

[4] Ayres v. Carver, 17 How. 591, 15 L. ed. 179.

[5] Cullen v. Duke of Queensberry, 1 Brown's Ch. 101; Cousins v. Smith, 13 Ves. 544; Story's Eq. Pl., § 116.

[6] U. S. v. Coal Dealers' Ass'n of California, 85 Fed. 252.

[7] Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. 598.

[8] Mandeville v. Riggs, 2 Pet. 482, 7 L. ed. 493; Railroad Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Wood v. Dummer, 3 Mason, 315.

[9] Spaulding v. Evenson, 149 Fed. 913, 916. See also Stationary Engineer Pub. Co. v. Comerford, 155 Fed. 667, 670; A. R. Barnes Co. v. Berry, C. C. A., 156 Fed. 72. But see Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 183; holding that the decree did not bind the absentees or defendants who had been represented but not served.

preserving the right of the absent ones to afterwards litigate for themselves the same question, it does not prohibit the whole class, when plaintiffs, from taking the benefit of a decree in favor of those who represent them, nor preclude a plaintiff who has sued the whole class by their representatives, from binding the absent parties by supplemental proceedings to bring them in when known, if necessary, and subject them to the decree, when they have had that opportunity to defend against it." [10]

§ 116. Suits by or against one or more as representatives of a class claiming a common right. In some instances when a number of persons have a common interest in the decision of a question of fact or law, though they have no common interest in any property which is the subject of litigation, yet as they are said to claim under a common right, one or more of them have been allowed to represent the rest as plaintiffs or defendants in a suit to determine the disputed question.[1] Ordinarily, the complainant selects such defendants as he considers proper and sufficient; but he may name all of the class in the title of his bill and ask the court to select a few to defend on behalf of the rest.[2] Instances where a suit of this kind has been allowed by one or more as plaintiffs in behalf of others similarly situated have usually occurred when, although the plaintiff and those represented by him had no common interest in property, yet he sought a determination of a question affecting the enjoyment of estates which, though distinct, came to him and the rest from a common source. Thus, one or more tenants or parishioners may sue a lord of a manor or parson, to establish a right of common,[3] or of turbary.[4] Two or more foreign corporations were permitted to file a bill, on behalf of themselves and all other foreign corporations similarly affected, in order to enjoin the execution of an un-

[10] Am. Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, 90 Fed. 598, 605, per Hammond, J.

§ 116. [1] West v. Randall, 2 Mason, 181, 195. See Percy Summer Club v. ..stle, 145 Fed. 53.

[2] Ayres v. Carver, 17 How. 591, 15 L. ed. 179.

[3] Anon., 1 Chancery Cases, 269; Conyers v. Lord Abergavenny, 1 Atk. 285; Brown v. Vermuden, 1 Ch. Cas. 272; Smith v. Earl Brownlow, L. R. 9 Eq. 241.

[4] Baker v. Rogers, Sel. Ch. Cas. 74.

constitutional statute.[5] A few defendants have been allowed to represent a large class, not only when all of that class had some privity of estate, but also in other cases. Thus, a parson was allowed to sue a few on behalf of all his parishioners to establish a disputed right to tithes.[6] A lord of a manor may sue some on behalf of all of his tenants to establish their duty to grind at his mill, or his right of enclosure,[7] or to enforce a rent-charge.[8] Bills were sustained when brought by those interested in contesting the legality of the issue of certain certificates of indebtedness, against some on behalf of all of the holders of such certificates;[9] and when brought by the purchaser to set aside a sale to him by a decedent against the executor of the vendor and some of his heirs at law, the other heirs at law being unknown.[10] It seems that a bill can be sustained when filed by a claimant to the equitable title to a tract of land against some on behalf of all who have severally bought with notice parcels of it since his right accrued, praying that their conveyances be set aside as in fraud of his rights.[11] It has been held that in a suit by a railroad company against a State Commission, to enjoin the enforcement of charges for freight, shippers of articles affected by such charges may properly be joined as defendants, as representatives of their class, upon an allegation that unless an injunction is granted against them they will attempt to enforce such rights.[12] "It has long been settled, that if a person has a common right against a great many of the king's subjects, inasmuch as he cannot contend with all the king's subjects, a court of equity will permit him to file a bill against some of them, taking care to bring so many persons before the court that their interests shall be such as to lead to a fair and honest support of the pub-

[5] Greenwich Ins. Co. v. Carroll, 125 Fed. 121.

[6] Brown v. Vermuden, 1 Ch. Cas. 272; Hardcastle v. Smithson, 3 Atk. 246.

[7] Brown v. Vermuden, 1 Ch. Cas. 272. *Cf.* U. S. v. Dastervignes, 118 Fed. 199; s. c., C. C. A., 122 Fed. 30.

[8] Attorney-General v. Wyburgh, 1 P. Wms. 599; s. c., 2 Eq. Cas. Abr. 167; Attorney-General v. Jackson, 11 Ves. 365, 367; Attorney-General v. Shelly, 1 Salk. 162.

[9] Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8.

[10] Alger v. Anderson, 78 Fed. 729, 733.

[11] Ayres v. Carver, 17 How. 591, 15 L. ed. 179.

[12] Northern Pac. Ry. Co. v. Lee, 199 Fed. 621.

lic interest; and when a decree has been obtained, then with respect to the individuals whose interest is so fully and honestly established, the court on the footing of the former decree will carry the benefit of it into execution against other individuals who were not parties."[13] Thus, a city may file such a bill to establish its right to levy a duty;[14] and it has been suggested that a suit may thus be brought by one of many persons jointly interested in a geographical trade-mark.[15] In these cases, as has been said, a decree against the defendants before the court has been held in England to bind others of the same class.[16] It has been said that this would be the rule here.[17] Under the former Equity Rules,[18] it was said that the doctrine did not apply to members of unincorporated trades' unions.[19]

§ 117. **Omission of defendants not within the jurisdiction of the court.** The second exception to the general rule is, that persons who cannot be subjected to the jurisdiction of a court of equity need not be joined as parties to a bill, provided that their presence is not indispensable to a decree. "When any are absent from the jurisdiction who, if within it, would be necessary parties defendant, their presence will ordinarily be dispensed with, provided an equitable and effectual decree can be made against those who have been served with process. The former English practice was to charge in the bill the fact of the absence from the realm of any who otherwise ought to have been joined as defendants, and to pray that they might be served with process if they came within the jurisdiction. Under the modern English system this strictness is not required, and it seems to be sufficient if the excuse for not mak-

13 Lord Eldon in Weale v. West Middlesex Water Works Co., 1 Jac. & Walk. 358, 369.

14 City of London v. Perkins, 3 Bro. Parl. Cas. 602; Mayor of York v. Pilkington, 1 Atk. 282.

15 City of Carlsbad v. Tibbetts, 51 Fed. 852, 856, per Putnam, J.

16 Brown v. Vermuden, 1 Ch. Cas. 272; Lord Eldon in Weale v. West Middlesex Water Works Co., 1 Jac. & Walk. 358, 369.

17 Wallace v. Adams, 204 U. S. 415, 425, 51 L. ed. 547, 552; Chisolm v. Caines, 121 Fed. 397, 400. *Cf.* U. S. v. Old Settlers, 148 U. S. 427, 480, 37 L. ed. 509, 529.

18 Eq. Rule 48, of 1842.

19 See McArthur v. Scott, 113 U. S. 340, 395, 28 L. ed. 1015, 1032; Am. Steel & Wire Co. v. Wire Drawers' & Dye Makers' Unions, 90 Fed. 598; Irving v. Joint District Council, &c., of United Brotherhood of Carpenters, etc., 180 Fed. 896.

ing the absent parties defendant appears on the face of the bill."[1] This rule of equity practice has been confirmed by statute in the United States. "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of, nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."[2] This statute is, however, merely declaratory, and does not enlarge the power previously possessed by courts of equity.[3] The power has been extended by rule, and parties not indispensable to an equitable decree may be omitted if their joinder would oust the court of jurisdiction by placing persons of the same citizenship upon different sides of a controversy. "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in its discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."[4] "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to

§ 117. [1] Judge Dwight Foster in Palmer v. Stevens, 100 Mass. 461, 466.

[2] U. S. R. S., § 737. See Conolly v. Wells, 33 Fed. 205; Wall v. Thomas, 41 Fed. 620; Greenhall v. Carnegie Tr. Co., 180 Fed. 812.

[3] Shields v. Barrow, 17 How. 130, 141, 15 L. ed. 158, 161.

[4] Eq. Rule 39. This modifies the language of Eq. Rule 47, of 1842, by omitting the words "necessary or" before the word "proper."

other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction."[5] "Such being the general rule, it remains to be considered what parties are indispensable to an equitable decree. As has been said above, a court of equity will ordinarily seek to have before it as parties all persons in any manner interested in the subject-matter of the litigation, in order to make a decree that will prevent the necessity of a subsequent appeal to its aid.[6] This rule, however, having been established for the promotion of justice, will be modified whenever its rigid enforcement would prevent the court from doing justice to a person invoking its protection. Accordingly it will proceed to a decree without the presence of such parties as cannot be subjected to its jurisdiction, provided it can determine the respective rights of the parties before it without affecting those of the rest. There are three classes of parties: formal parties; parties necessary to a decree which completely disposes of the controversy, so that the aid of the court need not be invoked again, but whose interests are so far separable from those of the parties before the court, that it can dispose of the controversy between the latter without affecting the interests of the former; and parties with an interest in the controversy "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."[7] Of these the first two classes can always be omitted, when they are beyond the reach of the process of the court or when their joinder would oust its jurisdiction[8] Thus where a

[5] Simms v. Guthrie, 9 Cranch, 19, 3 L. ed. 642; Meredith, 21 How. 489, 16 L. ed. 201.

[6] § 110, *supra*.

[7] Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 139, 15 L. ed. 158. See Chadbourne v. Coe, 51 Fed. 479.

[8] Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 187 Fed. 474. The rule upon the subject has been well stated by Mr. Justice Bradley: "The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessity of particular cases. The true distinction appears to be as

bill was filed for the construction of a will, an account by the executrix, and a declaration that certain heirs had abandoned their rights in a part of the estate, in the absence of one of the heirs the court took jurisdiction so as to grant all the relief prayed except that which affected him.[9]

§ 118. Formal parties who may be omitted when without the jurisdiction. Formal parties are those with a naked legal title, but no equitable interest in the subject-matter of the controversy. When the persons really interested are before the court, formal parties can always be omitted if without the jurisdiction,[1] and their joinder, no matter whether as plaintiffs or defendants, cannot oust the court of jurisdiction, as they are in reality upon neither side of the controversy.[2] Such are: a husband against whom no relief is sought, in a suit by his wife to enforce the trusts of a marriage settlement;[3] trustees of prior railroad mortgages in a suit for the foreclosure of a subsequent mortgage and the sale of the mortgaged property subject to their liens;[4] and parties with the

follows: First, when a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, when a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, when he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not at the option of the complainant." Williams v. Brownhead, 19 Wall. 563, 571, 22 L. ed. 184, 187. See Chadbourne v. Coe, 51 Fed. 479.

[9] Waterman v. Canal-Louisiana Bank & Tr. Co., 215 U. S. 33, 49, 54 L. ed. 80, 86.

§ 118. [1] Simms v. Guthrie, 9 Cranch, 19, 25, 3 L. ed. 642, 644; Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. ed. 651, 659; Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

[2] Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. ed. 651, 659; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Harter v. Kernochan, 103 U. S. 562; *supra*, § 60.

[3] Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651; Taylor v. Holmes, 14 Fed. 499. But see Watts v. Waddle, 1 McLean, 200.

[4] Pacific R. Co. v. Ketchum, 101 U. S. 289, 298, 25 L. ed. 932, 936.

naked legal title having no interst in the controversy.[5] A person against whom an injunction is sought, unless he consents thereto, cannot be omitted.[6] When a suit is brought to recover the possession of real or personal property the person in possession is not a formal party.[7] Where policy holders sued to enforce their rights against assets transferred to insurance companies, with whom they had not contracted, and the bill also prayed relief against funds deposited by some of the corporation defendants with the State auditor; it was held that his absence would not prevent the grant of the rest of the relief which the complainants sought.[8]

§ 119. Parties whose interest is separable. The second class is not so easy to define; and it is difficult to mark the limits between this and the third class of parties who are always indispensable. It includes all having an interest in the controversy so far separable from that of those before the court that a decree can be made and enforced which disposes of the matter in dispute between the latter without affecting their rights.[1] Thus, a trustee or director or executor beyond the jurisdiction has been held properly omitted in a suit against his colleagues for a breach of trust, or for an accounting.[2] For a trustee's liability is joint and several.[3] One of

5 Simms v. Guthrie, 9 Cranch, 19, 25, 3 L. ed. 642, 644; Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034; Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015; Walden v. Skinner, 101 U. S. 577, 588, 25 L. ed. 963, 967; Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69; Jackson v. Jackson, C. C. A., 175 Fed. 710, 717.

6 Ward v. Arredondo, 1 Paine, 410; Mills v. Hurd, 32 Fed. 127.

7 Mass. & So. Const. Co. v. Cane Creek Tp., 155 U. S. 283, 39 L. ed. 152.

8 Watson v. National Life & Tr. Co., C. C. A., 162 Fed. 7.

§ 119. 1 Cameron v. McRoberts, 3 Wheat. 591, 4 L. ed. 467; Mallow v. Hinde, 12 Wheat. 193, 6 L. ed. 599; Gridley v. Wynant, 23 How. 500, 16 L. ed. 411; Horn v. Lockhart, 17 Wall. 570, 21 L. ed. 657; Nesmith v. Calvert, 1 Woodb. & M. 34.

2 Parsons v. Howard, 2 Woods, 1, 5; Heath v. Erie Ry. Co., 8 Blatchf. C. C. 345; Hazard v. Durant, 19 Fed. 471, 476; Plume & A. Mfg. Co. v. Baldwin, 87 Fed. 785; Bay State Gas Co. v. Rogers, 147 Fed. 557, where it was not charged that the omitted trustees had shared in the money, as to which an accounting was prayed. But see Wall v. Thomas, 41 Fed. 620.

3 Parsons v. Howard, 2 Woods, 1, 5; Heath v. Erie Ry. Co., 8 Blatchf. 347.

the next of kin[4] may sue an administrator and his sureties; and a legatee,[5] at least if not a residuary legatee,[6] may sue an executor to recover his share of a decedent's estate without joining the rest of the class to which he belongs. It seems that the executor of a dead debtor need not be a party to a bill brought by a creditor of the estate to obtain payment out of assets in the hands of a legatee.[7] One of several tenants in common is not an indispensable party to a suit by another against a stranger, to establish the plaintiff's interest in the property.[8] "In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him."[9] It has been held: that an heir at law, whose presence could oust the jurisdiction, may be omitted from a suit by another heir, to set aside a deed and will by their common ancestor, and to recover the plaintiff's share of the common property.[10] The mortgagor is not an indispensable, although he is a proper, party to a bill to collect a mortgage from a purchaser who has assumed it, when, before the bill is filed, the mortgaged property was sold upon the foreclosure of a prior mortgage;[11] nor are the heirs of the mortgagor indispensable parties to a fore-

[4] Payne v. Hook, 7 Wall. 425, 19 L. ed. 260. See, however, West v. Randall, 2 Mason, 181; Wisner v. Barnet, 4 Wash. C. C. 631, 642; Greene v. Sisson, 2 Curtis, 171.

[5] Dandridge v. Washington's Ex'rs, 2 Pet. 377, 7 L. ed. 457. See West v. Randall, 2 Mason, 181.

[6] See McArthur v. Scott, 113 U. S. 340, 395, 28 L. ed. 1015; Braduin v. Harpur, Ambler, 374; Hawly v. Harvey, 4 Beav. 215; s. c., 5 Beav. 134.

[7] Milligan v. Milledge, 3 Cranch, 220, 2 L. ed. 417.

[8] Martin v. Fort, 83 Fed. 19, 27 C. C. A. 428; Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425; North Carolina Mining Co. v. Westfeldt, 151 Fed. 290, 296; Allred v. Smith, 135 N. C. 443, 452, 47 S. E. 597, 65 L.R.A. 924; Browne v. Browne, Fed. Cas. No. 2,035 (1 Wash. C. C. 429).

[9] Eq. Rule 41, copied from Eq. Rule 50 of 1842. It has been held: that the heirs of a decedent, who hold a beneficial life interest in, and a power of testamentary appointment over, certain property, are not indispensable parties to a suit against the representatives of the trustee to enforce the rights of the complainants to the same. Martin v. Fort, 83 Fed. 19, 27 C. C. A. 428.

[10] Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L.R.A. 425.

[11] Kelly v. Ashford, 133 Fed. 610, 626. But see Skinner v. Harker, 23 Colo. 333. *Supra*, § 112.

closure suit, when the bill and answer show that the entire interest in the premises has passed to the defendant; although the bill alleges that it passed by descent at the death of the mortgagor, and the answer that the defendant had acquired it by purchase.[12] Subsequent lienors are not indispensable parties to a foreclosure.[13] Where the title to part of the mortgaged premises had passed to a sovereign, who could not be sued, and all the other parties in interest were joined; it was held, that the court could except the land so conveyed, decree a sale of the balance and enter a deficiency judgment, if the proceeds of the sale were insufficient.[14] Persons in possession of the property, as agents of a defendant, are not indispensable parties to a foreclosure suit.[15] It has been held: that the pledgee of corporate stock is not an indispensable party to a suit to determine the title to the name; provided that its citizenship would defeat the jurisdiction; and that the court may, in its decree, protect the interests of the pledgee, by declaring the stock to be subject to the same lien, if any, that it had at the beginning of the suit.[16] It has been held: that neither a State, nor any of its officers, is a necessary party to a suit by an executor to compel a corporation to transfer to him stock standing in the testator's name, with a claim for damages because of the delay, although the stock is subject to a lien for an inheritance tax.[17] It has been held that the mortgagor is not an indispensable party to a suit by the mortgagee to enjoin the enforcement against the mortgaged property of unconstitutional legislation,[18] or to a suit by the mortgagee,[19] or by the

[12] Cooper v. Johnson, 157 Fed. 104.

[13] Brewster v. Wakefield, 22 How. 118, 129, 16 L. ed. 301; Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans C. & B. Co. v. Stafford, 12 How. 343, 13 L. ed. 1015; Howard v. Railway Co., 101 U. S. 837, 25 L. ed. 1081; Nalle v. Young, 160 U. S. 624, 40 L. ed. 560. See *supra*, § 112.

[14] Kawananakoa v. Polyblank, 205 U. S. 349.

[15] Golden Cross Min. & Mill. Co. v. Free Gold Min. Co., C. C. A., 154 Fed. 441.

[16] Edwards v. Mercantile Trust Co., 124 Fed. 381, 389.

[17] Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931.

[18] Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865; City and County of Denver v. N. Y. Tr. Co., C. C. A., 187 Fed. 890.

[19] Ban v. Columbia Southern Ry. Co., C. C. A., 117 Fed. 21.

bondholders,[20] to enjoin trespasses on the mortgaged property by striking employees of the mortgagor, and even that such bondholders need not allege a previous demand for the institution of such a suit by the mortgagor or by their trustee.[21] To a bill to enjoin trespass upon land, the person under a contract with whom the trespassers claim the right to use the land is not an indispensable party.[22] The early English cases hold: that in a suit against a firm, by strangers, a partner beyond the jurisdiction may be omitted if no injustice will be done him by a decree in his absence;[23] but the American authorities seem to be opposed to this.[24] It has been held that in a suit by one partner against another for an account of money received by the defendant in excess of his share of the firm assets, partners beyond the jurisdiction may be omitted if it appears that each has received his full share of the joint property,[25] and that a partner, whose sole interest is a share of the joint profits of a contract, is not an indispensable party to a suit by another member of the firm, to foreclose a mechanic's lien for the gross amount due.[26] A subcontractor who has fraudulently collected money from the United States may be sued at law to recover this without the joinder of the contractor, although the latter at the former's instigation made the fraudu-

20 The trustee does not seeem to have been a party, although the objection for not joining appears not to have been raised. Carter v. Fortney, 170 Fed. 463. But see Consol. Water Co. v. City of San Diego, 89 Fed. 272.

21 Carter v. Fortney, 170 Fed. 463.

22 Paint Creek Co. v. Gallego Coal & Land Co., C. C. A., 166 Fed. 62.

23 Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510; Calvert on Parties, Book III, ch. xxiii; Smith v. Consumers' Cotton-Oil Co., 86 Fed. 359; Vose v. Philbrook, 3 Story C. C. 335. *Cf.* Perkins v. Hendryx, 127 Fed. 448; s. c., 149 Fed. 526, 529; Lawrence v. Rokes, 53 Maine, 110.

24 Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973; Parsons v. Howard, 2 Woods, 1; Bell v. Donoughue, 17 Fed. 710; Mudgett v. Gager, 52 Maine, 541. See § 119, *infra*.

25 Towle v. Pieree, 21 Met. (Mass.) 329; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005. But see § 119, *infra*.

26 *Ex parte* Haggerty, 124 Fed. 441. Where the business of the firm was conducted by two houses, and those who managed one house had assigned their interest to the managers of the other; it was held: that the former, who filed a disclaimer, might be made defendants; and that their citizenship, which was the same as that of the principal defendant, did not defeat the jurisdiction. Poole v. West Point Butter & Cheese Ass'n, 30 Fed. 513.

lent representations.[27] "The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be fixed up in controversies between the parties on the other side, in which they have no concern."[28] An heir may file a bill for the specific performance of a contract entitling his ancestor to purchase land without bringing in the personal representative of his ancestor, provided that he offers himself to provide for the payment of the purchase-money.[29] Specific performance of a contract for the sale of land may be enforced against one of several joint tenants without joining the others with him as defendants.[30] It was held that to a bill to set aside a deed and power

27 U. S. v. Salisbury, 157 U. S. 121, 39 L. ed. 642.

28 Mr. Justice Field in Willard v. Tayloe, 8 Wall. 557, 571, 19 L. ed. 501, 505. But see Hoxie v. Carr, 1 Sumner, 173. It has been held: that, to a suit by an assignee of part of the rights under a contract to compel specific performance of the same, the owners of the other parts are necessary parties under the old Chancery rule; but not indispensable parties under the rule of the Federal court, Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606, 616. A party to a contract, who has received a release, Dodge v. Frank Waterhouse & Co., 156 Fed. 57; or one who has released his interest, Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894, is not an indispensable party to a suit to enforce the same.

29 Prout v. Roby, 15 Wall. 471, 21 L. ed. 58.

30 Stephen v. Beall, 22 Wall. 329, 22 L. ed. 786. It has been held, that a corporation, which is not a party to a contract for the conveyance of certain property thereto, is not an indispensable party to a suit to compel specific performance, Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606, 616; and that corporations are not indispensable parties to a suit for specific performance of a contract to convey land owned by them, which was made on their behalf by a corporation which held the control of their stock, Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1. A railway company is not an indispensable party to a bill against its receiver to enforce specific performance of a contract made by it, Express Co. v. Railroad Co., 99 U. S. 191, 25 L. ed. 319. To a bill to enjoin the execution of a judgment of ejectment and to decree a conveyance of lands, when the plaintiffs had an equitable title only, the persons whose legal title the complainants asserted were held properly omitted, when no relief was prayed against them, and their joinder would have ousted a court of jurisdiction, Simms v. Guthrie, 9 Cranch, 19, 25, 3 L. ed. 642, 644. See also Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034. But compare Mallow v. Hinde, 12 Wheat.

of attorney for the sale of land, a purchaser of part of the land from one of the defendants was not an indispensable party.[31] The assignor of a claim is not a necessary party to a suit upon it by his assignee,[32] unless the assignment be executory,[33] the assignor has an equitable interest in the claim.[34] Where a contract is joint and several, all parties to the same are not indispensable to a suit to enforce it.[35] A party to a contract with a trustee, which has been released, is not an indispensable party to a suit by the *cestui que trust* to compel such trustee to account for the loss he has thereby sustained.[36] It has been held: that a State is not an indispensable party to a bill, by the United States against a private individual, to cancel a contract between him and the State for the purchase of land obtained by the State from the national Government through mistake or fraud.[37] It has been held that a corporation, whose citizenship will defeat the jurisdiction, is not an indispensable party to a suit by a minority stockholder to compel the majority to account to the complainants for their share of the property, which such majority have misappropriated[38] that a corporation is not an indispensable party to a suit in equity by bondholders against directors, to compel them to make good fraudulent representations recited in their mortgage,[39] that an officer of a corporation, who has deposited with the defendants money, which it is charged he embezzled from the company, is not an indispensable party to a suit to establish a trust in the same.[40] The holder of a certificate of stock in a corporation, which has

193, 6 L. ed. 599. A border case is Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289.

31 Billings v. Aspen M. & S. Co., 51 Fed. 338, 350. See Hicklin v. Marco, 56 Fed. 549.

32 Batesville Inst. v. Kauffman, 18 Wall. 151, 21 L. ed. 775; Trecothick v. Austin, 4 Mason, 16; Rogers v. Penobscot Min. Co., C. C. A., 154 Fed. 606.

33 Land Co. v. Elkins, 20 Fed. 545.

34 Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470; Hubbard v. Manhattan Tr. Co., C. C. A., 87 Fed. 51, 57.

35 Richmond Cedar Works v. Buckner, 181 Fed. 424. Under the Iowa Code of 1897, § 3465, a surety may be sued without joining the principal upon the bond. Kans v. Am. Surety Co., 199 Fed. 972.

36 Frank Waterhouse & Co. v. Dodge, C. C. A., 162 Fed. 1.

37 Williams v. U. S., 138 U. S. 514, 516, 34 L. ed. 1026, 1028.

38 Kuehler v. Greene, 163 Fed. 91.

39 Slater Tr. Co. v. Randolph-Macon Coal Co., 166 Fed. 171.

40 White Swan Mines Co. v. Baliet, 134 Fed. 1004.

been cancelled by a decree in another court, is not an indispensable party to a bill to compel the issue to the complainant of a new certificate for the same stock.[41] Stockholders and creditors are not necessary parties to a suit to foreclose a lien upon the property of the corporation.[42] It has been held: that to a bill to restrain the directors of a corporation from negotiating a fraudulent sale of its property, the person to whom the sale is about to be made is not an indispensable party if no contract has been made with him;[43] that a party, whose presence will defeat the jurisdiction, is not an indispensable party to a suit to enjoin the making of a contract with him;[44] that contractors of a city are not indispensable parties to a suit to enjoin the municipal corporation from creating a debt beyond the constitutional limit, by carrying out its contract with them,[45] and that a non-resident is not an indispensable party to a bill to enjoin the transfer of property to it.[46] In proceedings under section 18 of the Interstate Commerce Act against a railroad company to enforce an order of the commission, it is not necessary that another carrier making the forbidden rate jointly with the defendant be made a party when it is without the jurisdiction.[47] To a suit by one indorser of a bill of exchange to restrain the collection of a judgment against him upon the ground that the bill had been paid by another indorser, the latter is not a necessary party.[48] To a bill by a creditor to satisfy a judgment out of land in a debtor's possession, but fraudulently conveyed by him to a person beyond the jurisdiction of the court, the person in whose name the land stood was held not to be an indispen-

[41] Citizens Sav. & L. Ass'n v. Belleville & S. I. R. Co., C. C. A., 117 Fed. 109.

[42] Godchaux v. Morris, C. C. A., 121 Fed. 482.

[43] Abbot v. American H. R. Co., 4 Blatchf. C. C. 489; Wallace v. Holmes, 9 Blatchf. C. C. 65.

[44] Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183; Wilson v. Am. Palace Car Co., 67 N. J. Eq. 262, 58 Atl. 195.

[45] City Water Supply Co. v. Ottumwa, 120 Fed. 309. But see *infra*, § 119.

[46] Wilson v. Am. Palace Car. Co., 67 N. J. Eq. 262, 58 Atl. 195. See City Water Supply Co. v. Ottumwa, 120 Fed. 309.

[47] Interstate Com. Com'n v. Texas & P. Ry. Co., 52 Fed. 187; s. c. as T. & P. Ry. Co. v. Interstate Com. Com'n, 162 U. S. 197, 265, 40 L. ed. 940.

[48] Atkins v. Dick, 14 Pet. 114, 10 L. ed. 378.

able party.[49] It has been held that a tenant in common of a water-right may sue to enjoin an injury to the property without making his co-tenant a party,[50] but that where the complainant seeks an injunction against interference by owners of the upland with his right to divert the water for irrigation, all persons who claim any right to use the waters of the stream are indispensable parties, although their joinder would defeat the jurisdiction.[51] It has been said that, to a bill by a private individual to enjoin the maintenance of a public nuisance, neither persons jointly interested with him nor those jointly guilty with the defendant are indispensable parties.[52] It has been suggested that the absence of one person guilty of a joint fraud might not prevent the court from taking jurisdiction over the others.[53] And in general to a suit for an injunction against a tort,[54] not committed under color of a contract right, or against the infringement of a patent when no accounting is prayed,[55] one or more of the joint wrong-doers may be

[49] McCoy v. Rhodes, 11 How. 131, 141, 13 L. ed. 634, 638. But see Billings v. Aspen M. & S. Co., 51 Fed. 338.

[50] Union M. & M. Co. v. Dangberg, 81 Fed. 73, 87; Washington State Sugar Co. v. Sheppard, 186 Fed. 233.

[51] Washington State Sugar Co. v. Sheppard, 186 Fed. 233. In view of the water code of Oregon, Act of February 24, 1909, L. 1909, p. 319, it was held that, where a suit was there brought to enjoin the defendants from using the waters of a stream, the Federal court should require the parties either to proceed under the statute or to bring in all other persons in interest. Pacific Live Stock Co. v. Silvies River Irr. Co., 200 Fed. 487.

[52] Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

[53] Judge Dwight Foster in Palmer v. Stevens, 100 Mass. 461, 466. See also Heath v. Erie Ry. Co., 8 Blatchf. C. C. 347 and note 2 *supra*. But see Bell v. Donohoe, 17 Fed. 710; Wall v. Thomas, 41 Fed. 620.

[54] Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Fed. Cas. No. 2,989 (1 Sawy. 470). The directors of a corporation are not indispensable parties to a suit by a stockholder to restrain it from acting in violation of his rights fraudulently or *ultra vires*, Geer v. Mathieson Alkali Works, 190 U. S. 428, 436, 47 L. ed. 1122, 1126; Hatch v. Chicago, Rock Island & Pac. R. R. Co., 6 Blatchf. 105, 114; Sidway v. Missouri L'd. & L. S. Co., 116 Fed. 381; Witherbee v. Bowles, 201 N. Y. 427. A corporation, the entire capital stock of which is owned by another company, is not an indispensable party to a suit by a stockholder of the latter, to restrain the latter from leasing the former's railroad. Sabre v. United Tr. & El. Co., 156 Fed. 79, 81.

[55] American B.-Mach. Co. v. Cros-

omitted. In an action by a creditor of a corporation to enforce the individual liability of its directors or stockholders, or to collect unpaid assessments or subscriptions from them, he cannot usually sue alone at law, but should file a bill in equity in behalf of himself and the other creditors, if any;[56] according to his pleasure.[57] The United States are not indispensable parties to a suit to enjoin a marshal from executing a judgment in their favor which was entered without jurisdiction;[58] but it has been held that an Indian agent is a proper, although not an indispensable, party to a suit to determine rights under leases of Indian lands.[59] A State is not an indispensable party to a bill seeking to restrain its officers from levying for its benefit an illegal tax;[60] nor, it has been held, to a bill to prevent their illegal issue of land warrants for property which it had agreed to convey to the plaintiff;[61] nor to a bill to restrain their unlawful issue of bonds which would diminish the value of bonds held by the complainant.[62] To such bills the persons to whom the unlawful issue of bonds or land warrants is about to be made, are not indispensable parties.[63] It has been said, that, in proceedings to establish claims against decedents estates, the Federal courts should follow the local law, and that

man, 57 Fed. 1021 (partners). The officers, agents and stockholders of a corporation may be enjoined from infringing a patent while acting for the company when the corporation itself is not a party and is beyond the jurisdiction. Edison El. L. Co. v. Packard El. L. Co., 61 Fed. 1002.

56 Hornor v. Henning, 93 U. S. 228, 23 L. ed. 879; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Terry v. Tubman, 92 U. S. 156, 23 L. ed. 537; Pollard v. Bailey, 20 Wall. 526, 22 L. ed. 378; Welles v. Graves, 41 Fed. 459; First Nat. Bank v. Peavey, 75 Fed. 154. But see Alderson v. Dole, C. C. A., 74 Fed. 29; *supra*, § 81.

57 Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. ed. 349; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Manufacturing Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034.

58 Buckley v. U. S., 196 Fed. 429.

59 Texas Co. v. Central Fuel Oil Co., C. C. A., 194 Fed. 1.

60 Osborn v. Bank of U. S., 9 Wheat 738, 6 L. ed. 204; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401.

61 Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Hancock v. Walsh, 3 Woods, 351. But see Cunningham v. Macon & B. R. Co., 109 U. S. 446, 453, 27 L. ed. 992, 994.

62 Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; *supra*, § 105.

63 Davis v. Gray, 16 Wall. 203, 233, 21 L. ed. 447, 457; Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. ed. 183.

no persons are indispensable parties who would not be such were the proceedings instituted in a State court.[64]

§ 120. Parties indispensable to a decree. No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto.[1] A person is affected by a decree when his rights against, or liability to, any of the parties to the suit is thereby determined. If a decree in favor of the complainant would cast a cloud upon another's title, that person, it seems, is thereby directly affected.[2] All tenants in common of land are necessary parties to an action for trespass upon the same.[3]

It has been held that the several lessors of lands are indispensable parties to a suit between their respective lessees, when the validity of their title is in question.[4] The United States are necessary parties to a suit brought by a State against the Secretary of the Interior to establish the title to, and to prevent the other disposition of, lands which the National Government claims to own.[5] A State is an indispensable party to a bill against its officers to compel specific performance by them for it of its contract for the sale of land;[6] or to establish a claim to property held by its officers claiming a title in the State thereto;[6a] or a claim to corporate stock registered in its name, the certificates of which are held by its officers;[7] or to

[64] Farmers' Bank of Cuba City, Wis. v. Wright, 158 Fed. 841.

§ 120. [1] See § 122. But see Eagle Mfg. Co. v. Miller, 41 Fed. 351.

[2] Young v. Cushing, 4 Biss. 456; California v. Southern Pac. R. Co., 157 U. S. 229, 395 L. ed. 683. But see Hicklin v. Marco, 56 Fed. 549. It was held improper to compel defendant to make a deed confirming complainant's title to land conveyed by the latter's grantors when such grantors were not parties. Zenbrugg v. Reed (N. J. Ch., 1896), 35 Atl. 298.

[3] Cochran v. Brannan, 196 Fed. 219.

[4] South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729, 736.

[5] State of Louisiana v. Garfield, 211 U. S. 70, 53 L. ed. 92.

[6] Preston v. Walsh, 10 Fed. 315. See also Walsh v. Preston, 109 U. S. 297, 27 L. ed. 940.

[6a] See § 103, *supra*.

[7] Cunningham v. Macon & B. R. Co., 109 U. S. 446, 27 L. ed. 992; *supra*, § 37. Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 33 L. ed. 589; *supra*, § 103

compel the removal of a nuisance from State land;[8] but not, it has been held, to a bill by the United States against a private individual to cancel a contract between him and the State for the purchase of land obtained by the State from the plaintiff through mistake or fraud.[9]

All attaching creditors are indispensable parties to a suit to obtain the possession of assets, which have been seized by the sheriff under attachments issued at their application.[10] The trustee of an active trust is a necessary party to a suit affecting the trust estate,[11] but the legal representative of a trustee is not an indispensable party to a suit by a *cestui que trust* to enforce a contract concerning the trust property made by the former with the consent of the latter.[12] Every party to a contract, whether of sale or for another purpose, except one who has released,[13] or assigned,[14] his interest, or who has been released,[15] or an agent through whom the title has passed;[16] is ordinarily a necessary party to a suit to enforce it;[17] or to set it aside;[18] or unless its performance would amount to a

[8] Hopkins v. Clemson Agricultural College of South Carolina, 221 U. S. 636, 55 L. ed. 890.

[9] Williams v. U. S., 138 U. S. 514, 516, 34 L. ed. 1026.

[10] De Galard v. Safe Deposit & Trust Co. of Baltimore, 196 Fed. 981.

[11] McRea v. Branch Bank of Alabama, 19 How. 376, 15 L. ed. 688; O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840; Thayer v. Life Ass'n, 112 U. S. 717, 28 L. ed. 864; American B. S. v. Price, 110 U. S. 61, 28 L. ed. 70; Billings v. Aspen M. & S. Co., 51 Fed. 338, 350; s. c. in C. C. A., 52 Fed. 250. But see New Chester Water Co. v. Holly Mfg. Co., C. C. A., 53 Fed. 19; *supra*, § 113.

[12] Sage Land & Improvement Co. v. Ripley, C. C. A., 192 Fed. 785, where no such representative had been appointed.

[13] Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894.

[14] Northern Pac. Ry. Co. v. Kindred, 14 Fed. 77; Mackay v. Gabel, 117 Fed. 873; U. S. v. Clark, 129 Fed. 241; O'Shaugnessy v. Humes, 129 Fed. 953.

[15] Dodgs v. Frank Waterhouse & Co., 156 Fed. 57.

[16] Donovan v. Campion, 85 Fed. 71; Gross v. George W. Scott Mfg. Co., 48 Fed. 35; Hamilton v. Savannah, F. & W. Ry. Co., 49 Fed. 412; Mackey v. Gabel, 117 Fed. 873. But see California v. So. Pac. Co., 157 U. S. 229, 39 L. ed. 683.

[17] Mallow v. Hinde, 12 Wheat. 193, 6 L. ed. 599; Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Gregory v. Stetson, 133 U. S. 579, 33 L. ed. 792; Perin v. Megibben, 53 Fed. 86; Rollins Inv. Co. v. George, 48 Fed. 776; Farni v. Tesson, 1 Black, 309, 17 L. ed. 67; Judson v. Courier Co., 15 Fed. 541. McAulay v. Moody, 185 Fed. 144.

[18] Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Coiron v. Millaudon, 19 How, 113, 15 L. ed. 575; Gay-

nuisance;[19] or other tort unconnected with contract;[20] to enjoin a person from carrying it into effect;[21] even, it has been held, in a case at circuit, when the other parties are co-trustees beyond the jurisdiction of the court.[22] Thus, a railway company is an indispensable party to a suit to enjoin another railway company from constructing a road under a lease by it.[23] In a suit to enjoin the persuasion and assistance of contractors with plaintiff to violate their obligations, it was held that such contractors were indispensable parties.[24] The assignors and assignees of a patent are necessary parties to a bill against the Commissioner to expunge it from the records of the Patent Office.[25] To a bill in equity by a State, to enjoin a corporation from acquiring a majority of the stock of two competing railroad companies, chartered by such State, and thus obtaining and exercising ownership and control over their railroads; these railway companies, are indispensable parties.[26] A city is

lords v. Kelshaw, 1 Wall. 81. 17 L. ed. 612; Ribon v. Railroad Cos., 16 Wall. 446, 21 L. ed. 367; Lawrence v. Wirtz, 1 Wash. C. C. 417; Tobin v. Walkinshaw, 1 McAll, 26; Bell v. Donohoe, 17 Fed. 710; Florence S. Mach. Co. v. Singer Mfg. Co., 4 Fisher's Pat. Cas. 329; s. c:. 8 Blatchf. C. C. 113; Chadbourne v. Coe, 45 Fed. 822; Empire C. & T. Co. v. Empire C. & M. Co., 150 U. S. 159, 37 L. ed. 1037; New Orleans W. Co. v. New Orleans, 164 U. S. 471, 41 L. ed. 518; s. c. in C. C. A., 51 Fed. 479; Clark v. Great Northern Ry. Co., 81 Fed. 282; U. S. v. No. Pac. R. Co., 134 Fed. 715; Beswick v. Dorris, 174 Fed. 502. See, also, Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309. But see French v. Shoemaker, 14 Wall. 314, 20 L. ed. 852; West v. Duncan, 42 Fed. 430; Smith v. Lee, 77 Fed. 779.

[19] Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311.

[20] Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., Fed. Cas. No. 2,989 (1 Sawy. 470). But see Anderson et al v. Bassman et al., 140 Fed. 10.

[21] Northern Ind. R. Co. v. Michigan C. R. Co., 15 How. 233, 14 L. ed. 674; Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973. But see Heriot v. Davis, 2 Woodb. & M. 229; Boon's Heir v. Chiles, 8 Pet. 532, 8 L. ed. 1034; McConnell v. Dennis, C. C. A., 153 Fed. 547.

See in Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820, held that the United States might sue to set aside conveyances, made by Indians, of allotted lands within the statutory period of restriction, without joining such allottees.

[22] Wall v. Thomas, 41 Fed. 620.

[23] Northern Ind. R. Co. v. Mich. C. R. Co., 15 How. 233, 14 L. ed. 674.

[24] Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309.

[25] Backus P. S. H. Co. v. Simonds, 2 App. D. C. 290.

[26] Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499.

an indispensable party to a suit by a company claiming a street railroad franchise, to enjoin another railroad company from occupying the street.[27] To a bill to set aside a decree, the party in whose favor the decree was made is an indispensable party.[28] This rule applies to a judgment in favor of the United States which is voidable, but not void.[29]

To a bill against the administrator with the will annexed of Kosciuszko, claiming a legacy under an alleged codicil to the will, foreigners claiming the assets of the deceased as heirs at law were held necessary parties.[30] To a bill between partners for an accounting, all the surviving partners and the representatives of a deceased partner, even when alleged to be insolvent, are, it seems, indispensable parties,[31] unless it can be shown that each of those omitted has received his full share of the assets, and that no claim is made against him.[32] All the partners must be joined as plaintiffs and defendants in a suit to recover money due the firm,[33] or, it seems, to prevent the disposition of a fund held by the firm.[34] To a partition suit all of the tenants in common are indispensable parties.[35] A person in possession under a claim of a title or interest in property is a necessary party to a suit affecting it.[36] The mortgagor is a

27 Tacoma Ry. & Power Co. v. Pacific Traction Co., 155 Fed. 259.

28 Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; Harwood v. Railroad Co., 17 Wall 78, 21 L. ed. 558; Johnson v. Hunter, 127 Fed. 219. For a case where, upon a petition of intervention, a sale was set aside and a prior lien upon the property enforced, although the vendor, a trustee, residing beyond the jurisdiction, was not before the court: see Anthony v. Campbell, C. C. A., 112 Fed. 212.

29 Buckley v. U. S., 196 Fed. 429.

30 Armstrong v. Lear, 8 Pet. 52, 8 L. ed. 863.

31 Bank v. Carrollton R. Co., 11 Wall. 624, 20 L. ed. 82; Bartle v. Coleman, 3 Cranch. C. C. 283; Gray v. Larrimore, 2 Abb. C. C. 542; Brew v. Cochran, 141 Fed. 459.

32 Towle v. Pierce, 12 Met. (Mass.) 329; Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005.

33 Edgell v. Felder, 84 Fed. 69. Where the business of the firm was conducted by two houses, and those who managed one house had assigned their interest to the managers of the other: it was held: that that the former, who filed a disclaimer, might be made defendants: and that their citizenship, which was the same as that of the principal defendant, did not defeat the jurisdiction. Poole v. West Point Butter & Cheese Ass'n, 30 Fed. 513.

34 Raphael v. Trask, 194 U. S. 272, 48 L. ed. 973. *Cf. supra*, §§ 119, 420, 425.

35 Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825.

36 Williams v. Bankhead, 19

necessary party to a suit by the mortgagee against a third person to remove a cloud upon the title;[37] or to prevent an injury to the property when the decree must necessarily adjudicate unsettled rights of the mortgagor.[38] It is the safer practice to join the mortgagor as a party defendant to a bill by the mortgagee of a patent seeking an injunction against its infringement with damages or an account of profits.[39] It has been held: that all the devisees, who are joint tenants of land, are indispensable parties to a suit to foreclose a mortgage upon the same, given by an executor under a power in the will.[40] It was held that in a suit to compel the execution and foreclosure of a mortgage, prior incumbrancers and others claiming an interest in the mortgaged property were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.[41] To a bill to enforce specific performance of a contract, providing for the sale of land the title to which was in one party, and its distribution between both parties to the contract; when filed, after the death of each by the personal representatives of the one as complainants against the heirs-at-law of the other as defendants: the executors of the defendants' ancestor are necessary if not indispensable parties defendant, and the heirs-at-law of the complainant's decedent are not.[42] All a decedent's heirs-at-law are indispensable parties to a bill by one of them to set aside a sale of his property under a decree; and to such a bill the party to the former suit at whose instance the sale was made is also an indispensable party.[43] All a woman's heirs have been held necessary parties to a bill to set aside a marriage settlement.[44] To a bill by a stock-

Wall. 563, 22 L. ed. 184; Young v. Cushing, 4 Biss. 456. But see Ringo v. Binns, 10 Pet. 269, 281, 9 L. ed. 420, 425; Hicklin v. Marco, C. C. A., 56 Fed. 549.

37 Bettes v. Dana, 2 Summer, 383; Hicklin v. Marco, C. C. A., 56 Fed. 549.

38 Consol. Water Co. v. San Diego, 84 Fed. 369.

39 Waterman v. Mackenzie, 138 U. S. 252, 261, 34 L. ed. 923, 927; quoted *supra*, § 112.

40 Detweiler v. Holderbaum, 42 Fed. 337.

41 Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 450, 37 L. ed. 799, 804.

42 Seymour v. Freer, 8 Wall. 202, 218, 19 L. ed. 311. See Prout v. Roby, 15 Wall. 471, 21 L. ed. 58.

43 Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; Harwood v. Railroad Co., 17 Wall. 78, 21 L. ed. 558. But see Alger v. Anderson, 78 Fed. 729.

44 McDonnell v. Eaton, 18 Fed. 710.

holder to set aside the foreclosure of a railroad mortgage, the trustees of the mortgage foreclosed, the mortgagor, the purchaser, and enough of such of the stockholders and bondholders as consented to the foreclosure to represent the remainder, are indispensable parties.[45] So, it has been said, are the trustees of a mortgage by the purchaser, and a corporation holding all the stock of the purchaser.[46] A corporation or its receiver,[47] must be a party to a suit to enforce a right against a third person, which the corporation refuses to assert,[48] or to prevent the waste of corporate assets.[49] If a receiver has been appointed he is an indispensable party to such a suit, even although the State court which appointed him refuses to authorize the suit against him.[50] Where a corporation had been dissolved and its receiver discharged; it was held: that neither of them was an indispensable party to a suit by its creditors against a former director and treasurer of the company, to enforce his promise to pay all its debts in case he should be allowed to buy its property at a judicial sale.[51]

The trustees and treasurer of an Iowa township are necessary parties to a suit by a taxpayer to prevent payment to the holder of bonds claimed to be invalid.[52] It has been said that to a bill by the receiver of a water company to establish his right to fix the water rates, all consumers of the water must be made parties.[53] To a bill for an injunction against interference by

45 Ribon v. Railroad Cos., 16 Wall. 446, 21 L. ed. 367.

46 Wenger v. Chicago & E. R. Co., C. C. A., 114 Fed. 34.

47 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815.

48 Davenport v. Dows, 18 Wall. 626, 21 L. ed. 938; New Jersey Central R. Co. v. Mills, 113 U. S. 249, 256, 28 L. ed. 949, 951; Bell v. Donohue, 17 Fed. 710; Swan L. & C. Co. v. Frank, 148 U. S. 603, 37 L. ed. 577; Kelly v. Mississippi River Coaling Co., 175 Fed. 482; Snead v. Scheble, C. C. A., 175 Fed. 570; Lawrence v. Southern Pac. Co., 180 Fed. 822.

49 Putnam v. Rich, 56 Fed. 416.

50 Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; *supra*, § 52; *infra*, § 312.

51 Lilienthal v. Betz, 185 N. Y. 153, 7 Ann. Cas. 41.

52 Sully v. Drennan, 113 U. S. 287, 28 L. ed. 1007. Compare Harter v. Kernochan, 103 U. S. 562, 26 L. ed. 411. In a suit by citizens to restrain the erection of a schoolhouse on land dedicated for a public park, it was held error to refuse to allow an amendment to the bill making the original donors of the land parties complainant. Rowzee v. Pierce, 75 Miss. 846; s. c., 23 S. R. 307; s. c., 40 L.R.A. 402, 65 Am. St. Rep. 625.

53 Ward v. San Diego L. & W.

riparian owners with complainant's right to divert the waters for irrigation, all persons who claim any right to use the waters are indispensable parties.[54] It seems that the principal debtor, or his assignee in bankruptcy or insolvency, is a necessary party to a suit against a surety.[55] Unless the bill is expressly filed on their behalf, all creditors of a corporation are indispensable parties to a suit by one of them to collect unpaid stock subscription.[56] To a suit by a creditor to enforce a lien upon property through a trust-deed made for the benefit of a surety, both the trustee and his beneficiary are indispensable parties, although the property is in the possession of neither of them; but if filed in a double aspect, either for the complainant's individual benefit, or on behalf of the other creditors of the principal debtor, to set aside a subsequent sale, relief may be had without having the surety or his trustee before the court.[57] So, a debtor, or if a bankrupt or insolvent, his assignee, is a necessary party to a creditor's suit to enforce a lien[58] or to levy[59] upon property in which the debtor has an interest, or to collect[60] a debt due the debtor. A corporation must be joined as a defendant to a bill for a receiver;[61] to a bill filed by a creditor to apply to the payment of its indebtedness money due it from its stockholders,[62] or to enforce the individual liability of its stock-

Co., 79 Fed. 656, 667; s. c. in C. C. A., 94 Fed. 849. But see Clyde v. Richmond & D. R. Co., 57 Fed. 436.

[54] Washington State Sugar Co. v. Sheppard, 186 Fed. 233.

[55] Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178. See also Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271. But see Eq. Rule 42.

[56] George W. Signor Tie Co. v. Monett & S. W. Const. Co., 198 Fed. 412.

[57] McRea v. Branch Bank of Alabama, 19 How. 376, 15 L. ed. 688.

[58] Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271; Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178. But see Heriot v. Davis, 2 W. & M. 229. It was held that in a suit against a bank for money deposited by complainant's agent, and applied by the bank to debts due from the agent, the latter was a proper and necessary party; but on a decree for complainant, without there appearing any right or liability for or against the agent, it is proper then to dismiss him. Union Stock Yards Nat. Bank v. Moore, C. C. A., 79 Fed. 705.

[59] Wilson v. City Bank, 3 Sumner, 422.

[60] U. S. v. Howland, 4 Wheat. 108, 4 L. ed. 526.

[61] Elkhart Nat. Bank v. Northwestern G. L. Co., 84 Fed. 76.

[62] Bingham v. Luddington, 12 Blatchf. C. C. 237; First Nat. Bank v. Smith, 6 Fed. 215; Dormitzer v. Illinois & St. L. Bridge Co., 6 Fed. 217; Walsh v. Memphis, C. & N. W. R. Co., 6 Fed. 797; Continental

holders;[63] to a bill to compel a transfer upon its books of stock which stands in the name of another than the complainant.[64] So must be an unincorporated association to a bill to foreclose a mortgage upon a certificate of membership which cannot be transferred without its consent.[65] To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder, not on behalf of the rest, the other stockholders or their representatives must be made defendants.[66] The owner of stock is an indispensable party to a suit to enjoin the voting upon the same, although the owner is a corporation, with the same directors as those of the company the stock in which he owns.[67] To a bill by a legatee against the husband of a residuary legatee or devisee to obtain payment of the complainant's legacy from assets in the defendant's possession, the residuary legatee herself, or, if she be dead, her personal representative, is a necessary party,[68] at least when it does not appear that she or her personal representative is without the jurisdiction of the court. To a bill by alleged heirs, to set aside the probate of a will, persons who appeared in the Probate Court,

Adjustment Co. v. Cook, 152 Fed. 652.

63 Elkhart Nat. Bank v. Northwestern E. L. Co., 84 Fed. 76.

64 Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061; St. Louis & S. F. Ry. Co. v. Wilson, 114 U. S. 60, 29 L. ed. 66; Rogers v. Nortwick, 45 Fed. 513; Patterson v. Farmington St. Ry. Co., 111 Fed. 262. See Wilson v. Oswego Township, 151 U. S. 56, 38 L. ed. 70; and cases cited; *supra*, § 40; *infra*, § 541. But it has been said that in a suit by the holder of a certificate of stock, duly endorsed, to compel a transfer of the same by the corporation, the owner of the legal title is not an indispensable party, although he has disputed the validity of the transfer. O'Neil v. Wolcott Mining Co., C. C. A., 174 Fed. 527, 536; see Gould v. Head, 41 Fed. 240, 248; Williamson v. Krohn, 66 Fed. 655.

65 Metropolitan Nat. Bank v. St. Louis Dispaeth Co., 149 U. S. 436, 37 L. ed. 799.

66 Watson v. U. S. Sugar Refinery Co., 68 Fed. 769. Where a corporation had been required to deposit moneys with the treasurer of the Commonwealth to indemnify those who should sustain damage by the construction of a canal, and the fund was insufficient to pay all claims, it was held that a bill to have certain damages paid therefrom should make parties to the suit all interested in the funds. Cowell v. Cape Code Ship Canal Co., 41 N. E. R. 290, 164 Mass. 235. Similar is Childs v. N. B. Carstein Co., 76 Fed. 86. But see Bickford v. McComb, 88 Fed. 428.

67 Talbot J. Taylor & Co. v. Southern Pac. Ry. Co., 122 Fed. 147. See Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499.

68 Levis v. Dart, 6 How. 1.

claiming adversely to the plaintiffs, that they are the true owners at law; are indispensable parties.[69] In a suit to compel the execution and foreclosure of a mortgage, it was held: that prior incumbrancers and others, claiming an interest in the mortgaged property, were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.[70] In one case, where a bill was filed to stay proceedings in ejectment, the court required the nominal defendant at law to be joined as a co-plaintiff with the real person interested, although it did not appear what citizenship he had.[71]

§ 121. When numerous interests have been created for the purpose of preventing the plaintiff from obtaining equitable relief. When numerous interests had been created for the purpose of preventing a person from obtaining equitable relief, the English courts allowed the persons to whom these interests were thus conveyed to be omitted from the bill, if the original owner of the property thus divided were made a defendant.[1] The rule and the reasons for it are thus stated by Calvert in his valuable work on Parties: "If a party has divided an interest amongst a number of persons for this purpose, the court, in order that the contrivance may be frustrated, and the equitable relief may be obtained, allows the suit to proceed in their absence. Such a division is in realty a fraud, an attempt to defeat justice by converting the general rule of the court into an obstruction to the ordinary proceedings. The court defeats the fraud by refusing to enforce the general rule."[2] Lord Hardwicke said upon this subject: "Where a mortgagee who has a plain redeemable interest makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make

[69] Carran v. O'Calligan, C. C. A., 125 Fed. 657.

[70] Caldwell v. Taggart, 4 Peters, 190, 7 L. ed. 828.

[71] Hyde v. Folger, 4 McLean, 255. In connection with this topic, the section on Separable Controversies in the Chapter on Removal of Causes, *infra*, should be consulted.

§ 121. [1] Calvert on Parties (2d ed.), Book I, ch. iv, p. 61; Yates v. Hambly, 2 Atk. 237. See, also, Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

[2] Calvert on Parties (2d ed.), 61.

them parties."[3] This rule might, perhaps, be extended to a case, where an attempt had been made to defeat the jurisdiction of the Federal court by a merely colorable conveyance to a person of the same citizenship as the complainant.[4]

§ 122. When a person consents to the relief sought. A person who consents to the relief sought, when it is so stated in the bill, need not be joined as a defendant with the other parties interested, unless his presence is indispensable for their protection.[1] Sometimes the plaintiff is required to execute a satisfactory undertaking that the party omitted will conform to the decree.[2] Similarly, a person who disclaims all interest in subject-matter may also be omitted, unless his joinder is essential to the protection of the rights of the other defendants.[3] An agreement between two persons that one shall represent the other as plaintiff, when the former would otherwise have no right to the relief sought, will not be sanctioned by the court.[4]

§ 123. When the plaintiff waives his right against a person. "Where a plaintiff," says Lord Hardwicke, "is only concerned in interest, there he may waive his demand, and omit making the party a defendant to his bill."[1] In accordance with this practice, the equity rules provide that "in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him."[2] Such a waiver cannot, however, be made unless

[3] Yates v. Hambly, 2 Atk. 237, 238.

[4] See Union Bank of Louisiana v. Stafford, 12 How. 327, 13 L. ed. —; New Orleans Canal & Banking Co. v. Stafford, 12 How. 343, 13 L. ed. 1015; Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 781, 30 L. ed. 816, 818.

§ 122. [1] Mechanics' Bank v. Seton, 1 Pet. 299, 306, 7 L. ed. 152, 155; Calvert on Parties (2d ed.), Book I, ch. V., 69, 84.

[2] Calvert on Parties (2d ed), Book I, ch. 69; Kirk v. Clarke, Prec. in Ch. 275; Harvey v. Corrie, 4 Russ. 35, 55; Bawtree v. Watson, 3 M. & K. 339, 340.

[3] Vattier v. Hinde, 7 Pet. 252, 258, 8 L. ed. 675, 677.

[4] Rylands v. Latouche, 2 Bligh, 579.

§ 123. [1] Williams v. Williams, 9 Mod. 299. See also Wilson v. Todd, 1 M. & C. 42, 46; Mechanics' Bank v. Seton, 1 Pet. 299, 306, 7 L. ed. 152, 155; Calvert on Parties (2d ed.), 83, and cases cited.

[2] Rule 50, copied from the 31st Order in Chancery of August, 1841.

it can be without prejudice to those against whom the bill is filed.[3]

§ 124. When the interest of an absent person is evidently very small. In England it has been held, in accordance with the maxim *de minimis non curat lex*, that when the interest of an absent person is evidently very small the court will dispense with his presence in the suit.[1] This view seems to be sanctioned by two decisions of the Supreme Court of the United States.[2]

§ 125. When the absent persons are unknown. When the absent persons are unknown and it is so stated in the bill, their omission is no defect in the suit until they are discovered, at least when parties with similar rights are parties who may defend in their interest.[1]

§ 126. When the right of administration is in dispute. The English rule was, that when there was a contest in the Ecclesiastical Court over the right of administration upon a decedent's estate, the omission in a bill affecting that estate of an administrator might be excused if special circumstances were shown.[1] If, however, no proceeding in the Ecclesiastical Court were pending, one must be instituted before the bill could be filed.[2]

§ 127. Relaxation of rule as to parties in special cases. The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court.[1] "The necessity for the relaxation of

[3] Anon., 2 Eq. Cas. Abr. 166, pl. 6; Story's Eq. Pl., § 139; Poole v. West Point Butter & Cheese Ass'n, 30 Fed. 513.

§ 124. [1] Calvert on Parties (2d ed.), Book I, ch. V, p. 70; Daws v. Benn, 1 J. & W. 513; Attorney-General v. Goddard, 1 T. & R. 348, 350. See also Faulkner v. Daniel, 3 Hare, 199, 213.

[2] Union Bank v. Stafford, 12 How. 327, 13 L. ed. 1008; New Orleans C. & B. Co. v. Stafford, 12 How. 343, 13 L. ed. 1015.

§ 125. [1] Alger v. Anderson, 78 Fed. 729, 734.

§ 126. [1] Plunket v. Penson, 2 Atk. 51; Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.), Book I, ch. V, p. 70.

[2] Penny v. Watts, 2 Phillips, 149, 154; Calvert on Parties (2d ed.), Book I, ch. V. See Reed v. Bennett, 55 N. J. Eq. 587, 37 Atl. 75; *supra*, § 113.

§ 127. [1] Cameron v. McRoberts, 3 Wheat. 591, 4 L. ed. 467; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Lewis v. Darling, 16 How. 1, 14 L. ed. 819; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Greene v. Sis-

the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."[2] A court of equity adapts its decrees to the necessities of each case; and should a suit brought by a single complainant concerning a matter in which others as well as himself were interested terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other persons similarly situated with the plaintiff, "either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."[3] The discretion as to the joinder or omission of the parties is, however, one which, when properly raised, is subject to review upon appeal.[4] An act of Congress relaxing or extending the rules as to parties in a particular case is constitutional.[5]

§ 128. **Restatement of the rules as to parties.** The rules upon the subject may be summarily though roughly stated thus:—

I. All persons, not too numerous, whose joinder will not oust the jurisdiction of the court, and who have any direct interest in obtaining or resisting the relief prayed for in a bill, or granted in a decree which so disposes of the controversy as to prevent any future litigation concerning the same, must be parties to a suit in equity.[1]

II. No person without an interest in the contest or its settlement can be joined as a party, except perhaps the officer or member of a corporation, who according to some authorities may

son, 2 Curtis, 171; West v. Randall, 2 Mason, 181; Parsons v. Howard, 2 Woods, 1; Winter v. Ludlow, 3 Phila. (Pa.) 464.

[2] Mr. Justice Davis in Payne v. Hook, 7 Wall. 425, 432, 19 L. ed. 260, 262.

[3] Mr. Justice Davis in Payne v. Hook, 7 Wall. 425, 432, 19 L. ed. 260, 262. See s. c. as Hook v. Payne, 14 Wall. 252, 20 L. ed. 887: *infra*, § 238.

[4] Caldwell v. Taggart, 4 Pet. 190, 7 L. ed. 828; Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178; Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762; Railroad Co. v. Orr, 18 Wall. 471, 21 L. ed. 810.

[5] U. S. v. Union Pacific R. Co., 98 U. S. 569, 25 L. ed. 143.

§ 128. [1] §§ 109, 110, 116.

be made a defendant to a bill praying relief against it, in order to compel from him a discovery of facts of which he acquired knowledge in his official capacity.[2]

III. If the persons having a common interest in the subject of the controversy or the question to be decided therein are numerous, they may in certain cases be represented, as plaintiffs or defendants, by others who hold the legal title in trust for them, or by one or more of their number suing, or more rarely being sued, in their behalf.[3]

IV. Persons having a merely formal interest, or an interest so far separable from that of the principal parties that a decree disposing of the controversy as between the latter can be made and enforced without affecting their rights, may always be omitted when, by reason of their residence or citizenship, not within the jurisdiction of the court.[4]

V. All persons who have such an interest in the controversy that a decree cannot be enforced without directly affecting their rights, must be joined as parties; except possibly when they are unknown to the complainants, or when their interest is very small, or has been created for the purpose of depriving the court of jurisdiction.[5]

VI. There is no need of joining as parties any against whom the plaintiffs waive their rights, or who are willing to allow the relief prayed for in the bill, unless their presence is necessary for the protection of those who have been made defendants.[6]

VII. The necessity of the joinder of parties is always in the sound discretion of the court, which adapts itself to the facts of each particular case.[7]

§ 129. Objection for want of parties. An objection for want of parties may be taken by motion to dismiss[1] or by answer,[2] or at the hearing,[3] and if the absent persons are indispensable parties, even for the first time upon appeal,[4] although not

[2] § 110.
[3] §§113–115.
[4] §§ 42, 116–118.
[5] §§ 119, 120, 123, 124.
[6] §§121, 122.
[7] § 126.

§ 129. [1] Eq. Rules 29, 44.
[2] Eq. Rules 29, 44
[3] Eq. Rule 44.

[4] Hoe v. Wilson, 9 Wall. 501, 19 L. ed. 762. It has been held that, at common law, a defendant may, under a plea of the general issue, raise the objection that a necessary party has not been joined. Cochran v. Brannan, 196 Fed. 219. But see Iron Molders' Union No. 125 of Milwaukee, Wis. v. Allis-Chalmers Co.,

if a decree has been made which cannot prejudice their interests.[5] The objection should specify by name or description the omitted parties.[6] It should state the names, if known, of all the persons for whose omission the defendant claims that the bill is defective,[7] and the reasons why their presence is required in the suit.[8] It should also state that they are living, and, unless they are in every aspect of the bill indispensable parties thereto, that they are within the jurisdiction of the court.[9] "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties." [10] "Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require." [11] An objection to the whole bill for want of parties will be overruled if, in any aspect of the bill, the parties therein named would not be necessary.[12] Where a defendant in a suit in equity for the infringement of a patent made objection for the first time at

C. C. A., 20 L.R.A.(N.S.) 315, 166 Fed. 45.

5 See Eq. Rule 39. Keller v. Ashford, 133 U. S., 610, 626, 33 L. ed. 667, 674.

6 Eq. Rule 44.

7 Attorney General v. Jackson, 11 Ves. 367, 369; Cook v. Mancius, 3 Johns Ch. (N. Y.) 427; Dwight v. Central Vt. R. Co., 9 Fed. 785; Campbell v. James, 2 Fed. 338, 348. See Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77.

8 Sheffield v. Newman, 77 Fed. 789.

9 Goodyear v. Toby, 6 Blatchf. 138.

10 Eq. Rule 44; copied in substance from Eq. Rule 53, of 1842. See David v. M'Rae, 183 Fed. 812, 814.

11 Eq. Rule 43 copied in part from Eq. Rule 52, of 1842.

12 Homan v. Shiel, 2 Jones 164.

the argument upon final hearing, that there was a defect of parties, because a person holding an equitable title to the patent was not a party; and it appeared that no such issue was made by the pleadings, and that during the taking of the testimony the defendant's counsel admitted that the title to the patent was in the complainant, it was held that the objection was made too late and it was overruled.[13] The usual practice is for the court, if it considers the objection good, to allow the cause to stand over until the plaintiff shall amend his bill by bringing in the additional parties needed.[14] By the former practice, after a plea for want of parties had been sustained and the bill amended by adding thereto the parties named in the plea, the second plea further objecting to the bill for the omission of other parties not named in the first plea could not be filed.[15] If the omitted parties on account of their citizenship cannot be brought in, the court may retain the bill, and perhaps continue an injunction in accordance with its prayer until the complainants have had a reasonable time to litigate the matters in controversy between themselves and the omitted parties in a court of competent jurisdiction; and if it should then appear by the judgment of such a court that the complainants have in equity a superior title to the omitted parties, proceed to a determination of the rights between the parties to the bill.[16] If, however, the complainant does not within a reasonable time amend his bill, or, if so allowed by the court, proceed against the omitted parties, the court may dismiss his bill; but such dismissal must be without prejudice.[17] A lack of proper parties is not a jurisdictional defect.[18] It will not support an objection to the jurisdiction, that may be certified to the Supreme Court;[19] and if, pending the decision upon an objection for the omission of a party whose presence would oust

[13] California El. Works v. Finck, 47 Fed. 583. See also Hills v. Putnam, 152 Mass. 123.

[14] Hunt v. Wickliffe, 2 Pet. 2d, 215, 7 L. ed. 397, 402.

[15] Rawlins v. Dalton, 3 Y. & Coll. 447.

[16] Mallow v. Hinde, 12 Wheat. 193, 198, 199, 6 L. ed. 599, 600, 601.

[17] Mallow v. Hinde, 12 Wheat. 193, 199, 6 L. ed. 599, 601; Hunt v. Wickliffe, 2 Pet. 201, 215, 7 L. ed. 397, 402.

[18] Harrison v. Rowan, 4 Wash. C. C. 202, 208; Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79; Hinchman v. Paterson H. R. Co., 17 N. J. Eq. 76, 86 Am. Dec. 252.

[19] Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

the District Court of jurisdiction, he dies, or his interest ceases, and the defect is thereby cured, the bill will be retained.[20] It was held, where a defendant had removed a case, that he could not object to the absence of a party whose joinder would deprive the Federal court of jurisdiction.[21]

§ 130. Objections for joinder of improper parties. An objection that improper parties have been joined may be raised by motion to dismiss or by answer.[1] If persons are improperly joined as plaintiffs, all the defendants may take the objection.[2] If a person is joined as a plaintiff without his consent, he may on motion, or petition, upon notice to all parties, have his name stricken out, with costs to be paid by the plaintiff who has improperly brought him into the suit.[3] Such relief has been granted upon petition after a decree for costs against the petitioners and the other persons named as complainants.[4] Where several complainants with a similarity but not a community of interest had joined in a bill, and the presence of some of them deprived the Federal Court of jurisdiction, the one which had the right to sue the defendants there was allowed to amend the bill so as to make the other complainants additional defendants.[5] Where one of several complainants whose interest is opposed to the others, attempts to delay, harass, or impede the orderly progress of the cause, the court may order that he be made a defendant.[6] If a person having no interest in the controversy be improperly joined as defendant, he alone can raise the objection;[7] except, perhaps, when the bill is multi-

[20] Harrison v. Rowan, 4 Wash. C. C. 202, 208; Hinchman v. Paterson H. R. Co., 17 N. J. Eq. 76, 86 Am. Dec. 252.

[21] Fisher v. Shropshire, 147 U. S. 133, 145, 37 L. ed. 109, 115.

§ 130. [1] Eq. Rule 29.

[2] Cuff v. Platell, 4 Russ. 242; King of Spain v. Machado, 4 Russ. 225; Story's Eq. Pl., § 544.

[3] Calvert on Parties (2d ed.), 430; Keppell v. Bailey, 2 M. & K. 517; Titterton v. Osborne, 1 Dickens, 350; Wilson v. Wilson, 1 J. & W. 459. It was held that a motion to dismiss the bill upon that ground should be denied. Southern Life Ins. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

[4] McGeorge v. Bigstone Gap Imp. Co., 86 Fed. 599.

[5] Insurance Co. of N. A. v. Svendsen, 74 Fed. 346. See Aylwus v. Bray, 2 Y. & Jer. 518, note.

[6] Lalance & G. Mfg. Co. v. Haberman Mfg. Co. 93 Fed. 197, 199 As to the change of a defendant to a plaintiff, see Guinn v. Lee, 6 Pa. Super. Ct. 646.

[7] Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Seymour v. Freer, 8 Wall. 202, 218; Buerk v. Imhaeuser,

farious.[8] or he was joined through collusion in order to make out a case of difference of citizenship;[9] and no notice of his objection need be given to the other defendants, except in special cases, where it is clearly for the latter's interest to detain him in the suit.[10] If a misjoinder is apparent on the face of the bill, it is more prudent to raise the objection specifically by motion or answer, stating the names of the parties improperly joined.[11] If the objection is not made until the hearing, the court may disregard it.[12] It cannot be raised for the first time upon appeal.[13] When an objection that defendants have been improperly joined, as having no interest in the controversy, has been sustained, the plaintiff will always be allowed to amend by striking out their names.[14] In such a case, the dismissal does not affect the suit as against the remaining defendants.[15] Where a defendant is not an indispensable party, a dismissal as to him upon any ground does not necessitate a dismissal as to other defendants properly before the court.[16] If a bill is dismissed for a misjoinder of complainants and one of them appears to have a good cause for equitable relief, the dismissal must be without prejudice.[17] The subject of misjoinder is discussed in the next chapter under the head of "Multifariousness."[18]

8 Fed. 457; Mitzhener v. Robins (Miss.), 19 S. R. 103.

8 Cherry v. Monro, 2 Barb. Ch. 618; *infra*, § 141. But see Missouri Broom Mfg. Co. et al. v. Guymon, 115 Fed. 112.

9 Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

10 Anon., 9 Ves. 512; Hodson v. Ball, 11 Simons, 459; Calvert on Parties (2d ed.), 430.

11 Helm v. Zarecor, 222 U. S. 32, 35, 56 L. ed. 77, 79.

12 Story v. Livingston, 13 Pet. 359, 10 L. ed. 200; Eades v. Harris, 1 Y. & C. N. R. 235; Raffety v. King, 1 Keen. 601; Mosley v. Taylor, cited in 1 Keen. 601; s. c., 2 Y. & J. 520; Calvert on Parties (2d ed.), 156; Story's Eq. Pl., § 544.

13 Livingston v. Woodworth, 15 How. 546, 14 L. ed. 809; Hayes v. Pratt, 147 U. S. 557, 570, 37 L. ed. 279, 284.

14 Tryon v. Westminster Improvement Com'rs, 6 Jurist (N. S.), 1324.

15 Ladew v. Tennessee Copper Co., 179 Fed. 245.

16 Ladew v. Tennessee Copper Co., 179 Fed. 245; Irving v. Joint Dist. Council, United Brotherhood of Carpenters, &c., 180 Fed. 896.

17 House v. Mullen, 22 Wall. 42, 22 L. ed. 838.

18 *Infra*, §§ 139–143.

CHAPTER V.

BILLS IN EQUITY.

§ 131. Informations. The first proceeding in a suit in equity is the preparation and filing of the first pleading. The suit is begun when the bill is filed.[1] This was either an information, a bill, or an information and bill. Formerly in England the attorney-general or solicitor-general could file an information on behalf of the crown, or of those who either as idiots and lunatics partook of its prerogative, or whose rights, as those in charities, were under its particular protection. The law officers of the royal consort had the same right. If the suit did not immediately concern the rights of the crown, a relator, who sustained and directed the litigation, who it seems might prevent the discontinuance of the suit by the Attorney-General without his consent, and who was responsible for the costs, was usually joined with the officer in whose name it was filed. The main distinction between an information and a bill was that, whereas the latter was in the form of a petition to the court, in the former the officer that filed it stated the case by way not of petition or complaint, but of information to the court of the rights which the crown claimed on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the relator had a personal interest in the relief sought, his personal complaint was joined to and incorporated with the information given to the court by the officer of the crown; and the pleading was termed an information and bill.[2] The proceedings upon an information could only abate by the death or determination of interest of the

§ 131. [1] Farmers' L. & Tr. Co. v. Lake Street El. R. R. Co., 177 U. S. 51, 44 L. ed. 667; Humane Bit Co. v. Barnet, 117 Fed. 316. See *supra*, § 52.

[2] Mitford's Pl., ch. 1; Story's Eq. Pl., § 8; People v. North San Francisco Ass'n, 38 Cal. 564; Attorney-General v. Delaware & H. R. Co., 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631; Newark Aqueduct Board v. Parson, 45 N. J. Eq. 394.

defendant. If, however, the information were filed at the instance of one or more relators and all died, the court would not allow the cause to proceed till an order had been obtained giving leave to insert the name of a new relator, and one had been inserted accordingly. Otherwise, proceedings upon informations were substantially the same as upon bills, except that great laxity of practice was permitted when informations were filed on behalf of charities.[3] In the courts of the United States, it has been held to be the proper practice for the Government to sue in equity in its own name, by a bill similar to one filed by a private citizen;[4] but a pleading styled an information, filed on behalf of the United States, being in substance a bill, was sustained as such;[5] and so was one filed on behalf of the United States in his own name by the District Attorney for the Northern District of New York.[6] The most usual instances of these bills at the present time are in suits to enforce the Interstate Commerce Act[7] and the Anti-Monopoly Law.[8] It has been held that bills in equity will be sustained

[3] Mitford's Pl., ch. 1; Story's Eq. Pl., § 8.

[4] Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 616; U. S. v. Hughes, 11 How. 552, 568, 13 L. ed. 809, 816; s. c. as Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303; Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 492, 17 L. ed. 311, 314; U. S. v. Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143; Moffat v. U. S., 112 U. S. 24; U. S. v. Minor, 114 U. S. 233, 29 L. ed. 110; U. S. v. Am. Bell Tel. Co., 128 U. S. 316, 32 L. ed. 450.

[5] U. S. v. Hughes, 11 How. 552, 568, 13 L. ed. 809, 816; s. c. as Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303. See Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987. In Hawaii, at the suit of the Attorney General, an injunction was granted forbidding a railroad company from decreasing the intervals at which cars were run upon its line, from one every ten minutes to one every twenty minutes. Territory of Hawaii v. Honolulu Rapid Transit & Land Co., Sup. Ct. of Hawaii, January 20, 1908.

[6] Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987.

[7] *Infra*, see § 151.

[8] 26 St. at L. 209; U. S. v. E. C. Knight Co., 156 U. S. 1, 39 L. ed. 325; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 319, 41 L. ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. ed. 259; Hopkins v. U. S., 171 U. S. 578, 586, 43 L. ed. 290, 293; Anderson v. U. S., 171 U. S. 604, 43 L. ed. 300; Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 44 L. ed. 136; affirming U. S. v. Addyston Pipe & Steel Co., C. C. A., 46 L.R.A. 122, 85 Fed. 271; Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608; Northern Securities Co. v. U. S., 193 U. S. 197, 48 L. ed. 679; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. ed. 870; Swift & Co. v. U. S., 196 U. S. 375, 49

when filed by the United States to determine a controversy as to: the boundaries between a State and a Territory;[9] to compel the cancellation of illegal contracts between a railroad company and a telegraph company, when legal proceedings were authorized by statute;[10] to enforce their priority of payment out of a trust fund;[11] to cancel a land patent,[12] or a patent for an invention[13] which has been obtained by fraud,[14] or a land patent which has been by a mistake of law issued in violation of a statute,[15] or a certificate of naturalization obtained by fraud,[16] or where land has been recently patented under a grant, and there is basis for a claim that it has passed into the hands of a purchaser in good faith, a bill by the United States against the original grantee in the alternative for the recovery of the

L. ed. 518; Loewe v. Lawler, 208 U. S. 274, 52 L. ed. 488; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 L. ed. 486; Standard Oil Co. v. U. S., 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834; U. S. v. Am. Tobacco Co., 221 U. S. 106, 55 L. ed. 663; U. S. v. Terminal R. R. Ass'n. of St. Louis, 224 U. S. 383, 56 L. ed. 810; Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20, 57 L. ed. —; U. S. v. Union Pac. R. R. Co., 226 U. S. 61, 57 L. ed. 53; s. c., 226 U. S. 470, 57 L. ed. 90; U. S. v. Union Stock Yard Co. of Chicago, 226 U. S. 286, 57 L. ed. —; U. S. v. Patten, 226 U. S. 525, 57 L. ed. —; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. 898; s. c., 12 L.R.A. 753, 46 Fed. 432; Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869. See U. S. v. Delaware & Hudson Co., 213 U. S. 366, 53 L. ed. 836; U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458; U. S. v. Reading Co., 226 U. S. 324, 57 L. ed. 90; American Biscuit & Mfg. Co. v. Klitz, 44 Fed. 721, 725, 726.

[9] U. S. v. State, 143 U. S. 621, 36 L. ed. 285.

[10] U. S. v. Union Pac. Ry. Co., 160 U. S. 1, 40 L. ed. 319.

[11] Hunter v. U. S., 5 Pet. 173, 8 L. ed. 86.

[12] Moffat v. U. S., 112 U. S. 24, 28 L. ed. 623; U. S. v. Trinidad Coal & Coke Co., 137 U. S. 160, 34 L. ed. 640; J. J. McCaskill Co. v. U. S., 216 U. S. 504, 54 L. ed. 590.

[13] U. S. v. Am. Bell Telephone Co., 128 U. S. 315, 32 L. ed. 450; U. S. v. Gunning, 18 Fed. 511; s. c., 22 Fed. 653; Noble v. Union River Logging R. Co., 147 U. S. 165, 37 L. ed. 123.

[14] Moffat v. U. S., 112 U. S. 24, 28 L. ed. 623; U. S. v. Gunning, 18 Fed. 511; s. c., 22 Fed. 653.

[15] Mullan v. U. S., 118 U. S. 271, 30 L. ed. 170; McLaughlin v. U. S., 107 U. S. 526, 27 L. ed. 621; Western Pac. R. Co. v. U. S., 108 U. S. 510, 27 L. ed. 806. See U. S. v. Reed, 53 Fed. 405.

[16] U. S. v. Norsch, 42 Fed. 417. But see U. S. v. Andersen, 169 Fed. 201.

land or the price as the facts may appear.[17] It seems that a bill cannot be filed to enforce a forfeiture of a land grant for failure to perform a condition subsequent, unless expressly authorized by Congress.[18] When a statute authorized the Secretary of the Interior to sue in the name of the United States for the use of certain Indian tribes and "to pay from the funds of the tribe interested the costs and necessary expenses incurred in maintaining and prosecuting such suits;" he was authorized to employ private counsel to conduct the suits, and it was said that, in the absence of such a provision in the statute, the defendant could not object that the suit was not brought by a law officer of the Government.[19] In the suit brought by the State of Florida against the State of Georgia to settle the boundary between them, the Attorney-General of the United States was permitted to file an information praying "that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order;" and although permission for him to take testimony in the name of Florida with its consent was refused, it was "ordered that the Attorney-General have leave to adduce evidence, whether written or parol, and to examine witnesses and file their repositions in order to establish the boundary claimed by the United States."[20] Informations have, however, been filed in equity in the courts of some of the individual states. These have been usually brought to abate public nuisances.[21]

[17] Oregon & C. R. Co. v. U. S., C. C. A. 144 Fed. 832.

[18] U. S. v. Northern Pac. Ry. Co., 177 U. S. 435, 439, 441, 44 L. ed. 836.

[19] U. S. v. Rea-Read Mill & Elevator Co., 171 Fed. 501. Where a proceeding to restrain certain carriers and shippers from giving and receiving rebates on interstate shipments was instituted at the direction of the Attorney General, who retained special counsel nominated by the informing witness, and defendants made no application for a stay of proceedings in order to object to the appearance of such special counsel; it was held that they were not entitled to a dismissal on the ground that prosecutor had agreed with the Attorney General to bear a deficiency in the expense or the prosecution after applying the balance of the Attorney General's appropriation applicable to that purpose. U. S. v. Milwaukee Refrigerator Transit Co. et al., 145 Fed. 1007.

[20] Florida v. Georgia, 17 How. 478, 480, 523, 15 L. ed. 181, 195.

[21] Attorney-General v. Jamaica P. Aq. Co., 133 Mass. 361; Attorney-General v. Hare, 50 Mich. 447; Attorney-General v. Delaware & B. B.

and to enjoin acts by corporations, which were ultra vires, and which tended to be a public injury;[22] but one was allowed to protect a charity, which had no person directly interested qualified to defend its rights.[23] It has been held: that a State Attorney-General cannot maintain a suit to enjoin insurance companies from carrying out an agreement regulating their rates in restraint of trade.[24] A State chancellor refused to entertain an information filed in the name of the State Attorney-General on the relation of an alleged imbecile to set aside a conveyance; but he allowed the paper to be converted by amendment into a bill filed by the next friend of the alleged imbecile.[25] A State sues in a court of the United States by a bill in equity in its own name.[26] "When the United States comes into a court of equity as a suitor it is subject to the defenses peculiar to that court."[27] It is subject to the rules of court,[28] including those regulating the time of filing pleadings.[29] Such an information or bill should be filed in the name of the United States, not in the name of one of its law officers.[30] If a bill be filed to impeach a patent or other grant by the United States and be not brought by the Attorney-General, or some other officer authorized by statute so to do, it should contain an allegation that the Attorney-General has "given such order for its institution as will make him officially responsible for it, and show his control over the cause."[31] The signature of the Attorney-General subscribed to the bill is sufficient to show his authority for filing it.[32] Where the Attorney-General is disqualified, the bill may be signed by the Solicitor-General and filed in his discretion.[33]

R. Co., 27 N. J. Eq. 1; s. c., 27 N. J. Eq. 631.

22 Attorney-General v. Central R. R., 50 N. J. Eq. 52, 24 Atl. 964, 17 L.R.A. 97; Attorney-General v. Am. Tobacco Co., 55 N. J. Eq. 352, 356, 3 Atl. 971, 977.

23 Attorney-General v. Butler, 123 Mass. 306.

24 McCarter v. Fireman's Ins. Co., 70 N. J. Eq. 291, 61 Atl. 705.

25 Thompson v. Thompson, 6 Houston (Del.), 225.

26 *Supra*, § 13. For a crossbill filed in the name of a State *ex relatione* by private citizens, see Jack v. Williams, 113 Fed. 823.

27 U. S. v. White, 17 Fed. 561, 565.

28 U. S. v. Barber Lumber Co., 169 Fed. 184.

29 Ibid.

30 Benton v. Woolsey, 12 Pet. 27, 9 L. ed. 987.

31 Miller, J., in U. S. v. Throckmorton, 98 U. S. 61, 71, 25 L. ed. 93, 97.

32 U. S. v. Mullan, 10 Fed. 785; s. c., 118 U. S. 271, 30 L. ed. 170.

33 U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450.

§ 132. **Definition and classification of bills.** The usual course, and the only one open to a private citizen, is the filing of a bill. The word "bill" is derived from the Latin *libellus;* and such a pleading is sometimes called an English bill; because at the time when pleadings at common law were in Law Latin or Law French, it was as now written in the English language.[1] A bill is a petition addressed to the judges of a court of equity, containing a statement of the facts which in the plaintiff's opinion give him a right to sue, and concluding with a prayer for the relief to which he deems himself entitled.

Quis, quid, coram quo, quo jure petitur, et a quo.
Recte compositus quisque libellus habet.[2]

Bills are divided by the books into three classes; original bills bills not original, and bills in the nature of original bills. A fourth class, which may be termed original bills in the nature of bills not original, is recognized by the Federal courts. Original bills are those which relate to some matter not before litigated in the court of equity by the same parties standing in the same interests. Bills not original are those, which relate to some matter already litigated in the court of equity by the same parties, or their representatives, and which are either an addition to or a continuance of an original bill, or both.[3] Bills in the nature of original bills are those which serve to bring before the court the proceedings and decree in a former suit, for the purpose of either obtaining the benefit of the same or procuring the reversal of the decision made therein.[4] Original bills in the nature of bills not original are those having all the characteristics of original bills, except that the Federal courts will take jurisdiction of them without regard to the citizenship or the parties, or the other limitations of the original Federal jurisdiction.[5] Original bills are of two kinds: those which pray relief, and those

§ 132. [1] Story's Eq. Pl., § 7.

[2] Com. Dig., Chancery, E. 2.

[3] Quoted with approval in Anglo-Florida Phosphate Co. v. McKibben, C. C. A., 65 Fed. 529, 530, 531.

[4] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., § 16.

[5] Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145; Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498; Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; *supra*, § 51.

which do not pray relief. Original bills which pray relief are said to belong to three classes: bills which pray the decree of the court concerning some right claimed by the plaintiff in opposition to some right claimed by the defendant, bills of interpleader, and bills of *certiorari*. Original bills not praying relief are of two kinds: bills of perpetuate the testimony of witnesses, and bills of discovery. Bills not original are bills of revivor, supplemental bills and bills of revivor and supplement. Bills in the nature of original bills are bills in the nature of supplemental bills, bills in the nature of bills of revivor, cross-bills, bills of review, bills impeaching decrees upon the ground of fraud, bills to suspend the operation of decrees on special circumstances or to avoid them on the ground of matter subsequent, and bills partaking of the qualities of some one or more of these bills.[6] If the court has jurisdiction of an original bill, it will take jurisdiction of bills not original, and bills in the nature of original bills, growing out of the first suit, without regard to the citizenship of the parties thereto.[7] And in certain other cases it will take jurisdiction of bills otherwise original which are so intimately connected with matters before the Federal court that it is in the interest of convenience and justice to have them disposed of before the same tribunal.[8] These may be named original bills in the nature of bills not original. They are usually called ancillary bills.[9] Such is a bill to obtain a judicial construction of previous decrees;[10] a bill to obtain a determination of the rights of a claimant to a fund in the hands of a Federal marshal;[11] a bill to stay proceedings at law;[12] and a bill to set aside a decree.[13] The peculiarities in the form and the procedure upon

[6] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 16–24.

[7] Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; Jones v. Andrews, 10 Wall. 327, 333, 19 L. ed. 935, 937; Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498. See § 53.

[8] Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

[9] *Supra*, § 53.

[10] Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

[11] Krippendorf v. Hyde, 110 U. S. 276; Freeman v. Howe, 24 How. 450, 16 L. ed. 749.

[12] Logan v. Patrick, 5 Cranch, 288, 3 L. ed. 103; Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Jones v. Andrews, 10 Wall. 327, 333, 19 L. ed. 935, 937; Dunlap v. Stetson, 4 Mason, 349.

[13] Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

original bills not praying relief, bills not original, and bills in the nature of original bills, will be discussed in the latter part of this work. In this chapter, the form of original bills praying relief and, in the chapters immediately succeeding, the proceedings upon them, will be explained, beginning with the ordinary kind,—bills which seek relief concerning some right claimed by the plaintiff in opposition to one claimed by the defendant.

§ 133. Frame of a bill in equity. Formerly, bills usually consisted of nine parts: the direction or address, the introduction, the premises or stating part, the common-confederacy clause, the charging part, the jurisdiction clause, the interrogating part, the prayer of relief, and the prayer of process.[1] Of these, however, the common confederacy clause, alleging that the defendant or defendants are combining and confederating with some persons to the plaintiff unknown, whose names when discovered he prays leave to insert as defendants, which owed its origin to an idea that otherwise the bill could not be amended so as to add new defendants, and its retention to the practice of taxing costs according to the length of the documents filed; the charging part, alleging the defense which it anticipated would be made by the defendant, and the reply which the plaintiff intended to make therto; and the jurisdiction clause, alleging that the acts of the defendant which were complained of were contrary to equity, and that the plaintiff was without any remedy at law: were not even then considered necessary by the best authorities,[2] and by the equity rules of 1842 they were expressly declared superfluous.[3] The equity rules of 1912 have obviated the necessity of the address,[4]

§ 133. [1] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., §§ 26–48.

[2] Mitford's Pl., ch. 1, § 3; Langdell's Eq. Pl., § 55; Story's Eq. Pl., §§ 29, 32, 33, 34; Comstock v. Herron, 45 Fed. 660.

[3] Rule 21 of 1842.

[4] Eq. Rule 25. By the Equity Rules of 1842. "20. Every bill in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the judges of the circuit court of the United States for the district of ——: A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that,' etc."

the interrogating part[5] and the prayer of process.[6]

"Hereafter it shall be sufficient that a bill in equity shall contain in addition to the usual caption:

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

[5] The old form was as follows: "To the end, therefore, that the said A. B. and the rest of the confederates, when discovered, may, upon their several and respective corporate oaths, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief; and more especially that they may answer and set forth whether, etc.; or they may set forth and discover whether they do not know, have heard, or are informed, and in their conscience believe that," &c. Story's Eq. Pl., § 35, note 2. "41. By the equity rules of 1842 the interrogatories contained in the interrogating part of the bill must be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form to the effect following, that is to say: 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, etc.'" "42. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed shall be considered and treated as an amendment to the bill." "43. Instead of the words of the bill now in use preceding the interrogatory part thereof, and beginning with the words 'to the end, therefore,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporate oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"'Whether, etc.

"'Whether, etc.'"

[6] Equity Rules of 1842. "23. The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact,

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statements of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."[7]

§ 134. Address and Caption. In England, a bill in chancery was required to be addressed to the person having the custody of the great seal, usually either the sovereign, or the Lord Chancellor, except when the Lord Chancellor himself was the complainant, when it was addressed to the sovereign "in his high court of chancery."[1] In the United States, as a great seal is not, as in England, essential to the validity of writs in equity, before the Equity Rules of 1912, a bill was addressed to the judge or judges of the court where it is filed.[2] The Equity Rules of 1912 in prescribing the requirements of a bill in equity, omit therefrom the address, but require the usual caption.[3] The caption should state the name of the court, including the district and division and the names of each of the parties.

§ 135. Introduction and Jurisdictional Averments. The introduction formerly contained the names, descriptions, and residences of the complainants, together with the character

so that the court may take order thereon as justice may require upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process."

[7] Eq. Rule 25.

§ 134. [1] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 26.

[2] Eq. Rule 20 of 1842.

[3] Eq. Rule 25.

in which they sued, if in a representative capacity, and such other allegations as were necessary to found the jurisdiction of the court.[1] Sometimes the names and descriptions of the defendants were also here inserted, but it was more usual to name them in the next part of the bill.[2] The Equity Rules of 1842 regulated the subject as follows: "Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: 'To the judges of the Circuit Court of the United States for the district of ——; A. B., of ——, and a citizen of the State of ——, brings this his bill against C. D., of ——, and a citizen of the State of ——, and E. F., of ——, and a citizen of the State of ——. And thereupon your orator complains and says that, etc.'"[3] The Equity Rules of 1912 provide: that a bill in equity shall contain "First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated. Second, a short and plain statement of the grounds upon which the court's jurisdiction depends. * * * Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction."[4] Where there are two districts in a State, the bill must show in which district a party resides.[5] An allegation of residence without an allegation of citizenship is insufficient.[6] So is an allegation that plaintiff is "of,"[7] or is

§ 135. [1] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 26.

[2] Story's Eq. Pl., § 26. *Contra*, Leavenworth v. Pepper, 32 Fed. 718.

[3] Eq. Rule 20 of 1842.

[4] Eq. Rule 25.

[5] Harvey v. Richmond & M. Ry. Co., 64 Fed. 19.

[6] Tug River C. & S. Co. v. Brigel, 67 Fed. 625; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; Pacific Postal Tel. Co. v. Irvine, 49 Fed. 113; Stockwell v. Boston & M. R. Co., 131 Fed. 152; Atchison, T. & S. F. Ry. Co. v. Frederickson, C. C. A., 177 Fed. 206; M'Eldoyney v. Card, 193 Fed. 475; Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79; International Bank & Trust Co. v. Scott, C. C. A., 159 Fed. 58, holding that such a defect is not cured by an admission in an answer that "plaintiff" is a resident citizen of a foreign country, the reference being

a *bona fide* resident of,[8] a certain State; but a description of a party as a citizen of a certain county in a specified State was held to be sufficient to describe him as a citizen of the State and a resident of the county.[9] Where a bill recited facts to show diversity of citizenship without making distinct the traversible averments of such diversity, it was held to be sufficient.[10] So it was held: that, in view of the Fourteenth Amendment, an allegation that a plaintiff was a citizen of the United States and a resident of a specified State therein, was sufficient to show that he was a citizen of such State.[11] Where the plaintiffs sue as executors or administrators, it is insufficient to allege that letters of administration or letters testamentary had been taken out in a specified State[12] or "that said plaintiffs as such executors, are citizens" of a specified State;[13] but it was held to be sufficient to aver that the defendants, "as they are the qualified executors of the last will and testament of James Brown, deceased, were, each and all, at the time of the commencement of this suit, and still are, citizens of the State of New York; and that the defendant John S. Schultze, also a qualified executor of the last will and testament of James Brown, deceased, was then, and still is, a citizen of the State of New Jersey."[14] If one of the parties is a corporation, the bill must state by or under the laws of what State it was created, and its members will then be conclusively presumed to be citizens of that State.[15] An allegation that a corporation is a citizen of ——,[16] or that it is "duly established by a law,

to the liquidating committee of a bank, which had instituted a suit, and not to the individuals composing the same, who were the real plaintiffs.

[7] Yeandle v. Pennsylvania R. Co., C. C. A., 169 Fed. 938.

[8] Koike v. Atchison, T. & S. F. Ry. Co., 157 Fed. 623.

[9] Gruetter v. Cumberland Telephone & Telegraph Co., 181 Fed. 248. But see Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341; Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 L. ed. 697.

[10] Gorham Mfg. Co. v. Weintraub, 176 Fed. 927.

[11] Clausen v. American Ice Co., 144 Fed. 723.

[12] Yeandle v. Pennsylvania R. Co., C. C. A. 169 Fed. 938.

[13] Amory v. Amory, 95 U. S. 186, 24 L. ed. 428.

[14] Cooke v. Seligman, 7 Fed. 263.

[15] Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Steamship Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87.

[16] Thomas v. Board of Trustees

having its principal place of business"[17] in a specified State or that it "claims to be" a corporation organized under the laws of a specified State, as a company of a specified character,[18] or that it is a "joint stock company," duly organized and existing under the laws of a specified State and a citizen thereof,[19] is insufficient. The pleading should allege that it was created by or under the laws of such State,[20] or at least that it was organized[21] under the laws thereof. An allegation that a party was a corporation under the laws of the State of Virginia, and a citizen of Virginia, and a resident of the Western District thereof, was held to be good.[22] It has been held: that the fact that the residence of a corporation is at a certain place cannot be inferred because the name of that place is part of the corporate name.[23] If one of the parties is an alien, the bill should aver that he is "a citizen and subject of a foreign State," specifying that State's name.[24] An allegation that a party is "a citizen of London, England,"[25] was held to be insufficient to show that he was an alien; but the averment that the complainants are "all of Cognac, France, and citizens

of Ohio State University, 195 U. S. 207, 49 L. ed. 160; Lonergan v. Illinois Cent. R. Co., 55 Fed. 550; Frisbie v. Chesapeake & O. R. Co., 57 Fed. 1; De Loy v. Traveler's Ins. Co., 59 Fed. 319; American S. R. Co. v. Johnson, 60 Fed. 503; Winkler v. Chicago & E. I. R. Co., 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Knight v. Lutcher & Moore Lumber Co., 130 Fed. 404. *Supra*, § 48. *infra*, § 1.

[17] N. Y. & N. E. R. Co. v. Hyde, C. C. A., 56 Fed. 188, 191.

[18] Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983.

[19] Rountree v. Adams Express Co., C. C. A., 165 Fed. 152. For what is a sufficient allegation of the citizenship of members of a partnership, see Derk P. Yonkerman Co. v. C. H. Fuller's Ad. Agency, 135 Fed. 613.

[20] Lonergan v. Illinois Cent. R. Co., 55 Fed. 550.

[21] Sun Pr. & Pub. Ass'n v. Edwards, 194 U. S. 377, 48 L. ed. 1027; Ward v. Blake Mfg. Co., C. C. A., 56 Fed. 437.

[22] Mathieson Alkali Works v. Mathieson, C. C. A., 150 Fed. 241.

[23] Harvey v. Richmond & M. Ry. Co., 64 Fed. 19.

[24] Wilson v. City Bank, 3 Sumner, 422.

[25] Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341. But in Mahoning Valley Ry. Co. v. O'Hara, C. C. A., 196 Fed. 945, held that an averment that plaintiff "is now, and at all times hereinafter mentioned was, a citizen of Ireland," was a sufficient allegation that he was an alien.

of the Republic of France," was held to be adequate.[26] An allegeation that the State of which a party is a citizen is unknown, is insufficient when the jurisdiction is claimed for difference of citizenship.[27] Where a bill or a common-law pleading is filed or served subsequent to the commencement of the suit, it should aver the citizenship of the parties at the time the suit was commenced as well as in the present tense.[28] It has been held, that an allegation that a corporation has a place of business within the district, when admitted in the answer, relates to the time when the suit was brought.[29] How advantage could be taken of an omission in the introduction of the residence of the parties, whether by demurrer or simply by a motion for security for costs, was, under the old practice, a doubtful question.[30] It was held: that a bill was not demurrable for the failure to state the residence of a party;[31] and that where the jurisdiction does not depend upon a difference of citizenship, such as a case arising out of the bankruptcy laws, an omission to aver the citizenship of the parties does not make the bill demurrable, but that the objection can be made by motion only;[32] and that an allegation of the residence of the parties is not required in a pleading at common law.[33] The bill was certainly demurrable if enough did not appear upon its face to show the court's jurisdiction.[34] It has been suggested that a defect in this respect in the introductory part of a bill is not cured by an allegation in its title or caption.[35] It has been said that no one can be made a defendant under a

[26] Hennessy v. Richardson Drug Co., 189 U. S. 25, 47 L. ed. 697.

[27] Tug River C. & S. Co. v. Brigel, 67 Fed. 625.

[28] Lackey v. Newton Min. Co., 56 Fed. 628.

[29] Streat v. Am. Rubber Co., 115 Fed. 634.

[30] Rowley v. Eccles, 1 Sim. & S. 511; Daniell's Ch. Pr. (2d Am. ed.) 409.

[31] Vermont Mach. Co. v. Gibson, 50 Fed. 233; (a patent case); Harvey v. Richmond & M. Ry. Co., 64 Fed. 19; (a case of difference of citizenship); Wright v. Skinner, 136 Fed. 694; (a bankruptcy case).

[32] Wright v. Skinner, 136 Fed. 694.

[33] Balt. & O. R. Co. v. Doty, C. C. A., 133 Fed. 866.

[34] Bingham v. Cabot, 3 Dall. 382, 1 L. ed. 646; Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898; U. S. v. Pratt C. & C. Co., 18 Fed. 708; Lackey v. Newton Min. Co., 50 Fed. 634.

[35] Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898. See Sharon v. Hill, 23 Fed. 353; Railway Co. v. Ramsey, 22 Wall. 322, 22 L. ed. 823; Berger v. Sperry, 95 U. S. 401, 24

fictitious name;[36] but in an English case where the parents of an infant, who was a necessary defendant to a bill, refused to have her baptized in order to interpose difficulties in the plaintiff's way, Sir John Leach ordered that she should be described as the youngest female child of A. B. (naming her father) and C. D. (naming her mother).[37] Where the complainant is assignee of the cause of action, it is the safer practice to allege the citizenship of his assignor.[38] An admission on the trial of "the liability of defendant in this case and everything as alleged except the measure of damages," is insufficient to show the jurisdiction of the court.[39] Where the jurisdiction does not depend upon difference of citizenship, the bill should state, here or elsewhere, the facts showing that it arises under the Constitution or laws of the United States or is justified by some other Federal statute.[40] The bill should also state, here or elsewhere, the facts which show that the matter in dispute exceeded the jurisdictional amount,[41] at the time when suit was brought,[42] unless the case be one of which the District Courts of the United States takes jurisdiction, irrespective of the value of the matter in dispute.[43] The allegation is not insufficient because it uses the word "amount," instead of "matter" in dispute.[44] Upon a bill for an injunction, where the amount involved cannot be deduced from the facts alleged, a simple allegation that the right sought to be

L. ed. 390; Robertson v. Cease, 97 U. S. 646, 24 L. ed. 1057; Gordon v. Third Nat. Bank, 144 U. S. 97, 36 L. ed. 360.

[36] Kentucky S. Mining Co. v. Day, 2 Sawyer C. C. 468.

[37] Ely v. Broughton, 2 Sim. & S. 188.

[38] Parker v. Ormsby, 141 U. S. 81, 35 L. ed. 654; U. S. Nat. Bank v. McNair, 56 Fed. 323; Kolze v. Hoadley, 200 U. S. 76, 83, 50 L. ed. 377; J. J. McCaskill Co. v. Dickson, C. C. A., 159 Fed. 704. See *supra*, § 63.

[39] Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898.

[40] *Supra*, §§ 34–39.

[41] U. S. v. Pratt C. & C. Co., 18 Fed. 708; Murphy v. East Portland, 42 Fed. 308; Olson v. Nor. R. Co., 43 Fed. 112; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 546; Strasburger v. Beecher, 44 Fed. 209; Back v. Sierra N. C. M. Co., 46 Fed. 673; Harvey v. Raleigh & G. R. Co., 89 Fed. 115; Yellow A. M. & M. Co. v. Winchell, 95 Fed. 213; Evenson v. Spaulding, 150 Fed. 517; Southern Land & Timber Co. v. Johnson, 156 Fed. 246; *supra*, § 6.

[42] Strasburger v. Beecher, 44 Fed. 209.

[43] *Supra*, § 5.

[44] Blackburn v. Portland Gold-Min. Co., 175 U. S. 571, 44 L. ed. 276.

protected is of the value of more than three thousand dollars, exclusive of interest and costs, will usually be sufficient.[45] When the test of the value of the matter in dispute was stock in a corporation, it was presumed that the same was worth par, in the absence of allegations to the contrary.[46] Although this part of the bill should contain the statement that the complainant sues on behalf of others as well as himself, if he intends so to do, it has been suggested that this might not be necessary when his case is founded upon a statute "which itself gives that force and direction to the bill."[47]

§ 136. The narrative part of a bill. The most important portion of a bill in equity is the narrative or stating part, otherwise called the stating part. This contains the plaintiff's cause of action. The Equity Rules of 1912 provide: that it shall consist of "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."[1] "It should set forth the plaintiff's case in a clear and distinct narrative, with the facts relied upon as the basis of the suit. For convenience, each paragraph should be numbered, so that the successive allegations may be readily referred to.[2] The objection of old common-law pleading was to bring the matter in controversy to certain distinct issues. In equity pleading no such attempt was made. The statement of the plaintiff's case in the bill differs little in language or form from any other statement of facts which might be drawn up for the information of third parties, say an application to a government board. The defendant's answer usually admits, or denies, or qualifies *seriatim* each statement in the bill; and occasionally, before proceeding to notice the statement in detail, the defendant gives a general history of the case from his own point of view. The issues, both of fact and of law, are thus often involved in large masses of statement, and had to be

[45] Texas & P. Ry. Co. v. Kuteman, C. C. A., 54 Fed. 547. See Hyde v. Victoria Land Co., 125 Fed. 970; Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1, 5; Southern Cash Register Co. v. National Cash Register Co., 143 Fed. 659; Spaulding v. Evenson, 149 Fed. 913. See, also, *supra*, § 13.

[46] Bernier v. Griscom-Spencer Co., 161 Fed. 438.

[47] Irons v. Manufacturers' Nat. Bank, 17 Fed. 308.

§ 136. [1] Eq. Rule 25.

[2] An omission to do this will not be a defect in pleading.

selected, so to speak, by the judge who tried the cause, with the assistance of the arguments of counsel. It would be difficult to imagine a less technical document than a bill in equity."[3] "A bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech."[4] The bill must contain every fact essential to the plaintiff's cause of action, for no evidence will be admitted or considered to prove any fact not alleged in it.[5] It must plead every fact essential to the rights of the plaintiff, and necessarily within his knowledge, positively, not upon information and belief,[6] and with certainty.[7] Otherwise, it is defective. It was said, in a case at common law, to be an elementary rule in pleading, that when a state of facts is relied upon, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation.[8] Facts not necessarily in the complainant's knowledge he may allege "as your orator is informed and believes, and therefore avers."[9] Or "your orator further shows on

[3] Lectures before the Law School of Boston University on Equity Pleading by Judge Dwight Foster, MS. See Hayne, Eq. 70.

[4] Swift & Co. v. U. S., 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. ed. 518; per Holmes, J.: "After all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill." See Prindle v. Brown, C. C. A., 155 Fed. 531, 533; Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 180 Fed. 160.

[5] Gordon v. Gordon, 3 Swanst. 400, 472; Miller v. Cotten, 5 Ga. 341, 346; Wilson v. Stolley, 4 McLean, 275; Crocket v. Lee, 7 Wheat. 522, 5 L. ed. 513; Jackson v. Ashton, 8 Pet. 148, 8 L. ed. 898; Henry v. Suttle, 42 Fed. 91; Phillipps v. Phillipps, 4 Q. B. D. 127, 133.

[6] Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Egremont v. Cowell, 5 Beav. 620; Gaines & Co. v. Stroufe, 117 Fed. 965; Mitford's Pl. 40; Story's Eq. Pl., §§ 255, 256.

[7] Harrison v. Dixon, 9 Pet. 483, 503, 9 L. ed. 201, 208; Wormald v. De Lisle, 3 Beav. 18; Brooks & Hardy v. O'Hara Brothers, 8 Fed. 529; Daniell's Ch. Pr. (2d Am. ed.) 421–425; *infra*, § 137.

[8] Williams v. Wilcox, 8 A. & E. 314, 331, per Denman, C. J. See Stenart v. Gladstone, 10 Ch. D. 644.

[9] Coryell v. Klehn, 157 Ill. 462; s. c., 41 N. E. 64; Wyckoff v. Wagner T. Co., 88 Fed. 515.

information and belief."[10] An allegation "as your orator is informed and believes" was said to be bad.[11] So was an allegation upon belief.[12] It is the safer practice to set forth in the bill any facts which justify delay in the commencement of the suit or which would take the case out of the bar of the statute of limitations, if that might otherwise apply.[13] Under the former practice, where the complainant anticipated a defense which could only properly be met by pleading new matter, it was necessary to set up the same by way of confession and avoidance in his bill.[14] This was originally inserted in the charging part. "It usually consists of some allegation or allegations which set forth the matters of a defense or excuse which it is supposed the defendant intends or pretends to set up to justify his noncompliance with the plaintiff's right or claim, and then charges other matters, which disprove or avoid the supposed defense or excuse. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiff to admit; for which purpose the charge of the pretense of the defendant is held to be sufficient."[15] This was more recently, when considered to be necessary, inserted in the narrative part of the bill.[16] Illustrations of such cases are: a prior patent;[17] and, it seems, an

[10] Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330; Murray Co. v. Continental Gin Co., 126 Fed. 533, a charge of the infringement of a patent. See Boyd v. Thayer, 143 U. S. 135, 36 L. ed. 103.

[11] Wyckoff v. Wagner Typewriter Co., 88 Fed. 515; Dupree v. Leggette, 140 Fed. 776.

[12] Rubber T. Co. v. Davie, 100 Fed. 85. But see Leavenworth v. Pepper, 32 Fed. 718; Kelley v. Boettcher, C. C. A., 85 Fed. 553; Curran v. Campion, 85 Fed. 67.

[13] Edison El. Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478. But see Brush El. Co. v. Ball El. Light Co., 43 Fed. 899.

[14] Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45.

[15] Story's Eq. Pl., § 31. See Mitford's Pl., ch. 1, § 3.

[16] Equity Rule 21; Partridge v. Haycraft, 11 Ves. 574.

[17] Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45, 50. Where the answer set up a license, complainant was not allowed to prove an abandonment thereof because the bill contained no allegation to that effect. Wilson v. Stolley, 4 McLean, 275.

estoppel;[18] but not ordinarily *ultra vires*.[19] The practice under the new rules has not been decided. In England, it is well settled that this should not be done;[20] but there the plaintiff has the right to reply, by way of confession and avoidance or otherwise, to any defense in an answer.[21] Whether that is so under the new Federal Equity Rules is unsettled.[22] Under the New York Code of Civil Procedure, a defense in an answer may be met by confession and avoidance without any reply or reference to the same in the complaint or other pleading by the plaintiff, unless a reply is ordered.[23]

§ 137. Certainty. A bill must state the plaintiff's case with sufficient certainty.[1] The same precision of statement re-

18 Hill v. Hite, C. C. A., 85 Fed. 268. But see Woodward v. Boston L. M. Co., 63 Fed. 609; Story's Eq. Pl., § 31; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 42 L. ed. 355.

19 Interstate Construction Co. v. Regents of the U. of Idaho, 199 Fed. 509. It was held in North Carolina, that, where a deed was pleaded in the answer together with averments of the facts upon which its validity depended, no amendment of the bill was needed to enable the plaintiff to attack the validity of the deed. Boyd v. Hawkins, 2 Dev. Eq. (N. C.) 195, 215.

20 Hall v. Eve, 4 Ch. D. 341, 345; per James, L. J.: "It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it."

21 Ibid.

22 See §§ 195, 203, *infra*.

23 Welsh v. German-American Bank, 42 N. Y. Superior Ct. 462, errors in accounts stated; Freund v. Paten, 10 Abb. N. C. 311, fraud in a discharge in bankruptcy.

§ 137. 1 Thus it was held that a bill by a receiver of a national bank to recover for the loss caused to it by the negligence of its directors, which prays relief against the persons who acted as directors during various periods of time, together with the representatives of such as are dead, must "state the dates of the losses sustained by the corporation and the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him." Price v. Coleman, 21 Fed. 357. But a late decision holds that upon such a bill it is unnecessary to allege the exact amount of the loss arising from each transaction, where that was not yet known but that the acts of the defendants, which were charged to constitute negligence or misconduct, must be set forth with particularity, and the details of the several transactions should be given with as much fullness as could be done by the complainant. Allen v. Luke, 141 Fed. 694. The following allegations were held to have sufficient certainty: that the defendants "suffered and permitted the said reports," which were alleged to be false, "to be placed on file in the Department

ERRATUM.

Foster's Federal Practice, 5th Ed. Vol. 1.—Page 478, Section 137, Note 1—4th line from the foot of the page. Insert the word "not" before the word "held."

quired in pleadings at law is not necessary.[2] Less certainty is required concerning facts of which a discovery is sought from the defendant.[3] An allegation that an event occurred on or about a certain specified day is, however, sufficient.[4] An allegation that an event happened before a specified date, without averring the day of the event, may be the subject of a motion for a bill of particulars, but it seems that it is not a ground for dismissing the whole bill.[5] The bill must state facts, not con-

of the Comptroller of the Currency; that the said directors utterly failed and neglected to perform their aforesaid official duties, and each and every of them; and that for a considerable period of time prior to said November 13th, 1902, as hereinbefore and hereinafter set forth, failed to give any adequate attention to the affairs of said bank, and allowed the said bank to be improvidently and recklessly managed:" and that the defendants "wholly failed and neglected to make personal examinations into the conduct and management of its affairs and into the condition of its accounts." Ibid. For an insufficient allegation that plaintiff was a *bona fide* purchaser of a note before its maturity, see Caesar v. Capell, 83 Fed. 409. For a lack of certainty in allegations concerning the assignment of a patent, see Jaros H. U. Co. v. Fleece H. U. Co., 60 Fed. 622. A bill to enjoin the enforcement as a lien upon land of a judgment entered a few days after complainant had begun to erect a building upon such land under a contract which he claimed gave him priority under a mechanic's lien, was held demurrable for lack of certainty because it failed to set forth "the actual dates at which he commenced, carried on, and finished work and labor, and the actual dates on which he furnished materials," in order that the court might determine the validity and extent and right to priority of the lien he claimed. McKee v. Travelers' Ins. Co., 41 Fed. 117, 119. An allegation that a song formed a material part of a dramatic composition was held fatally indefinite because it failed to say whether the pleader intended merely the words of the song, which were set out in the bill, or also the music to which they were sung. Henderson v. Thompkins, 60 Fed. 758, 765. It has been held: that a bill to restrain the wrongful diversion of water from a street is not demurrable for failure to allege the particular point of the diversion, and the means and methods used therein. Miller v. Rickey, 127 Fed. 573.

[2] Prindle v. Brown, C. C. A., 155 Fed. 531, 533; Daniel's Ch. Pr., 1st Am. ed. 421; Storey's Eq. Pl., § 253. See Droullard v. Baxter, 1 Scam. 192.

[3] Towle v. Pierce, 12 Met. (Mass.) 329, 332, 46 Am. Dec. 679; Lafayette Co. v. Neely, 21 Fed. 738.

[4] Richards v. Evans, 1 Yes. Sen. 39; Roberts v. Williams, 12 East 33, 37; Leigh v. Leigh, Daniell's Ch. Pr. 369.

[5] Prindle v. Brown, C. C. A., 155 Fed. 531, 533. See § 242, *infra*.

clusions of law which will be disregarded by the court.[6] Thus the averment of irreparable injury will be disregarded in the absence of allegations of facts from which the court can see that irremediable mischief may be apprehended from the threatened wrong.[7] An allegation that a decree was null, void and inoperative, is insufficient without a specification of the defects in the same.[8] An allegation, that an act complained of was not a judicial act, and was done without the jurisdiction of a judge, is a mere conclusion of law.[9] A general charge of fraud is not sufficient, but it must allege the specific acts or language which constitute the fraud.[10] All the evidence of the fraud

6 Harper v. Hill, 35 Miss. 63.

7 Indian Land & Trust Co. v. Schoenfelt, C. C. A., 135 Fed. 484.

8 Flannigan v. Chapman & Dewey Land Co., C. C. A., 144 Fed. 371. See U. S. v. Norsch, 42 Fed. 417.

9 O'Connell v. Mason, 132 Fed. 245.

10 Gilbert v. Lewis, 1 De G. J. & Sm. 38, 49; Bryan v. Spruill, 4 Jones Eq. (N. C.) 27; U. S. v. Atherton, 102 U. S. 372, 26 L. ed. 213; U. S. v. Norsch, 42 Fed. 417. But see Field v. Hastings & Bradley Co., 65 Fed. 279; Kittel v. Augusta, T. & G. R. Co., 65 Fed. 859; Patton v. Glatz, 56 Fed. 367; Von Horst v. Am. Hop & Barley Co., 177 Fed. 976, where allegations that an assessment was made pursuant to a conspiracy to deprive complainant of his stock, was held to be insufficient without any showing of facts tending to prove such conspiracy or improper motive; James v. City Investing Co., 188 Fed. 513. See *infra*. A bill to set aside a decree for fraud must specifically state the manner in which the imposition was practiced upon the court. U. S. v. Norsch, 42 Fed. 417; U. S. v. Rose, 166 Fed. 999, a bill to set aside a decree of naturalization. So held where a bill attacked a land patent for fraud and mistake. Le Marchel v. Teegarden, 133 Fed. 826. In a suit to set aside conveyances of land, made by an executor in probate proceedings, allegations that the sales were fraudulently conducted are insufficient without any averment of the substantive facts justifying the charge. Williamson v. Beardsley, 137 Fed. 467. A bill to set aside a land patent on account of fraud or mistake must state the particulars of the fraud, the names of those engaged therein, the officers who were deceived and the manner in which the mistake occurred. U. S. v. Atherton, 102 U. S. 372, 26 L. ed. 213. But see U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450. A bill to enjoin the construction of a county vault, which avers that the commissioners who let the contract "were imposed upon by false and fraudulent representation made to them by . . . the contractor and carpenter, as to the character, quality, and cost of the material of said vault," does not show with sufficient definiteness what representations were made; and an averment "that said contract or agreement was made by collusion or agreement between said A. and

need not be pleaded.[11] It is sufficient if the main facts or incidents which constitute the fraud against which relief is desired are fairly stated so as to put the defendant upon his guard and apprise him of whatever answer may be required of him.[12] An allegation of a fraudulent intent was held to be an allegation of a fact.[13] A bill for relief from an old fraud must state the

co-respondents, or some of them, in order to give said A. an undue advantage in the erection of the vault over any other persons, to the great damage and injury of the county," is sufficient as failing to set out the facts constituting collusion. Hays v. Alrichs, 115 Ala. 239; s. c., 22 S. R. 465. See Moore v. Hawkins, 19 How. 69, 15 L. ed. 533.

[11] U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 316, 32 L. ed. 450. It has been held that a creditor's bill for an injunction and a receiver, because of the fraudulent disposition of assets, need not describe the assets. Shainwald v. Lewis, 6 Fed. 766, 775.

[12] U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 316, 32 L. ed. 450.

[13] Platt v. Mead, 9 Fed. 91. In a suit for a conveyance of land, it was held to be sufficient to allege that the defendant, while plaintiff's agent, proposed that she convey the property to him for the purposes of its management, and promised that he would reconvey it upon demand, which promise he then had no intention of performing, but made in order to fraudulently procure the land; and that she was induced by his promise and representations to make the transfer. Alaniz v. Casenave, 91 Cal. 41. See also Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82; Peck v. Vinson, 124 Ind. 12; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29. An averment that one B. was from infancy of unsound mind, and that his mother and her legal adviser procured a deed from him for a grossly inadequate consideration, which was never paid, is a sufficient averment of fraud. Rhino v. Emery, C. C. A., 72 Fed. 382. The allegation that a decedent, when very feeble both in mind and body, was persuaded and induced through some undue and improper influence, unknown to complainants, to execute a deed, was held to be insufficient. Jackson v. Rowell, 87 Ala. 685, 4 L.R.A. 637. But see Mott v. Mott, 68 N. Y. 246; s. c., 22 Atl. 797, cited *infra*, § 138. A bill alleged "that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant and by continuing business and otherwise represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations, believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting, upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the

time of the discovery of the fraud, the reason why it was not discovered earlier, the means used by the defendant to conceal it, the manner in which it was learned, and the diligence with which the transaction was investigated.[14] A general allegation of concealment and ignorance is insufficient.[15] It is insufficient to allege that the defendant is a trustee without stating the facts that show how the trust arose.[16] In a bill to set aside a freight rate established by a State board or officer, it is insufficient to aver that the rates are unjust and unreasonable and to aver their prospective effect without stating concrete facts from which such effect can logically or naturally result,[17] and it is insufficient to allege that the known loss resulting from the rate will be a specified amount without stating the facts from which

bank." These allegations were held sufficient to charge fraud. "The omission to state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent was not fatal, as the conclusion asserted showed the intention of the pleader." St. Louis & S. F. Ry. Co. v. Johnson, 133 U. S. 566, 577, 578, 33 L. ed. 683, 686, 687. On a bill against the officers of a bank for damages caused by the bad management of its affairs, it was held that specific allegations, which in themselves might not be sufficient, when supported by general allegations of misconduct and negligence, made out a case for relief. Ackerman v. Halsey, 37 N. J. Eq. 336; s. c., 38 N. J. Eq. 501.

[14] Badger v. Badger, 2 Wall. 95, 17 L. ed. 838; Hubbard v. Manhattan Trust Co., C. C. A., 87 Fed. 51; Edwards v. Mercantile Trust Co., 124 Fed. 381; Cutter v. Iowa Water Co., 128 Fed. 505. For allegations held to be sufficient, see Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263. See Bangs v. Loveridge, 60 Fed. 963.

[15] Ibid. Where, as an excuse for laches, it is alleged that negotiations were pending from which plaintiff hoped to obtain a settlement, the bill should allege that his adversary encouraged such hope. Mackall v. Casilear, 137 U. S. 556, 567, 34 L. ed. 776, 779.

[16] Evan v. Avon, 29 Beav. 144; Dickinson v. Kempner, 193 Fed. 204. It was held: that a bill by a judgment debtor against the judgment creditor and other defendants, which alleged that the creditor would hold a certain part of an amount collected on the judgment in trust for his co-defendants, or one of them; and that complainant had a set-off against each and all of such co-defendants; was not insufficient for uncertainty, because it did not allege which of them was the owner of the beneficial interest in the judgment; there being averments that complainant had no knowledge as to such fact and prayed discovery in relation to the same. Brown v. Pegram, 149 Fed. 515.

[17] Southern Pac. Co. v. Railroad Commission of California, 193 Fed. 699; Northern Pac. Ry. Co. v. Lee, 199 Fed. 621.

such result is reached, nor that the railroad's principal business between the points affected consists of interstate commerce and the road will be compelled to lower its interstate rates without showing what part of the predicted loss will be on the traffic affected as distinguished from the general body of traffic. It has been said that the biall must disclose facts showing with reasonable definiteness, not only the present total value and total gross revenue of the road affected, but also the gross revenue from each class of business, interstate and local, freight, passenger or other, and the proportionate property values devoted thereto, together with the gross operating expenses and a proportionate application thereof to such different classes of traffic, so that the net revenue from each source may be thereby ascertained.[18] In a bill to enjoin railroads from discriminating between white and black passengers, it is insufficient to aver that passenger coaches maintained for the Negro race are not provided with separate and equal toilet and waiting rooms for male and female passengers, nor equal smoking accomodations, nor separate and equal chair-cars, sleeping-cars and dining-car accomodations.[19] An allegation that a defendant corporation is about to exceed its powers is insufficient. The bill must show what acts are threatened, and why they exceed the powers of the corporation.[20] It has been said that as much certainty is required in a bill by a stockholder to enforce a corporate right as in a bill by the corporation for the same purpose.[21] In a stockholders' suit to wind up a corporation as insolvent, it is not necessary that all the property of the corporation should be specifically described in the bill.[22] The

[18] Southern Pac. Co. v. Railroad Commission of California, 193 Fed. 699.

[19] M'Cabe v. Atchison, T. & S. F. Ry. Co., C. C. A., 186 Fed. 966.

[20] Leo v. Union Pac. Ry. Co., 19 Fed. 283.

[21] Whitney v. Fairbanks, 54 Fed. 985.

[22] Williams v. Am. Ass'n, C. C. A., 197 Fed. 500. A bill by a stockholder seeking dissolution of a corporation and accounting, alleged that business had been suspended, "among other things," because of the worthlessness of a patent under which it had been carried on, but without stating that that was the controlling reason; that the officers were misapplying the funds, but without stating that any effort had been made to have the corporation bring suit; that the officers had tampered with the books, but without stating in what manner; that certain assets had not been entered in the books, but without charging concealment or inten-

allegation that the corporation cannot pay its current obligations as they mature and is unable in the ordinary course of its business to pay its liabilities, is a sufficient allegation of insolvency in a bill that prays the appointment of a receiver.[23] "The pleader should state the facts, and not formulate mere epithetic 'charges.' . . . If the facts are not to be ascertained by diligence, or because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity of discovery, when that is wanted; but a court cannot sustain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrongdoing appears, without much necessity for characterizing it as such."[24] The bill should state facts, not evidence.[25] It should not state admissions.[26]

tional wrong. It was held that the allegations were too general and indefinite to justify granting relief. Watson v. U. S. Sugar Refinery, C. C. A., 68 Fed. 769.

[23] Am. Can Co. v. Erie Preserving Co., 171 Fed. 540; Cincinnati Equipment Co. v. Degnan, C. C. A., 184 Fed. 834.

[24] Lafayette Co. v. Neely, 21 Fed. 738.

[25] Eq. Rule 25.

[26] This was held by Judge Story not to be the rule in this country. Smith v. Burnham, 2 Sumner, C. C. 612; Jenkins v. Eldredge, 3 Story C. C. 181, 283, 284; Story's Eq. Pl., § 265. By the English Chancery practice, admissions could not be put in evidence unless they had been specifically set forth in the bill. Hall v. Maltby, 6 Price, 240; Evans v. Bicknell, 6 Ves. 183; Austin v. Chambers, 6 Cl. & Fin. 38; Story's Eq. Pl., § 265. This is no longer the practice there. Davy v. Garrett, 7 Ch. D. 473, 47 L. J. Ch. 218, 26 W. R. 225, 38 L. T. 77, (letters); Jones v. Turner, (1875) W. N. 239, (plaintiff had "been informed by the defendant"). According to Professor Langdell, "when a bill charges a defendant with having had notice, or with having committed a fraud, or with insanity, or drunkenness, or lewdness, or misconduct in office, if the plaintiff intends to prove specific acts of notice, or of fraud, insanity, drunkenness, lewdness or misconduct in office, it seems that such acts should be specifically charged in the bill. But this view is not fully supported by authority. It may also be stated generally, that whenever the plaintiff has evidence which is likely to take the defendant by surprise, it is the safer course to indicate its nature in the bill, rather than to run the risk of having it objected to at the hearing." Langdell's Eq. Pl., § 60. See Weston v. Empire Assurance Corporation, L. R. 6 Eq. 23; Clark v. Periam, 2 Atk. 337; Shepherd v. Morris, 4 Beav. 252.

Objections to a bill for certainty should be raised by a special motion to dismiss upon that ground,[27] or by a motion for a further and better statement of the nature of the claim or further and better particulars of the matter stated.[28] By the former practice, when not raised by demurrer, they were ordinarily held to have been waived.[29]

§ 138. Inconsistency and bills with a double aspect.

The Equity Rules of 1912 provide: that the relief prayed "may be stated and sought in alternative forms."[1] It has not yet been decided whether this changes the former practice, which was as follows: A bill must not state two inconsistent states of fact and ask relief in the alternative. But it may state the facts and ask relief in the alternative according to the conclusion of law that the court may draw from them, so that if one kind of relief sought be denied, another may be granted; and it may state facts of a different nature not inconsistent with each other, and equally supporting the prayer for relief. In both of these cases a bill is said to have "a double aspect."[2] Thus, a bill may state facts constituting an attempt to form a new corporation by the consolidation of two already existing and pray that, if the new corporation have a legal existence, the plaintiff may be declared entitled to a certain number of shares therein, otherwise to a corresponding interest in the stock of one of the old companies.[3] A bill to enjoin the infringement of a copyright may set forth an agreement between the author and the plaintiff, and then allege that if such agreement does not constitute an assignment of the copyright, it is an exclusive li-

[27] See Eq. Rule 29.

[28] Eq. Rule 20; *infra*, §§ 240–242.

[29] Chicago, M. & St. P. R. Co. v. Pullman P. C. Co., 50 Fed. 24; Green v. Terwilliger, 56 Fed. 384; Thomas v. Nantahala, M. & T. Co., C. C. A., 58 Fed. 485; Rorback v. Dorsheimer, 25 N. J. Eq. 516, 518; Mason v. Daly, 117 Mass. 403.

§ 138. [1] Eq. Rule 25.

[2] Shields v. Barrow, 17 How. 130, 144, 15 L. ed. 158, 162; Halsey v. Goddard, 86 Fed. 25; Shackleton v. Baggaley, C. C. A., 170 Fed. 57, Story's Eq. Pl., § 426, note, § 254.

[3] Kilgour v. New Orleans Gas-Light Co., 2 Woods, 144, 148. The averment "that if said intention is true, which is denied, then the said State law, . . . is null and void, because it operates as a discrimination against the shareholders of national banks, in violation of the express terms of § 5219 of the Revised Statutes of the United States," is sufficient to

pense.[4] The complainant may seek to quiet the title to lands, claiming either as devisee or as heir-at-law.[5] A bill may contain a prayer that an agreement be either set aside as obtained by fraud, or else specifically enforced[6] or an accounting thereunder directed,[7] or else that it be reformed, or if that cannot be allowed that it be cancelled,[8] or else that a lien upon the same, in favor of the plaintiff, be foreclosed,[9] or that the defendant either restore property obtained by fraud or else pay the value of the same.[10] When the complainant alleged that a decree which he wished to set aside was obtained either by mistake of all the parties, or by deception practiced upon himself, or by collusion of the defendant with third parties, the bill was held to be demurrable for indefiniteness.[11] "To allege

raise the issue whether there is in the act any discrimination prohibited by the act of Congress. Whitney Nat. Bank v. Parker, 41 Fed. 402, 406.

[4] Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 623. See Chaffin v. Hull, 39 Fed. 877.

[5] Gaines v. Chew, 2 How. 619, 643, 11 L. ed. 402, 411.

[6] Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141. But see Shields v. Barrow, 17 How. 130, 143, 15 L. ed. 158, 161; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 33 Fed. 440, 448. But see Cella v. Brown, C. C. A., 144 Fed. 742. A bill was sustained when filed by one partner against another praying for specific performance of a contract for the sale of land, or else for an account of the partnership debts, and a charge of their amount upon the land as belonging to the assets of the firm. Hoxie v. Carr, 1 Sumn. 173. It was held: that a bill was not demurrable for multifariousness, or as based on antagonistic rights, when it alleged that a mortgage debt was paid before the mortgage was foreclosed under a power of sale, and asked that the mortgage and deed be canceled, and, at the same time, asked that the sale be set aside because the mortgagee became the purchaser at his own sale. Dickerson v. Winslow, 97 Ala. 491; s. c., 11 S. R. 918. But see Cutler v. Iowa Water Co., 96 Fed. 777.

It was held that bills were not demurrable for multifariousness, nor based upon antagonistic rights, which they prayed, for specific performance of an agreement to deliver coal in return for an advance of money, and in the alternative for the foreclosure of a mortgage, by which the return of the money was secured (Peale v. Marian Coal Co., 172 Fed. 639), and which

[7] Jackson v. Jackson, C. C. A., 175 Fed. 710.

[8] Electric Goods Mfg. Co. v. Koltonski, 171 Fed. 550.

[9] Jones v. Missouri-Edison El. Co., C. C. A., 144 Fed. 765.

[10] Hubbard v. Urton, 67 Fed. 419. But see Alger v. Anderson, 92 Fed. 696.

[11] Brooks v. O'Hara, 8 Fed. 529;

that a sale is simulated and if not simulated is fraudulent, meaning thereby it is a sham sale, and if not a sham then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency. It seems to me that, if there is doubt as to the nature of the transaction, the creditor, who has 'to strike in the dark,' should charge a fraudulent simulation, and on discovery amend if necessary." [12] It was held in England that a bill may not pray relief primarily against one of two defendants, and, in case the court should hold him free from liability, then against the other.[13] It was held that where a bill prayed

s. c., 2 McCrary, 644. But see Williams v. U. S., 138 U. S. 514, 517, 34 L. ed. 1026, 1028.

[12] Pardee, J., in Socola v. Grant, 15 Fed. 487, 489.

A bill by a judgment creditor of a railroad company, against that and another railroad company, to redeem property in the possession of the latter company as mortgagee, on the ground that such possession was fraudulently acquired, and also to subject to the payment of the judgment certain bonds about to be issued by the latter, to the officers of the former company, in order to confirm the title to such property, was held to be bad as multifarious. Merriman v. Chicago & E. I. R. Co., C. C. A., 64 Fed. 535, 550, 551, per Baker D. J.: "If the appellant's case was solely that the Eastern Illinois Company has no title to the property of the Danville Company, they might pray for various forms of alternative relief consistent with that case; but they cannot in the same bill make a case that it has no title, and also a case that it has a title, and then ask for inconsistent relief according to the different cases thus made. Such course of procedure we do not understand is warranted by the doctrine of alternative relief. Such are alternative cases, and not cases of alternative relief. They are inconsistent, for a decree of one of those forms of relief would proceed upon a theory fatal to the other form of relief."

Where a bank filed a bill to foreclose a mortgage and to restrain a sale of the mortgaged property to satisfy a judgment obtained against it by another, and the holder of the judgment thereupon filed an answer and cross-bill alleging that the mortgage had been withheld from record in fraud of creditors, and praying that the property be sold to satisfy the judgment, and the complainants filed an amendment alleging that, previous to the recovery of the said judgment, they themselves had recovered a judgment upon an indebtedness separate and distinct from the mortgage indebtedness, and that if their mortgage was invalid they had a prior lien under this judgment; it was held that the bill was demurrable for multifariousness. Mobile Savings Bank v. Burke, 94 Ala. 125, 10 S. R. 328.

[13] Clark v. Lord Rivers, L. R. 5

specific performance of a contract in relation to certain patents, and also contained expressions looking for relief by an injunction against an infringement of a patent, it could not be maintained for the latter relief as a bill with a double aspect, since the necessary parties must be different in each case.[14] And that a bill could not obtain a preliminary injunction to restrain infringement through sales, made by defendant, in violation of the terms of its license, where the bill also prayed for additional relief, which could only be granted if the license was still in force.[15] It was further held: that a bill was bad when it contained two alternative claims each belonging to several persons, of whom one had no interest in one claim, and others had no interest in the other; that a bill should not pray in the alternative legal and equitable relief,[17] and that a bill in equity with a double aspect must state each position separately and distinctly.[18] Under the modern practice in England, it has been held that, in an action for the recovery of land, plaintiff may claim possession as the residuary devisee; and, in the alternative, should the will be held invalid, as heir at law.[19] "When the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the

Eq. 91, 97. But see Kilgour v. New Orleans G. L. Co., 2 Woods. 144, 148; Brown v. Pegram, 149 Fed. 515. "The plaintiff brought a bill in equity joining A and B as defendants. The bill alleged that the plaintiff owned a lot fifty feet wide, that A owned a lot on one side and B owned a lot on the other side of the plaintiff's lot, that all three claimed under a common grantor, that A and B had erected buildings on their lots, that these buildings were less than fifty feet apart, but that the plaintiff's surveyors could not agree as to which defendant was encroaching. The bill prayed for a determination of the encroachment and a decree for the removal of the encroaching building and damages. *Held*, that the bill is not demurrable. Caleo v. Goldstein, 118 N. Y. Supp. 859, (Sup. Ct., App. Div.)

[14] Am. Box Mach. Co. v. Crosman, 57 Fed. 1021. See Magic R. Co. v. Elm City Co., 13 Blatch. 151; Halsey v. Goddard, 86 Fed. 25.

[15] Lovell-McConnell Mfg. Co. v. Waite Auto Supply Co., 198 Fed. 130.

[16] Stebbins v. St. Anne, 116 U. S. 386, 29 L. ed. 667.

[17] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 651, 34 L. ed. 295, 300; Alger v. Anderson, 92 Fed. 696.

[18] Electric Goods Mfg. Co. v. Koltonski, 171 Fed. 550.

[19] Annual Practice, 1913, p. 317. But see Field v. Camp, 193 Fed. 160.

allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case not founded on fraud is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing on that ground, on some other equity, a plaintiff failing on the first may succeed on the latter alternative. But when the attention of the defendant has been distinctly called to it, and he has been called upon to answer the case according to both alternatives, it is the duty of the judge to determine whether the two are so interwoven with each other that, on the failure of proof of fraud, it is impossible to treat the facts as separate allegations, justifying a separate mode of dealing with them."[20] Thus, it has been held, that where a bill to rescind a contract was based solely upon alleged fraudulent representations by defendant, it could not be sustained upon proof of a mutual mistake;[21] and upon a bill to set aside a decree for fraud and error, apparent upon the record, relief upon proof of a mistake of fact was denied.[22] This objection cannot be raised for the first time upon an appeal.[23] When a bill alleges both fraud and mistake, if the latter alone is proved the bill will be sustained.[24] If the plaintiff wish to set aside a deed on account of fraud, imposition, and undue influence, he may allege both that the maker was insane and that he had a great imbecility of mind.[25] It was held: that

[20] Dwight Foster's Lectures on Equity Pleadings, MS.; Eyre v. Potter 15 How. 42, 56, 14 L. ed. 592, 598; Britton v. Brewster, 2 Fed. 160; French v. Shoemaker, 14 Wall. 314, 335, 20 L. ed. 852, 857; Fisher v. Boody, 1 Curt, 206; Hoyt v. Hoyt, 27 N. J. Eq. 399; Wilde v. Gibson, 1 H. of L. Cases, 605; Hickson v. Lombard, L. R. 1 H. of L. 326; Thomson v. Eastwood, L. R. 2 App. Cases, 215; Price v. Berrington, 2 Macn. & G. 486, 498; Dashiell v. Grosvenor, C. C. A., 27 L.R.A. 67, 66 Fed. 334; Grosvenor v. Dashiell, 62 Fed. 584; Brown v. Davis, C. C. A., 62 Fed. 519; Hendryx v. Perkins, C. C. A., 114 Fed. 801. See Chicago, B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 593, 51 L. ed. 636, 638.

[21] Burk v. Johnson, C. C. A., 146 Fed. 209.

[22] Hendryx v. Perkins, C. C. A., 114 Fed. 801.

[23] Wasatch Min. Co. v. Creston Min. Co., 148 U. S. 293, 37 L. ed. 454.

[24] Williams v. U. S., 138 U. S. 514, 517, 34 L. ed. 1026, 1028; U. S. v. Mills, C. C. A., 190 Fed. 513, 515.

[25] Story's Eq. Pl., § 254; Bennet v. Vade, 2 Atk. 325; Colton v. Ross, 2 Paige (N. Y.) 396; Lloyd v.

a suit to enjoin a railroad company from granting rebates to favored shippers, under the Elkins act of February 19, 1903, could not be sustained under the statute of July 2, 1890, forbidding combinations and monopolies in restraint of commerce between the States.[26]

§ 139. Multifariousness or misjoinder. In General. The Equity Rules of 1912 provide: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."[1] To what extent this modifies the previous practice has not yet been determined. The former rule was as follows: A bill must not be multifarious. Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways,—by a misjoinder of plaintiffs, by a misjoinder of defendants, and by a misjoinder of grounds for equitable relief held by and against the same parties.[2] "To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition is, upon the authorities, utterly impossible. The cases upon the subject are extremely various, and the court in deciding them seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule."[3] "The only way of reconciling the authorities upon the subject is by adverting to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the ob-

Brewster, 4 Paige (N. Y.) 537; Mott v. Mott, 49 N. J. Eq. 177; s. c., 22 Atl. 997. But see Jackson v. Rowell, 87 Ala. 685, 4 L.R.A. 637; *supra*, § 137.

[26] U. S. v. Atchinson, T. & S. F. Ry. Co. 142 Fed. 176.

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[2] Calvert on Parties, Book I, Ch. vii.

[3] Lord Cottenham in Campbell v. Mackay, 1 M. & Cr. 603, 618.

jection raised though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless these transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term 'multifariousness' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which he has no connection whatever."[4] There is, however, little practicable good to be obtained from a maintenance of this distinction except as a means of elucidating some of the expressions in the earlier authorities.[5] "The decisions on this subject are contradictory and unsatisfactory. The common-sense rule in such cases is that an individual shall not be called to maintain his title or shall not assert it in connection with others to which it has no analogy, and in the investigation of which the costs and complexity of the case will be increased."[6] It has been said that

[4] Lord Cottenham in Campbell v. Mackay, 1 M. & Cr. 603, 618. Approved in Shields v. Thomas, 18 How. 253, 259, 15 L. ed. 368, 370.

[5] See Calvert on Parties, Book I, ch. vii.

[6] McLean, J., in Turner v. Am. Baptist Missionary Union, 5 McLean, 344, 349.

The following rule laid down by Mr. Gibson in his Suits in Chancery, section 292, was quoted with approval by Judge Jenkins in Von Auw v. Chicago T. & F. G. Co., 69 Fed. 448: "To make a bill demurrable for multifariousness it must contain all of the following characteristics. First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but must be separate and independent; third, the evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper as to the other cause or causes, must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants in one or more of the separate and independent causes of action must be distinct from the re-

the fact that separate decrees may be requisite in order to afford complete relief does not necessarily make the bill multifarious.[7]

§ 140. Multifariousness by misjoinder of plaintiffs. The Equity Rules of 1912 provide: "When there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."[1] It has not yet been decided whether this last clause modifies the whole sentence or only that which refers to the joinder of defendants. It consequently is uncertain whether it affects so much of the former practice as permitted a joinder of plaintiffs, who had a common interest in the relief sought. In England, a party cannot now unite in the same suit claims which he holds in two different capacities unless connected.[2] In New York, it was held, where the plaintiff prayed the same relief both individually and as executor upon the same cause of action, which appeared upon the face of his complaint to be for the benefit of the testator's estate, that there was no misjoinder of parties or of causes of action.[3] No persons can unite as complainants in a bill in equity unless they have a joint or common interest in obtaining the same relief. Thus, if one of them has no interest in the relief claimed, the bill is demurrable.[5] Those who claim the return of money paid by them severally on distinct promissory notes cannot join their claims in the same bill;[6] nor can several cred-

lief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other dedendant or defendants, or the other cause or causes of action; and eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest."

7 Neal v. Rathell, 70 Md. 592; s. c., 17 Atl. 566.

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3 Moss v. Coehn, 158 N. Y. 240. See Metropolitan Trust Co. v. Columbus, S. & H. R. Co., 93 Fed. 689.

4 Story's Eq. Pl., § 279; Calvert on Parties (2d ed.), 105, 110.

5 Walker v. Powers, 104 U. S. 245, 249, 26 L. ed. 729, 731; Doggett v. Railroad Co., 99 U. S. 72, 25 L. ed. 301. *Contra*, Havens v. Burns, 188 Fed. 441.

6 Yeaton v. Lenox, 8 Pet. 123, 8 L. ed. 889.

itors claiming under several obligations unite in a suit to attach the debts of an absent debtor.[7] Persons who have been defrauded of stock in a corporation by the same parties who promised it to them before the organization of the corporation cannot join in a bill to compel the issue of the stock to each of them.[8] Persons who have been separately indicted for similar acts committed while acting as agents for the same principal cannot join in a bill to enjoin the further prosecution of the indictments.[9] But in a bill to compel specific performance of a decree in a former suit, all the complainants in the first suit may join as plaintiffs, though the decree sought to be enforced orders the payment of specific sums severally to each of them.[10] Several fire insurance companies were allowed to unite in a bill to set aside one award against them upon an arbitration of claims by the same person under several policies;[11] and to enjoin the prosecution of separate actions at law, brought by the same plaintiffs against them and other insurance companies to recover upon policies on the same property, which provided for a proportional liability, where the same defense had been interposed to each action,[12] but not where they had issued concurrent policies upon the same policy, the liability of each being independent of that of the rest.[13] Plaintiffs with conflicting interests cannot so join.[14] Such are, in a suit for the construc-

7 Ibid. But see Norris v. Hassler, 22 Fed. 401; Langdon v. Branch, 37 Fed. 449.

8 Summerlin v. Fronterizac S. M. & M. Co., 41 Fed. 249.

9 Woolstein v. Welsh, 42 Fed. 566.

10 Shields v. Thomas, 18 How. 253, 15 L. ed. 368. It has been held that this rule does not extend to a bill for specific performance of a contract to convey real estate in which the complainants hold distinct rights to separate lots. Marselis v. Morris & L. Co., 1 N. J. Eq. 31, 39.

11 Hartford Fire Ins. Co. v. Bonner, 11 L.R.A. 623, 44 Fed. 151.

12 Virginia-Carolina Chem. Co. v. Home Ins. Co., C. C. A., 113 Fed. 1.

13 Rochester German Ins. Co. v. Schmidt, C. C. A., 175 Fed. 720.

14 Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; Saumarez, v. Saumarez, 4 Mylne & Cr 331, 336; Parsons v. Lyman, 4 Blatchf. C. C. 432; Bell v. Cureton, 2 M. & K. 503; Stebbins v. St. Anne, 116 U. S. 386, 29 L. ed. 667; Brown v. Bedford City L. & I. Co. 91 Va. 31, 20 S. E. 968. A bill was held multifarious where all the complainants sought as taxpayers to enjoin a defendant town from purchasing the plant of a defendant waterworks company, and one complainant further sought, as a stockholder in that company, to enjoin the sale on the ground of inadequacy of price. Peabody v.

tion of a will, persons, each of whom is interested in having a different construction put upon it.[15] Nor can two join in a bill to set aside a fraudulent conveyance of land, of whom one claims the land as a creditor of the person who has made the conveyance, and the other as the purchaser of the land upon a sheriff's sale to satisfy a judgment held by him.[16] So, a bill was held to be multifarious which sought to enforce a trust in land and also to give the title to one of the complainants to the same property.[17] But the interests of the complainants need not be co-extensive. Thus, a tenant for life and the remaindermen of an estate, either legal or equitable, may join in a suit to protect the estate.[18] Beneficiaries of a trust fund may join in a suit for an accounting, although their interests are several.[19] The buyer of a secret formula and the vendor who sold the same with a guarantee, may join in a suit to enjoin the unlawful use of the same.[20] Although usually there must be some privity between the complainants in a bill, and a common interest in the questions involved cannot alone lay the foundation for the joinder of parties;[21] yet in certain cases those between whom there was no privity were allowed to sue together when they sought to avert an injury which would affect them all alike.[22] Thus persons with a common interest in trademarks and labels, as owners and selling agents of the goods upon which they were affixed, might join in a suit to prevent their imitation.[23] Several tenants or parishioners might unite in a bill of peace seeking to dispose of a disputed right claimed against them by the lord of the manor[24] or the parson of the parish.[25] And the

Westerly Waterworks, 20 R. I. 176, 37 Atl. 807.

15 Parsons v. Lyman, 4 Blatchf. C. C. 432; Saumarez v. Saumarez, 4 M. & Cr. 331, 336.

16 Walker v. Powers, 104 U. S. 245, 26 L. ed. 729.

17 Leslie v. Leslie, 84 Fed. 70.

18 Story's Eq. Pl., § 279*a*; Buckeridge v. Glasse, 1 Cr. & Phill, 126; Calvert on Parties (2d ed.), 99; Rainey v. Herbert, C. C. A., 55 Fed. 443.

19 Watson v. National Life & Tr. Co., C. C. A., 162 Fed. 7.

20 James B. Sipe & Co. v. Columbia Refining Co., 171 Fed. 295.

21 Rochester German Ins. Co. v. Schmidt, C. C. A., 175 Fed. 720.

22 See § 116 *supra*.

23 Jewish Colonization Ass'n v. Solomon, 125 Fed. 994.

24 Annon., 1 Chan. Cas. 269; Smith v. Earl Brownlow, L. R. 9 Eq. 241.

25 Rudge v. Hopkins, 2 Eq. Cas. Abr. 70.

owners of several lots of land claiming under a common source of title might unite in a bill of peace against several other claimants to the same lots, who also relied upon a common source of title adverse to that of the complainant.[26] Several owners of different lots of land who have a common interest in an easement derived from the same source may unite in a suit to enjoin the obstruction of the easement.[27] Several claimants in possession of several parcels of land whose rights depend upon the same question of fact or law may unite in a bill of peace against the same defendant who claims title to all the land by reason of the same disputed facts or legal proposition.[28] The owner of several mines might join in a suit to enjoin different assayers from buying ore from laborers employed by the complainants, although there was no concert of action among the defendants in their various purchases,[29] to enjoin smelters from injuring their crops.[30] The owners of adjacent property might join in a bill in equity to enjoin a defendant from erecting a livery-stable,[31] an unauthorized street railroad[32] or other nuisance in their vicinity. But another case holds that different persons, each of whom will suffer a distinct injury from the levy of a

[26] Crews v. Burcham, 1 Black, 352; Prentice v. Duluth S. & F. Co., C. C. A., 58 Fed. 437. It has been held that the pastor and some of the members of a religious association may unite in a suit to recover possession of the church and parsonage, to enjoin the trustees and the remainder of the congregation from interfering with each in his ecclesiastical rights; and also to compel an accounting for collections taken up, which are payable to the elder and pastor as salary. Fuchs v. Meisel, 113 Mich. 559; s. c., 60 N. W. R. 773. But see Douglas v. Boardman, 113 Mich. 618, s. c., 71 N. W. 1100.

[27] Norton v. Colusa Parrot Min. & Smelting Co., 167 Fed. 202. Springer v. Lawrence, 47 N. J. Eq. 461, s. c., 21 Atl. 41. See Union Mill & M. Co. v. Dangberg, 81 Fed. 73; Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824; Cent. Pac. R. Co. v. Dyer, 1 Saw. 641; *infra*, § 141. Flint v. Russell, 5 Dill. 151; Parker v. Nightingale, 6 Allen (Mass.), 341, 80 Am. Dec. 632. *Contra*, Hudson v. Madison, 12 Simons, 416.

[28] Holst v. Savannah El. Co., 131 Fed. 931; Rafferty v. Central Tr. Co. 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884.

[29] Goldfield Consol. Mines Co. v. Richardson, 194 Fed. 198.

[30] Am. Smelting & Refining Co. v. Godfrey, C. C. A., 158 Fed. 225, 89 C. C. A. 139.

[31] Cutting v. Gilbert, 5 Blatchf. C. C. 259. See, however, Central Pac. R. Co. v. Dyer, 1 Saw. 641; Union Pac. R. Co. v. McShane, 3 Dill. 303; *infra*, § 141.

[32] Allen v. Fairbanks, 45 Fed. 445.

tax, cannot unite in a bill to enjoin its levy on account of its alleged unconstitutionality.[33] Several stockholders who had been compelled to pay corporate debts were allowed to join in a bill against another stockholder to compel him to contribute his proportion, and several persons who had been induced by identical fraudulent misrepresentations to subscribe to stock in a corporation were allowed in Virginia to join in a suit to cancel their subscriptions.[34] It has been held: that several depositors may join in a suit against directors of their common bank, for loss through improper loans of the bank funds.[35] A stockholder might sue on his own behalf and on behalf of his corporation, in the same bill, when the same facts sustained the cause of action on behalf of both, such as an attempt to make a fraudulent consolidation between his company and another on terms unduly unfavorable to his corporation.[36] But, it has been held, that a suit by a stockholder, who is indebted to a building and loan association, to cancel his loan contract for fraud, usury and incapacity of the association to do business within the State, who also prays, on behalf of himself and all other stockholders, to have a receiver of the property of the corporation within the State appointed upon allegations of mismanagement and misappropriation by its officers, is multifarious;[37] that so is a suit by a corporation for a breach of contract, coupled with claims by individuals, to compel the delivery of stock of the same defendant.[38] It has been said that the fact that separate decrees may be requisite in order to afford complete relief does not necessarily make the bill multifarious.[39]

§ 141. Multifariousness by misjoinder of defendants. The Equity Rules of 1912 provide: "If there be more than

[33] Rader v. Bristol Land Co. 94 Va. 766, 27 S. E. 590.

[34] Foster v. Abingdon, 88 Fed. 604; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478.

[35] Boyd v. Schneider, C. C. A., 131 Fed. 223.

Several stockholders may unite in a suit to enjoin the directors of a corporation from issuing new stock without giving the complainants a reasonable opportunity to take their proportionate share and from allowing any holder thereof to vote at a corporate meeting. Snelling v. Richard, 166 Fed. 635.

[36] Jones v. Missouri-Edison El. Co., C. C. A., 144 Fed. 765.

[37] Emmons v. National Mut. Bldg. & Loan Ass'n of New York, C. C. A., 135 Fed. 689.

[38] Backus v. Brooks, 189 Fed. 922.

[39] Neal v. Rathell, 70 Md. 592; s. c., 17 Atl. 566.

one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."[1] This seems to broaden the former rule, which was as follows: No persons could be joined as defendants to a bill in equity who had not a joint or common interest in opposing the relief prayed.[2] Different relief might, however, be obtained against different defendants when the bill sought to prevent or annul the effect of acts in pursuance of a common scheme, or so connected with each other as to form part of the same transaction.[3] The rule was thus stated by Sir. John Leach: "In order to determine whether a suit is multifarious, or, in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object."[4] "The entirety of the case against one defendant constitutes the connecting link."[5] But a bill is multifarious, when the charge against one is in no way connected with those against other defendants.[6] A bill is not multifarious which is filed by a cred-

§ 141. [1] Eq. Rule 26.

[2] Calvert on Parties, Book I, ch. vii; U. S. v. Alexander, 4 Cranch, C. C. 311.

[3] Calvert on Parties, Book I, ch. vii; Manners v. Rowley, 10 Simons, 470.

[4] Salvidge v. Hyde, 5 Maddock, 138, 146.

[5] Calvert on Parties (2d ed)., 98, quoting Sir John Leach in Turner v. Robinson, 1 Sim. & S. 313; and Lord Cottenham in Attorney General v. Corporation of Poole, 4 M. & Cr. 17, 31; Halsey v. Goddard, 86 Fed. 25; Porter v. Robinson 2 Va. Dec. 183, 22 S. E. 843; Crickard v. Crouch's Adm'rs, 41 W. Va. 503; s. c., 23 S. E. 727; Middleton Sav. Bank v. Bacharach, 46 Conn. 513. But see Washington City Sav. Bank v. Thornton, 83 Va. 157; Buffalo v. Town of Pocahontas, 85 Va. 222; Sylvester v. Boyd, 166 Mass. 445; s. c., 44 N. E. 343; Staude v. Keck, 92 Va. 544; s. c., 24 S. E. 227.

[6] Wood v. Dummer, 3 Mason, 308; West v. Randall, 2 Mason, 181, 200; Lewarne v. Mexican Int. I. Co., 38 Fed. 620; Scales v. Pheiffer, 77 Ala. 278; Sumter County v. Mitchell, 85 Ala. 313; Van Houten v. Van Winkle, 46 N. J. Eq. 380.

itor on behalf of himself and others similarly situated: to wind up the affairs of the bank, to determine the amount due him, to ascertain the amounts due to other creditors, to distribute the assets among them, and to enforce the liability of the stockholders, who are made defendants with the bank.[7] Bills were held to be multifarious when filed by receivers against several stockholders to enforce a statutory liability to creditors,[8] or to collect an assessment made in another proceeding, to which the defendants were not parties.[9] But a receiver's bill to collect the amount due by subscriptions to stock was held, not to be multifarious when filed against several stockholders, who had a common defense depending upon the same questions of fact and law.[10] A bill is not multifarious as regards stockholders, who have a common defense, when filed to collect dividends paid while the corporation was insolvent.[11] Nor a bill by a receiver against a number of bank directors, to recover money lost by the bank through their alleged misconduct.[12] Nor in New Jersey a stockholder's bill to recover damages for the negligence of the officers and directors of a bank for a period of time during part of which some of the defendants were not in office.[13] Nor

[7] Richmond v. Irons, 121 U. S. 27, 50, 30 L. ed. 864, 871; Wyman v. Wallace, 201 U. S. 230, 242, 50 L. ed. 738, 741.

[8] Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380.

[9] Fidelity Tr. & Safe Dep. Co. v. Archer, C. C. A., 179 Fed. 32.

[10] Wyman v. Bowman, C. C. A., 127 Fed. 257.

[11] Hayden v. Thompson, C. C. A., 71 Fed. 69; reversing, 67 Fed. 273.

[12] Allen v. Luke, 141 Fed. 694.

[13] Ackerman v. Halsey, 37 N. J. Eq. 356. *Contra*, under the N. Y. Code, People v. Eq. L. A. S'y., 124 App. D. (N. Y.) 714. Bills were held to be *multifarious* which were filed by a stockholder to enforce the liability to the corporation of one defendant for unpaid stock, his joint liability with five others for fraud against the creditors of the corporation, and the liability of these five for the fraudulent sale of corporate property with which the first defendant was not connected. Holton v. Wallace, 66 Fed. 409. In Missouri, a bill by a creditor of an insolvent corporation to collect unpaid stock subscriptions and also to recover from one of the subscribers for his conduct as president both in defrauding the corporation and in injuring the individual property of complainant. Montserratt Coal Co. v. Johnson County C. M. Co., 141 Mo. 149; s. c., 42 S. W. 822. By a stockholder who complained of other stockholders and officers for false representations which induced him to buy his stock, and against the corporation for a dissolution and an accounting because of the suspension of its business

a bill against two depositaries of the funds of an insolvent association, the proceeds of embezzlements by its treasurer, all of which were of the same character and grew out of his manipulation of the deposits, in some of which transactions it was alleged that both of them participated and were jointly liable; when it was further charged, that the illegal matters were so interwoven that an accounting was necessary of all the different accounts of the association in both depositaries, that the defendants knowingly participated with the treasurer in the misappropriation of the funds.[14] Nor one by the holder of a bond secured by a lien upon the property of a corporation against both the corporation and its stockholders, at the same time to foreclose his lien and to compel the stockholders to pay so much of the balance of their subscriptions to the stock of the corporation as will suffice for the payment of the deficiency after the foreclosure sale.[15] Nor one by a mortgagee of water works to foreclose the mortgage, and to compel the city which had bought the property to pay hydrant rents to the plaintiff in pursuance of the contract granting the franchise.[16] Nor a bill by a city bondholder for an accounting by his obligor and by the county, to whom assessments, upon which the complainant had a lien, had been paid

and waste of the corporate funds. Watson v. U. S. Sugar Ref. Co., C. C. A., 68 Fed. 769. In Massachusetts, by a stockholder against a corporation and its trustees praying for a return of money advanced by him to the corporation through the fraud of the individual defendants, which also alleged misappropriation of the corporate funds and prayed the appointment of a receiver, where there was no allegation that the corporation had no funds to repay the plaintiff, and the receivership was not sought merely as an incident to the principal relief. Davis v. Peabody, 170 Mass. 397; s. c., 49 N. E. 750. It has been held that claims against directors and stockholders to enforce different liabilities cannot be combined. Cambridge Waterworks v. Somerville D. & B. Co., 14 Gray (Mass.), 193; Pope v. Leonard, 115 Mass. 286; Von Auw v. Chicago T. & T. G. Co., 70 Fed. 939. But they may be united in a suit to enjoin them from taking part in the same fraudulent transaction. Jones v. Missouri-Edison El. Co., C. C. A., 144 Fed. 765.

[14] Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co., 143 Fed. 152.

[15] Marine & R. P. M. & Mfg. Co. v. Bradley, 105 U. S. 175, 26 L. ed. 1034.

[16] Centerville v. Fidelity Tr. & G'y Co., C. C. A., 118 Fed. 322. In Massachusetts a stockholder was allowed to file a bill against a corporation and an officer thereof to recover corporate funds misappropriated by the officer and to apply

in part.[17] But bills were held to be *multifarious* when filed: to foreclose a mortgage on a gas plant, covering all moneys "furnished and hereafter paid" by a city for gas-light, which joined the city as a co-defendant with the mortgagor, and prayed for a judgment against the city for what it owed the mortgagor for light;[18] a bill to foreclose a mortgage by a corporation, and to recover dividends from stockholders paid out of the income of the mortgaged property,[19] a bill which joined a prayer for the recovery of bonds wrongfully retained by one defendant, with a prayer for relief against another to apply assets in payment of the same,[20] and a bondholders' bill to enforce a lien upon a fund in the possession of a corporation and to charge the directors individually for payments made to general creditors.[21] A bill was held multifarious which sought both to foreclose a mortgage and to restrain another defendant from asserting a claim of title adverse to both mortgagee and mortgagor,[22] at least when such adverse title accrued prior to the mortgage;[23] and even, it has been held in New York, when it subsequently arose;[24] and a bill to foreclose two mortgages by the same mortgagor upon separate lots owned by different persons;[25] or to foreclose a mortgage and recover damages from a third person for fraud in inducing the loan thereby secured.[26] But a party claiming a lien upon the property by a judgment against the mortgagor prior to the mortgage, the validity of which lien is contested by the mortgagee, may be joined as a party defendant in a foreclosure suit.[27] A bill may be filed to establish a lien, with a

the same to a dividend due the complainant. Dunphy v. Traveller Newspaper Ass'n, 146 Mass. 495.

17 Hayden v. Douglas County, Wisconsin, C. C. A., 170 Fed. 24.

18 International Tr. Co. v. Cartersville I. G. & W. Co., 63 Fed. 341, 346.

19 New Hamsphire Sav. Bank v. Ritchey, C. C. A., 121 Fed. 956.

20 Sawyer v. Atchinson, T. & S. F. R. Co., C. C. A., 129 Fed. 100.

21 Cass v. Realty Securities Co., 148 App. Div. (N. Y.) 96.

22 Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644. But see California S. D. & I. Co. v. Cheney El. L. T. & P. Co., 56 Fed. 257; Mendenhall v. Hall, 134 U. S. 559, 568, 33 L. ed. 1012, 1015.

23 Ibid.

24 Erie County Sav. Bank v. Schuster, 187 N. Y. 111.

25 Eastern B. L. Ass'n v. Denton, 65 Fed. 569.

26 Security S. & L. Ass'n v. Buchanan, 66 Fed. 799.

27 Converse v. Michigan Dairy Co., 45 Fed. 18; Copen v. Flesher, 1 Bond, 440.

prayer for the enforcement of the individual liability of some of the defendants, whose indebtedness the lien secures.[28] A bill against different lienholders on the same property to have their bills settled and adjusted is not multifarious.[29] A bill is multifarious which seeks to obtain a transfer of land from one defendant, and to restrain another from asserting a conflicting claim to the same.[30] So is a bill by an executor to settle the conflicting controversies between himself, the heirs of his testatrix, the heirs of her husband both of whom dispute bequests under her will, and one claiming to be a creditor of her estate.[31] A bill is *not* multifarious, which prays an accounting by one defendant under contracts made between him and the complainant, and joins another defendant, who is charged to be a secret partner with the former in these transactions, and who has received part of the profits of the same[32] or prays an accounting against a trustee and seeks to set aside a release of a claim of the estate given by him to a third person joined as a defendant;[33] but a bill was held to be multi-

[28] Ingersoll v. Coram, 127 Fed. 418; reversed on another point, C. C. A.

[29] Rumbarger v. Yokum, 174 Fed. 55.

[30] Copen v. Flesher, 1 Bond, 440.

[31] Haines v. Carpenter, 1 Woods, 262. The following bills have also been held to be *multifarious:* A bill by a creditor of an estate to enjoin the sale, to pay debts, of firm lands purchased by him from the heirs, and to recover from the administrator and his sureties the amount of his debt. Banks v. Speers, 103 Ala. 436. A petition against the executors of the petitioners' deceased father and against three successive guardians of the petitioners themselves, praying an account by the defendants of their respective trusts and waiving discovery. Cornwell Mfg. Co. v. Swift, 89 Mich. 503; s. c., 50 N. W. 1001. A bill to enforce a claim for *devastavit* against the personal representatives of some of the sureties upon an administrator's bond, and for a settlement of the estate, which also sought to enforce against the representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law. Page v. Bartlett, 101 Ala. 193. See also Cocks v. Varney, 42 N. J. Eq. 514; Henninger v. Heald, 51 N. J. Eq. 74; Bullock v. Knox, 96 Ala. 195; Dickerson v. Winslow, 97 Ala. 491; Smith v. Smith, 102 Ala. 516; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593; Wells v. S. & P. Guano Co., 89 Va. 708; Torrent v. Hamilton, 95 Mich. 159; Ashley v. City of Little Rock, 56 Ark. 391.

[32] McMullen Lumber Co. v. Strother, C. C. A., 136 Fed. 295.

[33] Pulver v. Leonard, 176 Fed. 586, 590. See Payne v. Hook, 7 Wall. 425, 433, 19 L. ed. 260. But bills were held *not multifarious* against an administrator *de bonis*

farious which joined with the executors and legatees under a will that it prayed to have set aside, another defendant who had a deed from the testator which it prayed should be cancelled.[34] Nor a bill to set aside transactions which form a series of acts connected with the same fraudulent design.[35] For example: creditors' bills to reach property fraudulently transferred to different corporations, the stock in which is owned and controlled by the judgment debtor,[36] and, to reach property, different parts of which have been sold to several defendants,[37] were held not to be multifarious; but where, in the same case, the complainant had obtained judgments against different defendants, it was held that he could not join in the same bill prayers to set aside as fraudulent several conveyances made by them of different property.[39] So where a bill filed by an assignee in bankruptcy against all the incumbrancers of his assignor's estate, some but not all of whom had liens upon the same property, to set aside their liens as fraudulent, and to have the property sold for the common benefit of the creditors;[40] a bill filed by the beneficiary under several deeds of trust, some upon different parts of the same property, and

non, the administrator of his predecessor and the holder of the only claim against the estate, for the purpose of completing the administration and disallowing the claim (Deans v. Wilcoxon, 25 Fla. 980); by heirs against executors under a will, the probate of which had been revoked, and those who had bought property of the estate from them with notice of the invalidity of the will (Gaines v. Chew, 2 How. 619, 11 L. ed. 402); and by a surety upon an official bond against the principal, the other sureties and purchasers with notice of property upon which the bond gave a lien. Schuessler v. Dudley, 80 Ala. 547, 60 Am. Rep. 124.

34 Miller v. Weston, C. C. A., 199 Fed. 104.

35 Field v. Western Life Indemnity Co., 166 Fed. 607.

36 Fowler v. Palmer, C. C. A., 160 Fed. 1.

37 Hultberg v. Anderson, 170 Fed. 657; U. S. v. Rea-Reed Mill & Elevator Co., 171 Fed. 501.

39 Hobbs Mfg. Co. v. Gooding, 166 Fed. 933.

40 McLean v. Lafayette Bank, 3 McLean, 415. See also Jones v. Slauson, 33 Fed. 632; Potts v. Hahn, 32 Fed. 660; Pullman v. Stebbins, 51 Fed. 10. *Contra*, Metcalf v. Cady, 8 Allen (Mass.) 587. In Mississippi, a stockholder's bill was sustained which sought to set aside two separate deeds of trust executed by the corporation where one of the defendants owned a number of the bonds secured by each deed. Hardie v. Bulger, 66 Miss. 577.

one covering the entire property, against the trustees, the trustor, and the different persons claiming liens upon it,[41] to set aside a will and deed, executed through the fraud and undue influence of one defendant; although other defendants claimed through him, different interests in the property in question;[42] a bill filed by one of the next of kin against both an administrator and his sureties, to obtain the plaintiff's share of the estate;[43] a creditor's bill against the members of two different firms, and the personal representatives of those who are dead, when some were members of both;[44] a bill to set aside an assignment of one partner's interest in the firm and then to divide the assets.[45] A bill to enforce an equitable title, such as a trust,[46] or to remove a cloud upon a complainant's title,[47] might also seek partition after the primary relief has been established, provided that no defendants needed to be joined who were not proper parties to a suit for the principal relief. A bill was sustained which sought partition and also the cancellation of tax deeds upon the common property held by strangers to the partition.[48] Persons who are acting in concert as employees or directors of the same corporation in the infringement of a patent or trade-mark,[49] or who are charged with using a corporation as the means of such an infringement,[50] or, it was held, the manufacturer and sellers of the same articles,[51] may be joined with the corporation as defendants to a suit for an

[41] Grant v. Phœnix Life Ins. Co., 121 U. S. 105, 30 L. ed. 905. See Pullman v. Stebbins, 51 Fed. 10; Hibernia Ins. Co. v. St. Louis & N. C. Transp. Co., 10 Fed. 596; s. c., 120 U. S. 166, 30 L. ed. 621.

[42] Williams v. Crabb, C. C. A., 59 L.R.A. 425, 117 Fed. 193, 202; James v. City Investing Co., 188 Fed. 513.

[43] Payne v. Hook, 7 Wall. 425.

[44] Nelson v. Hill, 5 How. 127, 12 L. ed. 81. See also Oliver v. Piatt, 3 How. 333, 11 L. ed. 622. But see Griffin v. Merrill, 10 Md. 364.

[45] Hayes v. Heyer, 4 Sandford Ch. (N. Y.) 485.

[46] Hopkins v. Grimshaw, 165 U. S. 342, 358, 41 L. ed. 739, 744; Briges v. Sperry, 95 U. S. 461; Hayes' Appeal, 123 Pa. St. 110; Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 517. But see Belt v. Bowie, 65 Md. 350.

[47] Vreeland v. Vreeland, 48 N. J. L. 56; s. c., 24 Atl. 551. But see Robinson v. Springfield Co., 21 Fla. 203.

[48] Ulman v. Jaeger, 67 Fed. 980.

[49] Popperhusen v. Falke, 4 Blatchf. C. C. 493.

[50] Nerve Food Co. v. Baumbach, 32 Fed. 205; California F. S. Co. v. Improved F. S. Co., 51 Fed. 296.

[51] Capewell Horse Nail Co. v. Green, C. C. A., 188 Fed. 20

injunction and an accounting; but it has been held that a bill cannot join complainants against different violators of the same patent[52] or copyright,[53] when their infringements were not performed in confederacy with each other. But the soundness of the decision last cited has been doubted by Judge Story[54] and it was distinguished by Chancellor Kent.[55] It was held that a bill against an interfering patentee was multifarious when it joined the commissioner of patents as a defendant and prayed for a reissue.[56] A bill of peace may be filed to dispose of the claims of a number of defendants, which all depend on the determination of a single question of fact or law.[57] Such bills have been maintained when filed by a railroad company against several ticket-scalpers to enjoin their sale of tickets which by their terms could not be transferred, and the use of which could only be accomplished by a fraud.[58]

[52] Jewell v. City of Philadelphia, 186 Fed. 639; Edison v. Allis-Chalmers Co., 191 Fed. 837; Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126.

[53] Dilly v. Doig, 2 Ves. Jr. 486. See Thomas H. El. Co. v. Sperry El. Co., 46 Fed. 75.

[54] Story's Eq. Pl., §§ 277, 278.

[55] Brinkerhoff v. Brown, 6 J. Ch. (N. Y.) 139, 155. See Foxwell v. Webster, 10 Jur. (N. S.) 137.

[56] Gold v. Gold, 181 Fed. 544.

[57] Gaines v. Chew, 2 How. 619, 11 L. ed. 402; U. S. v. Curtner, 26 Fed. 296, 298; Hyman v. Wheeler, 33 Fed. 329. Such are a bill by a parson or lord of a manor to establish a claim against all of his parishioners. Brown v. Vermuden, 1 Chan. Cas. 272. Or tenants. Conyers v. Lord Abergavenny, 1 Atk. 285; a bill by the owner of a fishery, Mayor of York v. Pilkington, 1 Atk. 284; or a water-right, Union Mill S. M. Co. v. Dangberg, 81 Fed. 73; to establish his claim against a number of riparian owners. Or by the owner or a fishery, to enjoin, from the use of the same, several persons who claim the right under a State statute, and who commit trespass upon the land of plaintiff, which are only incidental to their fishing. Percy Summer Club v. Astle, 145 Fed. 53; and to prevent injury to the stream, Woodruff v. North Bloomfield G. M. Co., 16 Fed. 25; Pacific L. S. Co. v. Handley, 98 Fed. 327; Warren v. Parkhurst, 186 N. Y. 45, 6 L.R.A.(N.S.) 1149, 78 N. E. 579, 9 Ann. Cas. 512. But see Illinois Steel Co. v. Schweder, 133 Wis. 561, 14 L.R.A.(N.S.) 239, 126 Am. St. Rep. 977, 113 N. W. 51; criticised 21 Law Review, 200. But a bill to enjoin the owners of a mill from floating logs over complainants' dam, and to recover damages for previous floatage, which joined as defendants former owners of the mill, was held to be multifarious. Allison v. Davidson (Tenn. Ch. App.), 39 S. W. 905. See Carmichael v. Texarkana, 94 Fed. 561.

[58] Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 52 L. ed. 171; Nashville, C. & St. L. Ry. Co. v.

To prevent several hackmen from congregating on the sidewalk adjacent to its station.[59] To enjoin different abutters from interfering with a right of way,[60] or different riparian owners from polluting a stream.[61] To enjoin different smelters from injuring the complainant's crops.[62] The owners of several mines might join in a suit to enjoin different assayers from buying ore from laborers employed by the complainants, although there was no concert of action among the defendants in their various purchases.[63] Bills have been sustained when filed: To restrain the tax collectors of different counties from levying taxes separately assessed, but part of each of which was to be paid to the State, and the validity of all of which depended upon the construction of a single statute.[64] By a city to establish its claim to a tax against several of the class liable to the same.[65] To quiet a title against a number of claimants to land in severalty, the validity of the separate title of each of whom depends upon the construction of one special statute[66] or the validity or construction of the same document[67] or proceeding.[68] A bill is not multifarious when brought to en-

McConnell, 82 Fed. 65; Illinois Cent. R. Co. v. Caffrey, 129 Fed. 770; Pennsylvania Co. v. Bay, 150 Fed. 770.

59 Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192.

60 Louisville & N. R. Co. v. Smith, C. C. A., 128 Fed. 1.

61 Woodruff v. No. Bloomfield Gravel Co., 16 Fed. 25.

62 Am. Smelting & Refining Co. v. Godfrey, C. C. A., 158 Fed. 225, 89 C. C. A. 139.

63 Goldfield Consol. Mines Co. v. Richardson, 194 Fed. 198.

64 Union Pac. R. Co. v. McShane, 3 Dill. 303. But see *supra*, § 140.

65 London v. Perkins, 2 Brown Parl. Cas. 652.

66 Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820; modifying and affirming U. S. v. Allen, C. C. A., 179 Fed. 13, which reversed U. S. v. Allen, 171 Fed. 907; U. S. v. Flournoy L. S. & R. E. Co., 69 Fed. 886; Central Pacific R. Co. v. Dyer, 1 Saw. 641; see Osborne v. Wisconsin Cent. R. Co., 43 Fed. 824; *supra*, § 140.

67 Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91; Hyman v. Wheeler, 33 Fed. 329; U. S. v. Curtner, 26 Fed. 296; U. S. v. Rea-Read Mill & Elevator Co., 171 Fed. 501. But see Kansas City Southern Ry. Co. v. Quigley, 181 Fed. 190.

68 Ulman v. Iaeger, 67 Fed. 980. But bills were held to be multifarious when brought against thirty-four defendants to enforce thirty-four separate, although similar, contracts, Cheney v. Goodwin, 88 Me. 563; s. c., 34 Atl. 420; nor against fifteen defendants to cancel separate notes severally held by them, some of which were alleged to be forgeries and the others obtained by fraud, the forger and defrauder being a stranger to the suit,

join several members of a trade union or other persons from acts of violence or other trespasses in furtherance of a strike.[69] But it was held that the claimant of a large tract of land, separate parts of which were in the possession of different persons claiming title in various ways, could not enforce his rights against them all in a single bill.[70] Where the evidence did not justify a charge of combination made in the bill, it was dismissed for nullifariousness upon the hearing.[71]

§ 142. Multifariousness without misjoinder of parties. The Equity Rules of 1912 provide: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. * * * If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."[1] This seems to abrogate the old doctrine of equitable practice, that a bill was bad for multifariousness when two or more distinct and unconnected grounds of equitable relief were therein joined. To create this defect under the former practice, it was requisite that the grounds of relief should be different and that each ground should be sufficient as stated to sustain a separate bill.[2] A bill was considered to be multifarious when it joined two matters, where the necessary parties to the suit were the same, but their interests and attitude were decidedly at variance.[3]

Scott v. McFarland, 70 Fed. 280; nor to enjoin several landowners from suing plaintiff because of his alleged nuisance. Ducktown Sulphur, etc., Co. v. Fain, 109 Tenn. 56, 70 S. W. 813. See So. Penn. Oil Co. v. Calf Creek O. & G. Co., 140 Fed. 507, and to enjoin different persons from suing a telephone company in tort for removing telephones from their separate premises. Cumberland Tel. & Tel. Co. v. Williamson, (Miss.) 57 So. 559; following Tribette v. Illinois Cent. R. Co., 70 Miss. 182, 19 L.R.A. 660, 35 Am. St. Rep. 642, 12 So. 32; overruling Whitlock v. Yazoo & Mississippi Valley R. Co., 91 Miss. 779, 45 So. 861. See Harv. Law Rev., XXV, 559.

69 Oxley Stave Co. v. Coopers' Int. Union, 72 Fed. 695; Casey v. Cincinnati Typ. Union, 12 L.R.A. 193, 45 Fed. 135; Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 9 Am. Crim. Rep. 169, 63 Fed. 310; *supra*, § 115; *infra*, ch. XVIII.

70 Buchanan Co. v. Adkins, C. C. A., 175 Fed. 692.

71 Coe v. Turner, 5 Conn. 86. But see *infra*, § 143.

§ 142. 1 Eq. Rule 26.

2 Brown v. Guarantee Safe Dep. & Tr. Co., 128 U. S. 403.

3 See Field v. Camp, 193 Fed. 160.

Bills were held not to be multifarious when filed: to dissolve a partnership and to partition the estate, real and personal;[4] to set aside and cancel an insurance policy and enjoin the further prosecution of an action to recover premiums paid upon the same;[5] to compel the issue of a policy and at the same time collect the same;[6] to reform a written agreement on account of a mistake and enforce its performance as reformed;[7] by a bondholder to compel a city to apply to their payment the proceeds of assessments, upon which he had a lien, and also praying to enforce a general liability by the city to pay the bonds;[8] to foreclose a mortgage, with a prayer for the enforcement of the liability at common law of the owner of the mortgaged premises to pay rents to the mortgagor.[9] It has been said: "That when the right of a party to specific relief is so incumbered that he cannot assert that right against another until he has removed the incumbrance, he cannot include an attempt to get rid of the incumbrance in a suit for specific relief, which he might be entitled to have, if the incumbrance were out of the way."[10] It has been held, under the former rules, that an equitable owner of stock, whose title was contested, could not in the same suit obtain the legal title and also protection of the corporate assets.[11] But the soundness of these decisions may be doubted, and, under the new rules, the doctrine, that equity having once obtained jurisdiction will afford full relief, may be enforced. Under the former practice, where a cause of action arising under the laws of the United States was joined with one of which a Federal Court had no original jurisdiction, and there was no diversity of citizenship, a demurrer

[4] Briges v. Sperry, 95 U. S. 401, 24 L. ed. 390.

[5] Eq. Life Assur. Soc. v. Patterson, 1 Fed. 126.

[6] Herbert v. Mutual Life Ins. Co., 12 Fed. 807; Brugger v. State Inv. Ins. Co., 5 Sawyer, 304, Fed. Cas. No. 2051.

[7] Gillespie v. Moon, 2 J. Ch. (N. Y.) 585, 7 Am. Dec. 559.

[8] Olmsted v. City of Superior, 155 Fed. 172.

[9] Fidelity Tr. & Guaranty Co. v. Fowler Water Co., 113 Fed. 560.

[10] Inman v. N. Y. Interurban Water Co., 131 Fed. 997, 999; quoted with approval, Witherbee v. Bowles, 142 App. Div. (N. Y.) 407, 417, reversed, 201 N. Y. 427.

[11] Inman v. N. Y. Interurban Water Co., 131 Fed. 997, 999; Witherbee v. Bowles, 142 App. Div. (N. Y.) 407, 417; U. S. Steel Corporation v. Hodge, 64 N. J. Eq. 807,

for multifariousness was sustained.[12] Where the requisite diversity of citizenship was pleaded, such joinder might be made when the transactions were connected;[13] but not, in a patent case, where the infringement was committed within the district, but neither party was a citizen or resident thereof.[14] Under the former practice, it was not multifarious to seek, in the same bill, an injunction against the infringement of several copyrights by the same publication[15] or theatrical performance,[16] or in different states where the general method of the infringement was the same and the acts were committed pursuant to a common purpose by the defendant.[17] It has been held, in England, that plaintiff may not sue the defendant for the infringement of twenty-three patents, but that he will be limited to selecting no more than three of them for joinder of acts of infringement thereof in the same suit.[18] The former rules concerning the joinder of complaints against the infringement of different patents are considered in a subsequent section.

§ 143. Objections for multifariousness or misjoinder. An objection to a bill for multifariousness or a misjoinder of parties or of causes of action, when it appears upon the face of the bill, should be taken by a motion to dismiss upon that specific ground.[1] The rule formerly was that the objection should be raised by a special demurrer.[2] If not apparent upon the face of the bill, it is doubtful whether it can be raised by

809, 60 L.R.A. 742. *Contra*, Weber v. Wallerstein, No. 1, 111 App. Div. (N. Y.) 693.

12 Keasby & Mattison Co. v. Philip Cary Mfg. Co., 113 Fed. 432; C. L. King & Co. v. Inlander, 133 Fed. 416. *Contra*, Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co., 182 Fed. 832. See, also, Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co., 60 Fed. 622; Ball & Socket Fastener Co. v. Cohn, 90 Fed. 664; Adam v. Folger, C. C. A., 120 Fed. 260; G. Heileman Brewing Co. v. Independent Brewing Co., C. C. A., 191 Fed. 489. See *supra*, § 24

13 Havens v. Burns, 188 Fed. 441.

14 Woerheide v. H. W. Johns-Manville Co., 199 Fed. 535.

15 Amberg F. & I. Co. v. Shea, C. C. A., 82 Fed. 314; Harper v. Holman, 84 Fed. 222.

16 Empire City Amusement Co. v. Wilton, 134 Fed. 132.

17 Bracken v. Rosenthal, 151 Fed. 136.

18 Saccharin Corporation v. Wild, (1903, C. A.) 1 Ch. 410. See Saccharin Corporation v. White, (C. A.) 88 L. T. 850.

§ 143. 1 Eq. Rule 29.

2 Nelson v. Hill, 5 How. 127, 12 L. ed. 81; Herndon v. Chicago, Rock

plea or answer.[3] If it is shown by the bill, it can never be taken for the first time at the hearing[4] or upon appeal;[5] but the court may, of its own motion, dismiss a bill for multifariousness at any time;[6] and perhaps the objection that the rights of the complaints are inconsistent can be raised at the hearing.[7] In one case the court, at the hearing, required the petitioner to elect which claim it should enforce, and then dismissed the rest of the petition.[8] The objection cannot be taken by a defendant who is not injured by it.[9] The misjoinder of a defendant against whom the bill states no ground for relief is not a cause for a demurrer by the other defendants.[10] Multifariousness as to subjects or parties does not render a decree void, so that it can be treated as a nullity in a collateral action.[11]

Island & Pac. Ry. Co., 218 U. S. 135, 155, 54 L. ed. 970, 976.

[3] Benson v. Hadfield, 4 Hare, 32; Greenwood v. Churchill, 1 M. & K. 559; Gibbs v. Clagett, 2 Gill & J. (Md.) 14; Putnam v. Hollander, 6 Fed. 882; Story's Eq. Pl., § 747; Beames on Pleas, 157, 158. But see Coe v. Turner, 5 Conn. 86.

[4] Greenwood v. Churchill, 1 M. & K. 559; Oliver v. Piatt, 3 How. 333, 412, 11 L. ed. 622, 658; Nelson v. Hill, 5 How. 127, 12 L. ed. 81; Bowman's Devisees v. Wathen, 2 McLean, 376; U. S. v. Reading Co., 183 Fed. 427.

[5] Oliver v. Piatt, 3 How. 333, 412, 11 L. ed. 622, 658; Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518; Converse v. Michigan Dairy Co., 45 Fed. 18; Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970.

[6] Oliver v. Piatt, 3 How. 333, 412, 11 L. ed. 622, 658; Nelson v. Hill, 5 How. 127, 132, 12 L. ed. 81, 83; Greenwood v. Churchill, 1 M. & K. 559; Ohio v. Ellis, 10 Ohio, 456; Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U. S. 135, 54 L. ed. 970.

[7] Davies v. Quarterman, 4 Y. & Coll. 257.

[8] State Trust Co. v. Kansas City, P. & G. R. Co., 128 Fed. 129.

[9] Buerk v. Imhaeuser, 8 Fed. 457; Metropolitan Trust Co. v. Columbus, S. & H. R. Co., 93 Fed. 689; Missouri Broom Mfg. Co. v. Guymon, C. C. A., 115 Fed. 112. Where a contractor had agreed to pay an employee a percentage of the profits of contracts with different municipalities, it was held that a bill by the employee, joining the municipalities as co-defendants with the contractor, for an accounting, though said to be subject to dismissal for multifariousness at the instance of one of the municipalities, was not so at that of the contractor. Olds v. Regan (N. J. Ch.), 32 Atl. 827. See also Couse v. Columbia Power Mfg. Co. (N. J. Ch.), 33 Atl. 331.

[10] Warthen v. Brantley, 5 Ga. 571; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Miller v. Jamison, 9 C. E. Green (N. J.), 41; Story's Eq. Pl., § 544.

[11] Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 31 L. ed. 309.

It has been held that a bill is not multifarious which joins an insufficient with a good case for equitable relief, when there is no misjoinder of parties, and that the proper course of the defendant is to demur to so much of the bill as is insufficient;[12] but that a bill is multifarious which joins two inconsistent complaints by different plaintiffs,[13] although the case shown by the principal plaintiff is not sufficient. It is within the constitutional power of Congress to pass a law allowing, in a single specified suit against a corporation chartered by it, matters and defendants to be joined in a manner that would otherwise constitute multifariousness.[14] The question in each instance where it arises calls for the exercise of the discretion of the court, regard being had to considerations of convenience and the substantial rights of the parties.[15] Multifariousness depends so much upon the discretion of the courts of first instance that a decision overruling an objection upon that ground would not be reviewed upon appeal,[16] except under very extraordinary circumstances. When an objection for multifariousness is sustained the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs.[17] In general, it may be remarked that multifariousness is an objection much more often taken than sustained.[18]

§ 144. General rules of equity pleading. Otherwise, the rules regulating the frame of a bill and, with the exceptions subsequently given, of other pleadings in equity are substantially the same as those of pleading at common law; but more liberality is used in their construction,[1] and the use of technical

[12] McCabe v. Bellows, 1 Allen (Mass.) 269; Snavely v. Harkrader, 29 Gratt. (Va.) 112; Story's Eq. Pl., § 283. See Brown v. Guarantee Trust Co., 128 U. S. 403, 32 L. ed. 468.

[13] Walker v. Powers, 104 U. S. 245, 249, 26 L. ed. 729, 731; Bracken v. Rosenthal, 151 Fed. 136.

[14] U. S. v. Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143.

[15] Weir v. Bay State Gas Co., 91 Fed. 940, per Dallas, J.

[16] See Gaines v. Chew, 2 How. 619, 11 L. ed. 402; Oliver v. Piatt, 3 How. 333, 11 L. ed. 622; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Graves v. Ashburn, 215 U. S. 331, 54 L. ed. 217; Sheldon v. Keokuk N. L. Packet Co., 8 Fed. 769; Hosmer v. Wyoming Ry. & Iron Co., 126 Fed. 884.

[17] Walker v. Powers, 104 U. S. 245, 249, 26 L. ed. 729, 731; Price v. Coleman, 21 Fed. 357.

[18] Quoted with approval, United Cigarette Mach. Co. v. Wright, 132 Fed. 195.

§ 144. [1] Daniell's Ch. Pr. (2d Am. ed.), 413. *Supra*, § 137.

expressions is never necessary.[2] The Equity Rules of 1912 provide: "Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished."[3] An allegation that the plaintiff is seized in fee simple is equivalent to an allegation that he is in possession.[4] If the plaintiff claim under a derivative title, he must show the steps by which it has come into existence;[5] but this is not ordinarily necessary when the plaintiff prays protection to rights connected with

[2] Daniell's Ch. Pr. (2d Am. ed.), 414.

[3] Eq. Rule 18.

[4] Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725. A plea which simply alleged that the defendant was "the sole owner in fee simple" of the property in question was held to be bad as a conclusion of law. McCloskey v. Barr, 38 Fed. 165. It was said: that, in a suit to remove a cloud from the title of land, generally, "it will be found sufficient for the plaintiff to allege his possession, and interest or estate in the land, as that he is the owner thereof in fee for life or for years, and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title, as, the United States, or its donee under the donation act of September 27, 1850, without setting out such conveyances or stating them in detail. But when there is reason to believe, as in this case and many others, that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail at that point in the chain of his title where it conflicts with the claim of the defendant. By so doing the necessity of future amendments will be avoided, and the progress and dispatch of the case promoted." A demurrer to a bill for a lack of certainty in this respect was sustained. Goldsmith v. Gilliland, 22 Fed. 865. But see Thomas v. Nantahala M. & T. Co., 58 Fed. 485. On the foreclosure of a mortgage for default in payment of interest coupons, an allegation that they are due and wholly unpaid "to your orator and other holders of said bonds" was held a sufficient allegation of ownership. Toler v. East Tennessee, V. & A. Ry. Co., C. C. A., 67 Fed. 168.

[5] Lord Digby v. Meech, Bunb. 195; Humphreys v. Tate, 4 Iredell's Eq. (N. C.) 220; Marshall v. Turnbull, 34 Fed. 827; Daniell's Ch. Pr. (2d Am. ed.) 369, 370. For a case upon the sufficiency of allegations in a bill that complainants comprise all the heirs and next of kin of deceased, as showing complainants' title, the bill also containing the decree of distribution, see Hubbard v. Urton, 67 Fed. 419. "It is not necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants." Shipman, J., in Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 623.

land, of which he is in possession.[6] Where, in a suit to restrain the diversion of the waters of a stream, the complainant's claimed to be prior appropriators as to a certain number of cubic inches of water, and to be entitled to additional amounts as the grantees of other appropriators; it was held, that the bill should allege on what lands such additional amounts of water, appropriated by complainants' grantors, were used by them.[7] Where, however, there is an existing privity between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain the suit; as, for example, if they are landlord and tenant, or mortgagor and mortgagee, then it is not necessary to state the plaintiff's title fully in the bill.[8] Where the bill alleged that complainant delivered certain securities to defendant, as trustee and depositary, to hold and thereafter deliver and distribute to him as directed by the complainant, but did not set forth the terms and conditions of the deposit, so as to show that it was not a mere bailment; it was held, that the bill did not aver trust sufficient to confer jurisdiction upon a court of equity.[9] If the plaintiff's title would be incomplete without the performance of some preliminary act, then a performance must be alleged, and a mere statement that the title is complete was insufficient.[10] In a bill

6 Miller & Lux v. Rickey, 127 Fed. 573.

7 Miller & Lux v. Rickey, 127 Fed. 573.

8 Daniell's Ch. Pr. (2d Am. ed.) 370, 371.

9 Young v. Mercantile Trust Co., C. C. A., 145 Fed. 39; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642.

10 Walburn v. Ingilby, 1 M. & K. 61; Daniell's Ch. Pr. (2d Am. ed.) 369; *supra*, § 150. An allegation that the complainant acquired the title by purchase from the assignee in bankruptcy of the original owner was held sufficient, although it did not state that the assignee in bankruptcy obtained an order from the court authorizing him to make the sale. Amory v. Lawrence, 3 Cliff. 523. Where the plaintiff sued as a shareholder of a joint-stock company, and merely alleged in his bill "that he purchased for valuable considerations divers shares, upon which the instalment of five per cent. had been paid, and that he ever since has been, and now is, the holder of such shares;" while in another part of the bill it was alleged "that by the rules of the association, as set forth in the prospectus, no transfer of shares would be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations,"—it was held, on demurrer, that such action on the part of the board and the purchaser was a condition precedent to the

filed by an executor or an administrator, it seems to be sufficient to state that the will has been proved, or letters of administration taken out, "in the proper court," without naming it.[11] If, however, the plaintiff undertake to name the court, and it be an improper or insufficient one, the bill is demurrable.[12] An allegation that the defendant is a trustee is insufficient without a statement of the facts which make him a trustee.[13] When the nature of the conveyance through which the plaintiff claims is such that by common law, independent of a statute, as, for example, the statute of frauds, no deed, writing, or other formality was essential to its validity, the English rule was that compliance with such formality need not be alleged.[14] In this respect equity followed the rule at common law, that such statutory regulations did not alter the form of pleadings.[15] If, however, it appeared upon the face of the bill that compliance had not been made with such a formality, the bill was demurrable upon that ground.[16] But when a right has been originally created by statute, as a right to land by devise, or in this

transfer of the title to a share of stock; and that the bill was defective for not alleging such action. Walburn v. Ingilby, 1 M. & K. 61. A complainant who rests his title upon a tax deed must plead performance of the prerequisites to the validity of the deed. Greenwall v. Duncan, 16 Fed. 35; Walburn v. Ingilby, 1 M. & K. 61; Atwill v. Ferrett, 2 Blatchf. C. C. 39; Chicago Music Co. v. J. W. Butler Paper Co., 19 Fed. 78; Trow City Directory Co. v. Curtin, 36 Fed. 829; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645.

[11] Humphreys v. Ingledon, 1 P. Wms. 752; Black v. Henry G. Allen Co., 42 Fed. 618, 623. The averment that the complainant was duly "appointed administrator was held insufficient; the issue of letters of administration must be alleged. Otto v. Regina M. B. Co., 87 Fed. 510. Where the state statute (Minn. R. L. 1905, § 3842) authorizes a foreign guardian to sue in the state provided he file an authenticated copy of letters in the probate court in the county where the ward's property is situated, it was *held* that a bill by such a guardian was not demurrable for failure to allege the filing of such a copy. Pulver v. Leonard, 176 Fed. 586.

[12] Tourton v. Flower, 3 P. Wms. 369; Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 624; Daniell's Ch. Pr. (2d ed.) 264.

[13] Evan v. Avon, 29 Beav. 144.

[14] Daniell's Ch. Pr. (2d Am. ed.) 416; Harrison v. Hogg, 2 Ves. Jr. 327.

[15] Daniell's Ch. Pr. (2d Am. ed.) 416; Stephen on Pleading, 313.

[16] Randall v. Howard, 2 Black, 585, 589, 17 L. ed. 269, 271; Daniell's Ch. Pr. (2d Am. ed.) 417; Redding v. Wilkes, 3 Brown, C. C. 401.

country a patent or copyrights, according to the former practice, a compliance with the statutory requirements had to be alleged by one claiming under it.[17] It has been held that an estoppel *in pais* must be pleaded by the party who seeks to avail himself of the same.[18]

Where complainant for fraud or a mistake in fact attacks a patent, issued by the Land Department, he must plead and prove the evidence before the department, show the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced the issue of the patent.[19] "The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud."[20] Where a bill shows apparent laches, it should set forth the impediments to an earlier suit, the cause of the complainant's previous ignorance, if any, of his rights, and when he first knew of them.[21]

In construing a bill in equity, every doubt is against the pleader;[22] but contracts by corporations are presumed to be within their charters until the contrary is shown.[23] When the bill contains general and specific allegations as to the same matter, the general allegations will be referred to those which are specific[24] Exhibits attached to the bill, and therein referred

17 Daniell's Ch. Pr. (2d Am. ed.) 419; Sullivan v. Redfield, 1 Paine, 441; Atwill v. Ferrett, 2 Blatch. C. C. 39; Walburn v. Ingilby, 1 M. & K. 61; Atwill v. Ferrett, 2 Blatchf. C. C. 39; Chicago Music Co. v. J. W. Butler Paper Co., 19 Fed. 758; Trow City Directory Co. v. Curtin, 36 Fed. 829; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645. This rule of equity practice is enforced under the English Rules of 1883. Secar v. Lawson, 16 Ch. D. 621; Read v. Brown, 22 Q. B. D. 128; Davis v. James, 26 Ch. D. 778.

18 Maybury v. Louisville & J. F. Co., 60 Fed. 645.

19 Le Marchel v. Teegarden, 133 Fed. 826; U. S. v. Pratt C. & C. Co., 18 Fed. 708; Murphy v. East Portland, 42 Fed. 308; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 546; Olson v. Nor. R. Co., 43 Fed. 112. But see Robinson v. Suburban Brick Co., C. C. A., 127 Fed. 804.

20 Linn v. Green, 17 Fed. 407.

21 Badger v. Badger, 2 Wall. 87, 17 L. ed. 836; Richards v. Mackall, 124 U. S. 183, 31 L. ed. 396; Gandy v. Marble, 122 U. S. 432, 30 L. ed. 1223; Wollensak v. Reiher, 115 U. S. 96, 29 L. ed. 350.

22 Phelps v. McDonald, 99 U. S. 298, 305, 25 L. ed. 473, 475.

23 Express Co. v. Railroad Co., 99 U. S. 191, 199, 25 L. ed. 319, 320.

24 Ellis v. Colman, 25 Beav. 662; Lumley v. Wabash Ry. Co., 71 Fed. 21; Story's Eq. Pl., § 37*a*.

to, are considered as a part of the same.[25] "As to exhibits, they are a mere matter of indulgence. In good pleading, strictly, the bill should give the requisite full information of itself; but indulgence to loose practice and convenience has allowed exhibits with explicit reference to them in the bill, and they may be referred to in aid of the bill; but they may not be omitted altogether, as here, and the pleader content himself with a naked reference by its date to some document of record in a far-away place."[26] "Good pleading requires that everything that is material to the case should be set forth in the pleading itself by proper averments. This may be done in general terms, and the exhibit may be referred to for greater certainty as to particular details, but the pleading ought to contain the substance of the case."[27] Where the plaintiff's title is intelligibly shown, there is no need for profert of the documents upon which it is founded.[28]

§ 145. Stockholders' bills. By the Equity Rules of 1912, "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."[1] This, with the exception of the last clause, is the new promulgation of a former equity rule, adopted during the October term, 1881.[2] The original object of the rule was to

[25] Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 625; *infra*, § 366.

[26] Hammond, J., in Electrolibration Co. v. Jackson, 52 Fed. 773, 776; *infra*, § 146.

[27] Chancellor Ellett in Harvey v. Kelly, 41 Miss. 490, 93 Am. Dec. 267.

[28] La Republique Francaise v. Schultz, 57 Fed. 379; *infra*, § 146.

§ 145. [1] Eq. Rule 27.

[2] Old Eq. Rule 94.

prevent suits brought by stockholders, in collusion with the corporation, in Federal courts, which otherwise would not have had jurisdiction thereof, and to remedy abuses in this respect, which had then become a common practice.[3] It has been held by one Circuit Court to apply to a suit removed from the courts of the State, the practice of which required no such allegations.[4] That part of the rule which forbids such a suit by a party who has bought the stock in good faith and for a valuable consideration, since the cause of action arose, might well be attacked as unconstitutional. That such a purchasing stockholder has the right to bring such a suit has been held by the courts of New Hampshire,[5] Illinois,[6] Alabama,[7] Montana,[8] Idaho,[9] Pennsylvania,[10] New Jersey,[11] and New York.[12] The opposite position

[3] Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 460, 461, 26 L. ed. 827, 832, where Mr. Justice Miller said that a stockholder could not file a bill founded upon rights which might properly be asserted by his corporation against the company and other parties, unless there existed. See also Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833; Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300; Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624.

[4] Venner v. Great Northern Ry. Co., 153 Fed. 408; affirmed on question of jurisdiction only, 209 U. S. 24, 52 L. ed. 666. *Contra*, Earle v. Seattle, L. S. & E. R. Co., 56 Fed. 909; s. c., Eabens v. Union Pac. Ry. Co., 58 Fed. 497; Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280.

[5] Winsor v. Bailey, 55 N. H. 218.

[6] City of Chicago v. Cameron, 22 Ill. App. 91, affirmed 120 Ill. 447.

[7] L. & P. Co. v. Lahey, 121 Ala. 131.

[8] Forrester v. B. & M., etc., Co., 21 Mont. 544, 565.

[9] Just v. Idaho Canal, etc., Co., 16 Idaho, 639, 133 Am. St. Rep. 140, 102 Pac. Rep. 381.

[10] Rafferty v. Donnelly, 197 Pa. St. 423.

[11] Appleton v. Am. Malting Co., 65 N. J. Eq. 375.

[12] Pollitz v. Gould, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, Ann. Cas. 1912D, 1098. The argument of Judge Hiscock seems unanswerable. "As an original proposition it would seem to be clear that a right of action by or in behalf of the corporation for fraud to set aside a conveyance of its assets or to avoid obligations imposed upon it is part of its rights, property and assets in which a stockholder has this indivisible interest transferable by the transfer of his certificates. I am unable to see any real or substantial distinction by virtue of which a stockholder transferring his certificates would transfer all of his indivisible interest in bonds or real estate on hand, but would not transfer his interest in a right of action to recover bonds or real estate which had been fraudulently withdrawn from the possession of the corporation, and which it was enti-

tled to recover. And if the subsequent holder by acquiring the certificates does acquire such latter interest, it seems to follow that he may, if necessary, in behalf of the corporation, assert and prosecute an action to protect and enforce the same.

"Brief reference may be made to some of the reasons advanced in opposition to this view. Counsel points out practical inconvenience which he says will result from its application, owing to the difficulties in tracing stock and distinguishing that which has not assented to the transaction from that which has or from that which perhaps has been issued since its consummation. These arguments, however, are so counterbalanced by corresponding claims from the opposite standpoint as to be of little weight.

"Again, it is argued that if one buys stock subsequent to the transaction he should be regarded as buying subject to it and not be permitted to question it. If the prior holder should give binding consent to the transaction, this under certain circumstances undoubtedly would prevent the subsequent purchaser from questioning it. But, in the absence of special circumstances, I fail to see any principle of estoppel or logic which makes a subsequent purchase of stock so subject to a fraudulent corporate transaction that the purchaser may not insist upon its being set aside. There is scarcely any analogy between the situation of one who buys property from an individual which the latter has subjected to a transaction which has not been disaffirmed and that of one who purchases stock in a corporation which has the continuing right before and after the purchase to disaffirm a wrong which has been perpetrated on it by its agents. There is little or no basis for the practical consideration that one who buys stock should be deemed to have adjusted his price to an existing transaction even though voidable. If he knows of it he may just as properly be assumed to have adjusted his price to the knowledge that the transaction may still be disaffirmed and avoided.

"Then, lastly, an argument is made which seems to be founded on the idea that in order to bring an action of this nature the stockholder must in effect disaffirm the corporate transaction and that this disaffirmance involves a personal right of election which vests in the one holding the stock when the transaction is consummated and which cannot be transferred. It is said 'the right to question a fraud is not a purchasable commodity,' and is not 'capable of assignment and transfer,' and does not pass 'as an implied incident to every sale of corporate stock,' and this view seems to be supported by some of the many cases which have been collected and reviewed by counsel with manifest industry and care.

"So far as this argument means to assert that a mere naked right to question a corporate transaction could not be transferred to a stranger, if such an attempt can be conceived of, it may be assumed to be true. But the assertion that the right to protect stock by procuring an improper corporate transaction to be vacated does not pass on a transfer of the stock is a very different proposition.

"The election to disaffirm a fraudulent corporate transaction belongs

is taken by the courts of Georgia,[13] Colorado,[14] New Mexico,[15] North Carolina,[16] Iowa,[17] Nebraska,[18] Analogous rules regulate a suit by a stockholder to set aside a contract by the corporation as beyond the powers conferred in its charter.[19]

It seems that the rule does not apply where the suit arises under the Constitution of the United States,[20] nor to a suit by a mortgagee.[21] It does not apply to suits brought by the stock-

to and is exercised in the right and name of the corporation and not of the stockholder. The stockholder demands that the right shall be exercised and the cause of action be prosecuted by the corporation or does it himself for the corporation. It is conceded that the one holding the stock when the fraud is consummated has this right. When he transfers his certificates the transaction still stands a continuing wrong impairing the surplus of the company and affecting the stock. If the transferee has the right to have it avoided it will protect and increase the value of his stock. If he has not acquired this right it is the only one held by his predecessor in or through the corporation which has been thought of which has not been transferred by the transfer of the stock. It will be an anomalous exception if the prior holder retains the right to maintain or have maintained this action while he passes all of his other rights by the transfer of his stock. The only justification pleaded for this is the idea suggested of a personal and non-transferable right of election to disaffirm vested in the original holder. But this theory is entirely unsubstantial. Such prior holder does not acquire this right to object to the transaction and bring an action to set it aside as a power conferred upon him by reason of any personal qualities, but because of his character as a stockholder, and when he loses this character and transfers it to another with his stock there is no reason why the latter should not exercise the right as a proper and necessary incident to and for the benefit of his stock ownership."

[13] Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337.

[14] Boldenweck v. Bullis, 40 Colo. 253.

[15] Rankin v. S. W. B. & I. Co., 12 N. Mex. 54.

[16] Moore v. Silver Valley Co., 104 N. C. 534.

[17] Clark v. Am. Coal Co., 86 Ia. 436, 17 L.R.A. 557.

[18] Home Fire Ins. Co. v. Barber, 67 Neb. 644, 60 L.R.A. 927, 108 Am. St. Rep. 716.

[19] Dimpfell v. Ohio & Miss. R. Co., 110 U. S. 209, 28 L. ed. 121; Tazewell v. Farmers' Loan & T. Co., 12 Fed. 752; Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961.

[20] Ball v. Rutland R. Co., 93 Fed. 513. See Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Pollock v. Farmers' L. & Tr. Co., 157 U. S. 429, 39 L. ed. 759. *Contra*, Corbus v. Alaska Treadwell Gold Min. Co., 187 U. S. 455, 47 L. ed. 256.

[21] Consolidated Water Co. v. City of San Diego, 89 Fed. 272; Dawson v. Columbia Trust Co., 197 U. S. 178, 181, 49 L. ed. 713. But see Newby v. Oregon C. R. Co., 1 Sawyer, 63; Dickinson v. Consol. Traction Co., 114 Fed. 232, 245.

holders of a corporation after its dissolution;[22] nor where the corporation has made a general assignment for the benefit of its creditors and the assignee in insolvency has refused to sue,[23] nor to a suit to rescind a contract, made by the stockholders individually, for the transfer of the corporate property;[24] nor to a bill for the appointment of a receiver because of insolvency;[25] nor, it has been held, to a suit by a stockholder alleging that his corporation had ceased actively to conduct its business and to elect officers and directors, praying the appointment of a receiver and a winding up of its affairs;[26] but the rule applies where, although the charter of the corporation has expired, the company still exists for the purpose of winding up its affairs.[27] Not, it has been said, to a bill where the complainant proceeds against the formal action of the stockholders of the corporation.[28] Nor, it has been held, to a case where the complainants' cause of action existed independently of and prior to the accrual of their rights as stockholders; for example, under a contract by the promoters of the corporation.[29] Nor to a suit to restrain corporate actions to which the president of the corporation is made a party solely for purposes of discovery.[30] Nor to a bill by a depositor on behalf of himself and the other depositors to hold the directors of a bank responsible for losses caused by their misconduct.[31] It has been held that the rule does not apply to a bill to enforce a right of action which the corporation could not enforce in its entirety, such as a suit which prayed the dissolution of the corporation as well as the rescission of a contract made by it.[32] Where bondholders, by judicial proceedings, compelled an exchange of stock for their bonds sub-

[22] Lafayette Co. v. Neely, 21 Fed. 738. See Boyd v. Hankinson, C. C. A., 92 Fed. 49.

[23] Streight v. Junk, C. C. A., 59 Fed. 321.

[24] Old Colony Trust Co. v. Dubuque L. & Tr. Co., 89 Fed. 794.

[25] *Re* Cleland, 218 U. S. 120, 54 L. ed. 962.

[26] Briggs v. Traders' Ins. Co., 145 Fed. 254.

[27] Taylor v. Holmes, 127 U. S. 489, 32 L. ed. 179; s. c., 14 Fed. 498.

[28] Binney v. Cumberland Ely C. Co., 183 Fed. 650.

[29] Rogers v. Penobscot Mining Co., 154 Fed. 606.

[30] Leo v. Union Pac. Ry. Co., 17 Fed. 273.

[31] Foster v. Bank of Abingdon, 88 Fed. 604.

[32] Barcus v. Gates, C. C. A., 89 Fed. 783, 793. See Towle v. Am. B. L. & I. Co., 60 Fed. 131; Excelsior P. P. Co. v. Browne, C. C. A., 74 Fed. 321. But see Becker v. Hoke, C. C. A., 80 Fed. 973.

sequent to the transaction of which complaint was made, it was held that they could not maintain a stockholders' suit to set the same aside.[33] It has been held that a stockholder cannot sue to enjoin a corporation from paying internal revenue taxes.[34] The bill must specifically aver that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it otherwise would not have cognizance.[35] It is insufficient to allege "that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim."[36] Collusion is not established by the facts that the corporation would be benefited by the success of the complainant;[37] that its officers expressed a desire for the success of the suit;[38] that the refusal of the corporation to institute the suit was based expressly upon the ground, that that would excite public prejudice against the company;[39] that one or more other stockholders who are citizens of the same State as the principal defendant, but who are less than a majority, contribute to the expense of the suit;[40] that the stockholder's counsel is subsequently retained in a prior suit by the corporation brought by it for the same purpose, which is still pending upon an appeal taken by the company;[41] that the corporation, subsequent to the commencement of the suit, assisted the stockholder in the same, when there is no proof of any agreement between them prior to the

[33] Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co., 173 Fed. 556.

[34] Strauss v. Abrast Realty Co., 200 Fed. 327; citing Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 23 Sup. Ct. 157, 47 L. ed. 256; distinguishing Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. ed. 428.

[35] Quincy v. Steel, 120 U. S. 241, 246, 30 L. ed. 624, 626; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466.

[36] Quincy v. Steel, 120 U. S. 241, 246, 247, 30 L. ed. 624, 626.

[37] Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504; affirming Mills v. Chicago, 143 Fed. 430.

[38] Ibid.

[39] Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504; affirming Mills v. Chicago, 143 Fed. 430; New Albany Waterworks v. Louisville Banking Co., 122 Fed. 776, 58 C. C. A. 576; Consumers' Gas Trust Co. v. Quinby, C. C. A., 137 Fed. 882.

[40] Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504; affirming Mills v. Chicago, 143 Fed. 430.

[41] Ibid.

filing of his bill.[42] Nor even when the plaintiff testified that he understood the suit was brought to confer, upon a court of the United States, jurisdiction, in a case of which it would not otherwise have cognizance, the difference of citizenship between him and the defendants being undisputed.[43] "It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."[44] A previous demand upon the board of directors is unnecessary in a case of emergency, when irreparable injury would be caused by delay; for example, in a suit to redeem, when the time for redemption expired within a few days;[45] or where the bill shows danger of the removal of the assets from the jurisdiction pending such an application.[46] A previous demand is not required in a case where it clearly appears, that the corporation would certainly refuse to bring the suit, and the demand would be a vain and useless act.[47] For example, a bill by a minority stockholder to set aside a transaction committed by the approval of the majority in their individual interests,[48] or when the directors of the corporation, at the time the suit was brought, were the same

[42] Ibid. For other cases where refusals to sue were held not to be collusive, see Bowdoin College v. Merritt, 65 Fed. 213; Towl v. Am. B. L. & I. Co., 60 Fed. 131.

[43] Ibid. Perkins v. Pac. Ry. Co., 155 Fed. 445.

[44] Eq. Rule 27. See also Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Huntington v. Palmer, 104 U. S. 482, 26 L. ed. 833; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Greenwood v. Freight Co., 105 U. S. 13, 16, 26 L. ed. 961; Detroit v. Dean, 106 U. S. 537, 542, 27 L. ed. 300, 302; County of Tazewell v. Farmers' L. & T. Co., 12 Fed. 752; Dimpfell v. Ohio & Miss. R. Co., 110 U. S. 209, 28 L. ed. 121; Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624; §§ 12, 87, 207; Whitney v. Fairbanks, 54 Fed. 985; Strang v. Edson, 198 Fed. 813.

[45] Young v. Alhambra Mine Co., 71 Fed. 810.

[46] Tevis v. Hammersmith, 31 Ind. App. 281, 66 N. E. 79.

[47] County of Tazewell v. Farmers' L. & T. Co., 12 Fed. 752; Ranger v. Champion C. P. Co., 52 Fed. 611; Rogers v. Nashville, C. & St. L. Ry. Co., C. C. A., 91 Fed. 299; De Neufville v. N. Y. & N. Ry. Co., C. C. A., 81 Fed. 10. But see Squair v. Lookout Mountain Co., 42 Fed. 729; Farmers' L. & T. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49; Church v. Citizens' S. R. Co., 78 Fed. 526.

[48] Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606; Rogers v. Nashville, C. & St. L. Ry. Co., C.

as those who had committed the wrongs, which the suit is brought to redress,[49] or a bill to enforce a cause of action against a defendant which owns or holds the voting power of a sufficient amount of stock of the plaintiff's corporation to control a stockholders' meeting.[50] Nor is there necessity for such a demand in a suit where the bill states facts showing that the managing directors are in league with the president, who chose them, and who is using the corporation to defraud the complainant;[51] nor where it is shown that a majority of the stock of the corporation is controlled by another company, which the bill seeks to enjoin from voting thereupon, so as to elect its own directors and eliminate competition, to the irreparable injury of the complainant.[52] It is insufficient, however, to allege complicity of the president and directors in the fraud, of which complaint is made, when the bill does not show that an application to the stockholders for action would be unavailing.[53] Where the matter has been considered at a stockholders' meeting, a protest then made by the dissenting stockholders is sufficient to enable them to maintain a bill;[54] but the bill must show that a majority of the stockholders voted in favor of the proposition.[55] Where the bill showed that the largest block of stock, although less than a majority, was held or controlled by the wrongdoers, and that all the stock not owned or controlled by the complainants was scattered among small holders; it was held to be suffi-

C. A., 91 Fed. 299; De Neufville v. N. Y. & N. Ry. Co., C. C. A., 81 Fed. 10; Sager v. Culver, 147 N. Y. 241, 246; Earle v. Seattle, L. S. & E. Ry. Co., 56 Fed. 909; Eldred v. Am. P. C. Co., 99 Fed. 168; Berwind v. Canadian Pac. Ry. Co., 98 Fed. 158.

[49] Howard v. National Telephone Co., 182 Fed. 215. See, also, Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945; O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 52.

[50] Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435, 53 L. ed. 862; Field v. Western Life Indemnity Co., 166 Fed. 607.

[51] Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

[52] Bigelow v. Calumet & Hecla Min. Co., 155 Fed. 869.

[53] Macon, D. & S. R. Co. v. Shailer, C. C. A., 141 Fed. 585; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466, where the bill showed that the complainant was requested to attend a directors' meeting, but had not done so, nor made any attempt to settle the dispute; Binney v. Cumberland Ely Copper Co., 183 Fed. 650.

[54] Binney v. Cumberland Ely Copper Co., 183 Fed. 650.

[55] Ibid.

cient.[58] By the courts of the State of New York, no application to the stockholders is required.[57] The facts showing the control of the corporation, in such a case, must be specifically pleaded.[58] An averment that the holders of a majority of the stock have granted a voting power to the directors, who are implicated in the transaction attacked, is sufficient.[59] But it was held in New York that averments that the defendants, against whom the complaint is made, caused the election of a board of directors, "subservient to the domination and dictation of said defendants," and that "the company, by its board of directors, acted fraudulently and collusively and under the domination of" one of such defendants; were insufficient to show that the plaintiff was relieved from making an application to the board prior to the commencement of his suit;[60] and that a previous demand upon a corporation to disregard a lease did not authorize a suit to annul the same.[61] The bill should show the time and manner of the demand and that the board of directors had not changed.[62] Where a bill showed that the corporation had refused to sue upon the advice of counsel that the proceeding could not be successfully maintained, it was dismissed.[63] General averments of fraud or misconduct are insufficient.[64] Tangible facts to sustain such averments must be pleaded.[65] It has been said that as much certainty is required in a bill by a stockholder to enforce a corporate right as in a bill by a corporation for the same purpose.[66] It has been said that the allegations required by the rule are jurisdictional

[56] Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435, 452, 53 L. ed. 862, 868.

[57] Continental Securities Co. v. Belmont, 206 N. Y. 7, affirming 150 App. Div. 298.

[58] O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 52.

[59] Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606.

[60] O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 52. See Brewer v. Boston Theatre, 104 Mass. 378.

[61] Flynn v. Brooklyn C. R. Co., 158 N. Y. 493, 509.

[62] Swope v. Villard, 61 Fed. 417.

[63] Hendrickson v. Bradley, C. C. A., 85 Fed. 508.

[64] Schell v. Alston Mfg. Co., 149 Fed. 439; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466; Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 611. See *supra*, § 137.

[65] Ibid.

[66] Whitney v. Fairbanks, 54 Fed. 985.

and cannot be supplied by amendment;[67] but the question as to the sufficiency of a bill, under this rule, cannot be certified directly from the District Court to the Supreme Court of the United States.[68] An allegation that complainant is the bona fide and lawful owner "of record" of a specified number of shares of the stock of the corporation, is a sufficient averment that the complainant is a stockholder.[69] It has been held: that such a bill must contain an allegation that the complainant and his predecessors in title, since the transaction which he seeks to set aside, have not acquiesced in the same;[70] that a tender or offer need not be made or alleged, which might be necessary in case of a suit brought by the corporation;[71] that a stockholder cannot, in the same suit, seek, on his own behalf, to cancel stock which he holds, and also, on behalf of all the stockholders, to set aside corporate transactions,[72] but that he can pray in the same bill for a cancellation of an illegal issue of stock to others, an injunction restraining the transferee from voting upon the same and a receiver of the corporation.[73] It was held, under the former rules, that an equitable owner of stock, whose title was contested, could not maintain such a suit.[74] But the soundness of these decisions may be doubted. Under the new rules, the doctrine that equity having once obtained jurisdiction will afford relief, may be enforced; and there can be little doubt that the holder of a certificate of stock, endorsed in blank, may bring

[67] Dickinson v. Consol. Traction Co., 114 Fed. 232, 242.

[68] Venner v. Great Northern Railway Co., 209 U. S. 24, 52 L. ed. 666.

[69] Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945, 963.

[70] Venner v. Atchison, T. & S. F. Ry. Co., 28 Fed. 581, 591; Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340. See Church v. Citizens' St. R. Co., 78 Fed. 526. *Contra*, Brazill v. Isham, 12 N. Y. 9, 17; Pollitz v. Gould, 202 N. Y. 11, 38 L.R.A.(N.S.) 988, Ann. Cas. 1912D, 1098; Coatsworth v. Lehigh Valley Ry. Co., 115 App. Div. (N. Y.) 7; Continental Securities Co. v. Belmont, 75 Misc. (N. Y.) 234, 250.

[71] Edwards v. Mercantile Tr. Co., 124 Fed. 381, 391; Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co., C. C. A., 182 Fed. 607.

[72] Church v. Citizens' St. R. Co., 78 Fed. 526.

[73] Howard v. National Telephone Co., 182 Fed. 215.

[74] Inman v. New York Interurban Water Co., 131 Fed. 997, 999; Witherbee v. Bowles, 142 App. Div. (N. Y.) 407, 417; U. S. Steel Corporation v. Hodge, 64 N. J. Eq. 807, 809, 60 L.R.A. 742. *Contra*, Weber v. Wallerstein, No. 1, 111 App. Div. (N. Y.) 693.

such a suit before the stock has been transferred to him upon the books of the corporation, although out of abundant caution it might be prudent to join as a party the person in whose name the stock is registered.[75] It has been said: that where a small minority of the stockholders have been injured by a sale, it will not always be rescinded; but that the court may direct a valuation of the complainants' stock and the payment to them of the same under such a penalty as will give them ample security.[76]

§ 146. Bills to enjoin the infringement of patents. A bill to restrain the infringement of a patent must allege: that the complainant or the person through whom he claims was the inventor or discoverer of the thing or process patented;[1] that it has not been previously patented, nor described in any printed publication;[2] that it was not in public use nor on sale for more than two years before the application.[3] It must show that the patent was duly issued;[4] that the plaintiff has and had, at the time when the bill was filed,[5] a title to the patent, or such

[75] See §§ 113, 120, *supra*.

[76] Binney v. Cumberland Ely Copper Co., 183 Fed. 650, 653.

§ 146. [1] Sullivan v. Redfield, 1 Paine, 441; Am. Graphaphone Co. v. Nat. Phonograph Co., 127 Fed. 349. For a precedent of a bill for the infringement by the original patentee, see McCoy v. Nelson, 121 U. S. 484, 30 L. ed. 1017. See § 29, *supra*; § 277, *infra*.

[2] Hutton v. Star S. S. Co., 60 Fed. 747; Diamond Match Co. v. Ohio W. Co., 80 Fed. 117; Goebel v. Am. Ry. Supply Co., 55 Fed. 825; Rubber T. W. Co. v. Davie, 100 Fed. 85; Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349.

[3] Blessing v. John Traeger S. C. Works, 34 Fed. 753; Krick v. Jansen, 52 Fed. 823; Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349; Hayes-Young T. P. Co. v. St. Louis Transit Co., 130 Fed. 900. An allegation that it had not been so used or sold with the consent of the inventor is insufficient. Ibid. The bill need not allege that the invention was not abandoned before the application for the patent. Warren F. Co. v. Warner Bros. Co., 92 Fed. 990.

[4] It has been held: that an allegation that a patent was duly issued, upon application to the "proper department of the government," is insufficient. Vant Woud Rubber Co. v. Sternau, 145 Fed. 197.

[5] Krick v. Jansen, 52 Fed. 823. But see Arrott v. Standard Mfg. Co., 113 Fed. 1014. Where a bill by the assignee of a patent seeks damages and profits for past infringement, it must state the date of the assignment, and that the right of recovery for past damages and profits was included therein. Vant Woud Rubber Co. v. Sternau, 145 Fed. 197.

an interest in the same as gives him the right to the protection from the court;[6] and that the defendant has infringed, and still infringes, the patent;[7] or threatens to infringe the same.[8] When the bill alleges: that a patent was issued, it is

[6] Krick v. Jansen, 52 Fed. 823; Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349. It has been held insufficient to aver simply the issue to complainant of the patent and that the letters-patent are in his possession. Lettelier v. Mann, 79 Fed. 81. But see Arrott v. Standard Mfg. Co., 113 Fed. 1014. When a bill alleged "that the patentee was the original, first and sole inventor of a certain new and useful improvement in the construction of cable railways, fully described in the specification of the said letters-patent, which had not been patented to himself or to others, with his knowledge or consent, in any country, and had not, to his or the orator's knowledge, been in public use or on sale in the United States for more than two years prior to his invention and discovery thereof, and application for letters-patent of the United States therefor" it was held sufficient. American Cable Ry. Co. v. City of N. Y., 42 Fed. 60. It has been held to be a sufficient allegation of title for the plaintiff to allege that he "was the true, original and first inventor of a certain new and useful improved application of steam power to the captain of vessels, not known or used before," that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters-patent annexed, accompanied by certain drawings referred to in said last mentioned schedule, and forming parts of said letters-patent,—the said letters-patent and the said specification thereto annexed (which, your orators will produce, which, or an exemplified copy of which, as your honors may direct) were duly recorded in the patent office." McMillin v. St. Louis & Mississippi Valley Transp. Co., 18 Fed. 260. Where the patentee and licensee joined as complainants, and there was a demurrer for misjoinder it was held, that the complainants must produce the license upon the argument of the demurrer, since it was not set out in the bill. Dyer v. Cryder, 153 Fed. 767.

[7] Western El. Instrument Co. v. Valee Bros. El. Co., 145 Fed. 534.

[8] Bowers v. Bucyrus Co., 132 Fed. 39. It has been held that a simple averment that the defendant has infringed the patents above described is sufficient. Am. Bell Tel. Co. v. Sou. Tel. Co., 34 Fed. 803. See also McMillin v. St. Louis & M. V. Tr. Co., 18 Fed. 260; McCoy v. Nelson, 121 U. S. 484, 30 L. ed. 1017; Cleveland F. & B. Co. v. U. S. Rolling S. Co., 41 Fed. 476; Peters v. Chicago Biscuit Co., 142 Fed. 779. See Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543. But see Am. S. L. B. Co. v. Empire S. N. Co., 50 Fed. 929. It is enough to aver: "that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters-patent mentioned." McMillin v. St. Louis & Missis-

unnecessary to allege that an application was made. The filing of the application in due form commensurate with the grant is presumed from the issue of the patent.[9] When, to meet a

sippi Valley Transportation Co., 18 Fed. 260, 261. See McCoy v. Nelson, 121 U. S. 484, 30 L. ed. 1017. A bill for an injunction and an accounting was held to be good on demurrer, although it did not allege that the complainant was engaged in using the invention patented, or that it was a source of profit to him, when it alleged that the defendant had made profits by the use of the invention. Wirt v. Hicks, 46 Fed. 71. A bill which alleged the issue of a patent for a "process" of making furniture nails, which it set forth, alleged that the defendant, "in infringement of the aforesaid letters-patent," did wrongfully "make, use, and vend to others to be used, furniture nails embracing the improvement set forth and claimed in the aforesaid letters-patent," was held demurrable as not containing sufficient averment of infringement. Am. S. L. B. Co. v. Empire S. N. Co., 50 Fed. 929. It has been held that in a suit against two or more for the infringement of a patent, a general allegation of infringement is sufficient without a specific allegation that they are joint infringers. Indurated F. I. Co. v. Grace, 52 Fed. 124, 127; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117. *Contra*, Shickle v. Foundry Co., 22 Fed. 105; Fitchel v. Barthel, 173 Fed. 489. A bill to enjoin the infringement of a patent by the use of a machine need not state what articles the defendant has made by the use of the machine. Fischer v. Hayes, 6 Fed. 76, 78. An allegation that the defendant "since the date of said patent" had infringed was held upon demurrer not to signify "ever since," but "after or subsequently to" that date. Brush El. Co. v. Ball El. Light Co., 43 Fed. 899. Where the bill alleged infringement subsequent to the date of the patent and more than six years before the filing of the bill, it was held not to be defective because it failed to allege such infringement had continued. Fichtel v. Barthel, 173 Fed. 489, 491. A bill which alleged that a complainant had obtained a certain patent, that the defendant had obtained patents of a later date which interfered with complainant's rights, and that defendant is making and selling machines under his patents, and has in other ways disturbed complainant in the use and enjoyment of the rights granted by his patent, was held to charge interference sufficiently. Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. 72. It has been held: that where a bill charges the infringement of a patent generally, it may be construed as charging the infringement of all the claims and that the complainant cannot be required to amend by specifying the claims, with respect to which the infringement is claimed, and the parts of defendant's machine or structure, which are claimed to infringe. Morton Tr. Co. v. Am. Car & Foundry Co., C. C. A., 129 Fed. 916.

[9] Bowers v. Bucyrus Co., 132 Fed. 39.

defense of prior public use, the plaintiff relied upon a former application which had been abandoned, it was said that the date and facts concerning the same should have been pleaded in the bill.[10] The bill need not set forth: that the invention was not patented in a foreign country more than seven months before the filing of the application in the United States.[11] The bill must also contain a substantial description of the patent or else set out the patent itself, or have the same annexed as an exhibit.[12]

Profert of the patent will, however, suffice,[13] and will supply any deficiencies concerning its contents or signature which therein appear.[14] In such a case, only its title need be set forth.[15] It is insufficient to allege: "as by the said letters patent and specifications, all in due form of law, ready in court to be produced, will fully appear;"[16] but it is the safer practice also to state the number of the patent, and the volume and page of its record in the patent office;[17] together with its title. An allegation of the date, without profert, is insufficient.[18] It has been held: that the mention, in a bill, of prior patents to the same patentee, does not amount to a profert of such patents, so as to bring them before the court for consideration on a

[10] Corrington v. Westinghouse Air Brake Co., C. C. A., 178 Fed. 711.

[11] American Cereal Co. v. Oriental Food Co., 145 Fed. 649.

[12] Stirrat v. Excelsior Mfg. Co. 44 Fed. 142.

[13] Wilder v. McCormack, 2 Blatchf. 31; McMillin v. St. Louis & Miss. Valley Transportation Co., 18 Fed. 260; Dickerson v. Green, 53 Fed. 247; Bogart v. Hinds, 25 Fed. 484; Hildreth v. Bee Candy Mfg. Co., 162 Fed. 40; Fichtel v. Barthel, 173 Fed. 489. "The demurrer says that the bill should make 'profert' of the letters patent, and the plaintiff replies the 'profert' is unknown to equity pleadings. Technically this may be so, but the equivalent of 'profert' is known; and whenever the law pleadings must make 'profert,' the equity pleadings must allege and prove with fullness enough to give all the benefit the 'profert' would give, and under a rule the production of the document would be compelled." Hammond, J., in Electrolibration Co. v. Jackson, 52 Fed. 773, 776. See *supra*, note 6; *infra*, § 366.

[14] Fichtel v. Barthel, 173 Fed. 489.

[15] McMillin v. St. Louis & Miss. Valley Transportation Co., 18 Fed. 260. See Dickerson v. Greene, 53 Fed. 247.

[16] Wilder v. McCormick, 2 Blatchf. 31; Dickerson v. Green, 53 Fed. 247; Bogart v. Hinds, 25 Fed. 484. See *infra*, § 366.

[17] Electrolibration Co. v. Jackson, 52 Fed. 773, 776. See Welsbach L. Co. v. Rex I. L. Co., 87 Fed. 477.

[18] Ibid.

demurrer.[19] In case of a profert, the document thus offered may be retained in the custody of the pleader until the hearing.[20]

The Revised Statutes provide: "Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent-Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." [21] It has been held that when one of the claims under a patent has been held to be void, a disclaimer of the same must be filed before the final decree in an infringement suit.[22] Where the complainants sued as joint owners of a patent and as such prayed for an accounting, adding thereto the prayer for general relief, it was held that profits due to a single one of them, as exclusive licensee for a certain territory, could not be recovered in the absence of an averment concerning his license in the bill.[23] But the better practice is not to require a disclaimer until the entry of the final decree after any accounting that

19 Bowers v. Bucyrus Co., 132 Fed. 39.

20 Germain v. Wilgus, C. C. A., 67 Fed. 597.

21 U. S. R. S., § 4922, 5 Fed. St. Ann. 598, Pierce's Fed. Code (1910), p. 1652, § 8789.

22 Suddard v. Am. Motor Co., 163 Fed. 852.

23 National Metal Weather Strip Co. v. Bredin, C. C. A., 186 Fed. 490.

may be ordered has been terminated, in order that the complainant may have the right to have so much of the adjudication as is against him reviewed upon appeal.[24]

Where damages for an infringement are prayed, the bill must show that notice to the public was given by the plaintiff, by affixing the word "patented," together with the day and year the patent was granted, upon each patented article made or sold by him, which is covered by the patent in suit, or when, from the character of the article, this could not be done, by affixing to it, or to the enclosing package, a label containing the same notice; or else that the defendant was duly notified of the infringement and continued after the notice to make, use or vent the article so patented.[25] Such notice is not essential where the city seeks an injunction without any demand for profits or damages;[26] and without such marking or any allegations concerning the same, an accounting may be decreed because of infringements committed after the filing of the bill.[27]

The history of the invention, and a description of patents issued to the complainant before that sued upon, were held to be proper averments.[28] So were the grant of foreign patents for the same invention and acquiescence therein in this and other countries.[29] It was also held proper to describe previous litigation over the same or similar patents.[30] The bill need

24 Page Mach. Co. v. Dow, Jones & Co., C. C. A., 168 Fed. 703.

25 U. S. R. S., § 4900. Sprague v. Bramhall-Deane Co., 133 Fed. 738; Streat v. Finch, Young & McConville, 154 Fed. 378; G. Heileman Brewing Co. v. Independent Brewing Co., C. C. A., 191 Fed. 491. Where the bill admitted that the complainant had made and sold the patented articles, without alleging compliance with the statutory requirement concerning marking the same; but alleged that defendant continued to infringe after due notice, and omitted to give the date of such notice; it was held: that an admission by the defendant of notice did not relieve complainant from the burden of proving the date; and that where that question was not adjudicated by an interlocutory decree finding infringement and directing an accounting, the date must be proved before the Master to afford any basis for an accounting. Lorain Steel Co. v. N. Y. Switch & Crossing Co., 153 Fed. 205

26 Morton Tr. Co. v. Am. Car & Foundry Co., 161 Fed. 546.

27 Maimen v. Union Special Mach. Co., C. C. A., 165 Fed. 440.

28 Steam G. & L. Co. v. McRoberts, 26 Fed. 765.

29 Peters v. Chicago Biscuit Co., 142 Fed. 779.

30 Steam G. & L. Co. v. McRoberts, 26 Fed. 765; Am. Bell Tel. Co. v. So. Tel. Co., 34 Fed. 803.

not allege that the invention had not been abandoned before the grant of the patent.[31] It was held at Circuit that in a bill founded upon a reissued patent it is not necessary to aver specifically the ground upon which the original patent was surrendered;[32] but if such a bill shows a delay of more than two years in the application for the reissue;[33] or in the patent office,[34] it must allege sufficient excuse for the delay. Where the bill shows such a relation between the defendants and the patentees as to estop the former from denying the validity of the patent, a specific allegation of such estoppel is not necessary.[35] The objection, that a bill for infringement does not show upon which of the claims of the patent the complainant relies, is not a ground for dismissing the bill, but should be raised by a motion to require the complainant to specify such claims.[36] When

But see Western El. Co. v. Williams-Abbott El. Co., 83 Fed. 842.

31 Fichtel v. Barthel, 173 Fed. 489.

32 Spaeth v. Barney, 22 Fed. 828. Upon a demurrer for both uncertainty and want of equity to a bill founded upon a reissued patent, when the only allegations concerning the reissue were "that said Charles T. Day having, for good and lawful cause and with the consent and approbation of your orator, surrendered said letters-patent to the Commissioner of Patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the eighteenth of February, 1879, obtain new letters-patent, being reissued letters-patent, for the same invention for the residue of said term, and which were marked 'reissue, No. 8,590,' and were issued in due form of law to your orator, as assignee, under the seal of the patent office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and bearing date the day and year aforesaid, as by the last mentioned reissued letters-patent, ready here in court to be produced, will appear:" it was held that the bill was not objectionable. The court then said: "It is not necessary to aver, specifically, the ground on which the original patent was surrendered. The reissue of letters-patent by the Commissioner is *prima facie* evidence that such reissue is founded on sufficient cause, and is in accordance with law. It is also presumed that the Commissioner acted within his statutory authority until the contrary is proved." Ibid.

33 Wollensak v. Reiher, 115 U. S. 96, 29 L. ed. 350.

34 Gandy v. Marble, 122 U. S. 432, 30 L. ed. 1223.

35 Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126.

36 Marconi Wireless Tel. Co. v. New England Nev. Co., 191 Fed. 194.

there is no other ground for equitable relief, the court of equity has no jurisdiction of a suit upon a contract for royalties,[37] nor for an accounting by an infringement of a patent.[38] Consequently, after the expiration of a patent, when an injunction can no longer be granted against further infringements, a bill for an accounting by an infringer will not be sustained.[39] But where infringing articles, made when the patent was in force, are in the defendant's possession, equity may take jurisdiction, since the right to an injunction there exists.[40] A bill praying an injunction and an accounting, filed only a few days before the expiration of a patent, may, in the discretion of the court, be sustained by a decree for an accounting only, although the patent has expired before the hearing, provided that it was possible to obtain equitable relief during the life of the patent.[41] It has been so held of bills filed four months and five days,[42] between two and three months,[43] "a few weeks,"[44] forty-eight days,[45] fifteen days,[46] before the patent's expiration; or even one day before, when the bill alleged that complainant

[37] Safford v. Ensign Mfg. Co., C. C. A., 120 Fed. 480; Allen v. Consol. Fruit Jar Co., 145 Fed. 948, where the cancellation of patents was also prayed.

[38] Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975; Brooks v. Miller, 28 Fed. 615, 617.

[39] Ibid.

[40] New Jersey Patent Co. v. Martin, 172 Fed. 760; Root v. Railway Co., 105 U. S. 189, 26 L. ed. 975; Clark v. Wooster, 119 U. S. 322, 325, 30 L. ed. 392, 393; N. Y. Belting & Packing Co. v. Magowan, 27 Fed. 111; American D. R. B. Co. v. Rutland Marble Co., 2 Fed. 356; American D. R. B. Co. v. Sheldon, 1 Fed. 870; Crossley v. Derby Gas Light Co., 4 L. J. Ch. (N. S.) 25. But see Westinghouse v. Carpenter, 43 Fed. 894, and *infra*, § 277.

[41] Beedle v. Bennett, 122 U. S. 71, 30 L. ed. 1074; Clark v. Wooster, 119 U. S. 322, 324, 30 L. ed. 392; Busch v. Jones, 184 U. S. 598, 46 L. ed. 707; Westinghouse Air Brake Co. v. Carpenter, 32 Fed. 484, per Brewer, J.; Kittle v. De Graaf, 30 Fed. 689, per Coxe, J.; Adams v. Bridgewater Iron Co., 26 Fed. 324; Brooks v. Miller, 28 Fed. 615, 617; Russell v. Kern, C. C. A., 69 Fed. 94.

[42] Chinnock v. Patterson, P. & S. Tel. Co., C. C. A., Third Circuit, 112 Fed. 531.

[43] Ross v. Fort Wayne, C. C. A., Seventh Circuit, 63 Fed. 466; Carnegie Steel Co. v. Colorado Fuel & Iron Co., C. C. A., 165 Fed. 195.

[44] Huntington Dry Pulverizer Co. v. Virginia, Carolina Chemical Co., 130 Fed. 558 (D. N. J.).

[45] Am. Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co., 169 Fed. 140.

[46] Clark v. Wooster, 119 U. S. 322, 30 L. ed. 392

had not used its patent and had sustained no actual damage by the infringement; although it did not appear that any motion for a preliminary injunction was made.[47] On the other hand, bills were dismissed when no applications for preliminary injunctions were made and the suits were begun within two months,[48] twenty-nine days,[49] twenty-two days,[50] fourteen days,[51] thirteen days,[52] eleven days,[53] ten days,[54] and five days,[55] respectively, before the expiration of the patent. The fact that, under the practice of the court requiring a certain notice, no injunction could possibly have been obtained before the expiration of the patent, may justify the dismissal of the bill:[56] Allegations that complainant derives his benefit from the patent through a limited granting of licenses does not deprive equity of jurisdiction by showing that he has an adequate remedy at law, when it appears that there is no established license fee for all users,[57] and even, it has been held, when there is no allegation upon the subject in the bill.[58] The discontinuance of the infringement shortly before the commencement of the suit does not deprive the complaint of his remedy for an injunction and accounting of the profits previously made.[59] All persons who have acted jointly in the infringement of a patent may be made defendants in the same suit.[60] It has

[47] Tompkins v. International Paper Co., C. C. A., 183 Fed. 773.

[48] Racine Seeder Co. v. Joliet Wire Check Rower Co., 27 Fed. 367.

[49] Keyes v. Eureka Con. Min. Co., 158 U. S. 150, 153, 39 L. ed. 929, 930; affirming 45 Fed. 199.

[50] McDonald v. Miller, 84 Fed. 344.

[51] Am. Cable Ry. Co. v. Chicago City Ry. Co., 41 Fed. 522.

[52] Miller v. Schwarner, 130 Fed. 561.

[53] Diamond Stone Sawing Machine Co. v. Seus, 159 Fed. 497; Beid-Archer Co. v. North Amer. Chemical & Eng. Co. et al., 147 Fed. 746.

[54] Overweight Counterbalance Elevator Co. v. Standard Elevator & Mfg. Co., 96 Fed. 231.

[55] Burdell v. Comstock, 15 Fed. 395.

[56] Clark v. Wooster, 119 U. S. 322, 324, 30 L. ed. 392; American Cable Ry. Co. v. Citizens' Ry. Co., 44 Fed. 484; Keyes v. Eureka Con. Min. Co., 45 Fed. 199; American Cable Ry. Co. v. Chicago City Ry. Co., 41 Fed. 522; Russell v. Kern, C. C. A., 64 Fed. 581; s. c., 69 Fed. 94; McDonald v. Miller, 84 Fed. 344.

[57] Am. Sulphite Pulp Co. v. Crown-Columbia Pulp & Paper Co., 169 Fed. 140.

[58] Peters v. Chicago Biscuit Co., 142 Fed. 779.

[59] Saxlehner v. Eisner, 140 Fed. 938.

[60] Climax Lock & Ventilator Co.

been held that an improper joinder of applicants for a patent is a purely technical defense which should not be favored after the patent has been assigned,[61] but it was held that, in the same bill, complainant could not join a prayer for relief against interference with a request that the commissioner grant a reissue of a patent;[62] nor a prayer for an injunction against infringement with one for specific performance of an agreement by a licensee.[63]

A bill to enjoin the infringement of several distinct patents under the former practice was held multifarious;[64] but if all the patents are infringed in the use of or manufacture of a single machine, process, manufacture, or compensation of matter and it is so alleged, the bill is good;[65] even if one has expired;[66] and although one is for a process and the other for a product.[67] It has been said that the complainant "should aver that said inventions are capable of conjoint as well as separate use, and are so used by the defendant,"[68] but, before the new Equity Rules, a general allegation of their infringement collectively was usually held to be sufficient.[69] An

v. Ajax Hardware Mfg. Co., 192 Fed. 126, corporations who had acted jointly with the patentees, who had assigned their patents to them.

61 Sieber & Trussel Mfg. Co. v. Chicago Finder & File Co., 177 Fed. 439.

62 Gold v. Gold, 181 Fed. 544.

63 Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579.

64 Quoted with approval in Robinson v. Chicago Rys. Co., C. C. A., 174 Fed. 40, 42; Hayes v. Dayton, 8 Fed. 702; Shickle v. South St. Louis F. Co., 22 Fed. 105; Thomas H. El. Co. v. Sperry, 46 Fed. 75; Louden M. Co. v. Montgomery W. & Co., 96 Fed. 232. But see Eq. Rule 26, *supra*, § 139.

65 Reported with approval in Robinson v. Chicago Rys. Co., C. C. A. 174 Fed. 40, 42; Nourse v. Allen, 4 Blatchf. C. C. 376; Perry v. Corning, 7 Blatchf. C. C. 195; Case v. Redfield, 4 McLean, 526; Gamewell F. A. Tel. Co. v. Chillicothe, 7 Fed. 351; Nellis v. McLanahan, 6 Fisher's Pat. Cas. 286; Diamond Match Co. v. Ohio M. Co., 80 Fed. 117; Edison Phon. Co. v. Victor Talking Mach. Co., 120 Fed. 305; American Graphophone Co. v. Leeds & Catlin Co., 131 Fed. 281. See U. S. v. Am. Bell Tel. Co., 128 U. S. 315, 32 L. ed. 450.

66 Hunting Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 Fed. 558.

67 Am. Graphaphone Co. v. Leeds & Catlin Co., 131 Fed. 281.

68 Gamewell F. A. Tel. Co. v. Chillicothe, 7 Fed. 351; Nellis v. McLanahan, 6 Fisher's Pat. Cas. 286; Robinson v. Chicago Rys. Co., C. C. A., 174 Fed. 40, 42.

69 Luten v. Sharp, 200 Fed. 151.

amendment adding such an averment will be allowed.[70] A charge of infringement, and a prayer for an injunction and accounting accordingly, may be joined with a charge of interference and a prayer for relief against the same.[71] A bill seeking an injunction with damages against the infringement of a patent, and an injunction with damages against the publication of libelous circulars affecting plaintiff's patent has been held multifarious.[72] A bill seeking an injunction against the infringement of a patent and the infringement of a trademark was held not multifarious when the allegations as to both related to the same subject-matter;[73] but, it was held, that a complaint could not join a cause of action for the infringement of a patent with another for unfair competition in trade, although both related to the same subject-matter,[74] although this might be done when the unfair competition was incidental to the infringement. For example, an imitation of the form[75] and design,[76] and of pictures of the device in catalogues,[77] but not, it has been held, when the defendant is sued in a different district from that of his residence and neither party resides

70 Union L. & S. Co. v. Philadelphia R. Co., 68 Fed. 914; Electric Goods Mfg. Co. v. Benjamin Electric Mfg. Co., 169 Fed. 832.

71 Leach v. Chandler, 18 Fed. 262; Holiday v. Pickhardt, 29 Fed. 853; Swift v. Jenks, 29 Fed. 642; American Roll Paper Co. v. Knopp, 44 Fed. 609, 612; Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. 72.

72 Fougeres v. Murbarger, 44 Fed. 292. See International T. C. Co. v. Carmichael, 44 Fed. 349.

73 Jaros H. U. Co. v. Fleece H. U. Co., 60 Fed. 622; Adam v. Folger, 120 Fed. 260; Globe-Wernicke Co. v. Fred Macey Co., C. C. A., 119 Fed. 696, 703, 56 C. C. A. 304; T. B. Woods Sons Co. v. Valley Iron Works, 166 Fed. 770. *Contra*, Cushman v. Atlantis Fountain Pen Co., 164 Fed. 94; Mecky v. Grabowski, 177 Fed. 591. See *supra*, §§ 24, 142.

74 Ball & S. F. Co. v. Cohen, 90 Fed. 664; C. L. King & Co. v. Inlander, 133 Fed. 416; Cushman v. Atlantis Fountain Pen Co., 164 Fed. 94; Mecky v. Grabowski, 177 Fed. 591; National Casket Co. v. N. Y. & Brooklyn Casket Co., 185 Fed. 533. See *supra*, §§ 24, 142. See, however, Keasby & Mattison Co. v. Phillip Cary Mfg. Co., 113 Fed. 432; C. L. King & Co. v. Inlander, 133 Fed. 416.

75 T. B. Woods Sons Co. v. Valley Iron oWrks, 166 Fed. 770; Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 193 Fed. 658.

76 Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 193 Fed. 658.

77 Climax Lock & Ventilator Co. v. Ajax Hardware Mfg. Co., 192 Fed. 126.

in the same.[78] Under the former practice it was held as follows: A bill to set aside a contract for a partnership in royalties, which also prayed an account of matters collected under a verbal understanding before the date of the contract, is not multifarious;[79] nor a bill for an infringement, which also pleads a contract, in which it is alleged that defendants have agreed not to contest the validity of the patent.[80] A supplemental bill against a new defendant, to whom the original defendant had transferred its property, pending the suit, which prayed an injunction against the use of plaintiff's patents, and that it be obliged to pay the damages caused by its predecessor's infringement; was multifarious.[81] Where a bill set out a contract relating to certain patents, and asked specific performance thereof against several parties, but also contained expressions looking to relief, as in a suit for infringement, it could not be sustained as a bill with a double aspect, because the determination of who are proper parties must be made from different standpoints in the two kinds of bills.[82] Persons who are acting in concert as employees of the same corporation in the infringement of a patent may be joined as defendants to the same bill.[83] An averment that two parties, one of whom is an officer of the other, have infringed a patent, is a sufficient allegation that their infringement was joint.[84]

§ 147. Bills to compel the issue of patents and bills to obtain relief against interfering patents. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or any part thereof, as the facts in the case may appear.

78 Woerheide v. H. W. Johns-Manville Co., 199 Fed. 535.

79 Patton v. Glantz, 56 Fed. 367.

80 Dunham v. Bent, 72 Fed. 60.

81 Western Telephone Mfg. Co. v. Am. El. Tel. Co., 137 Fed. 603.

82 American Box Mach. Co. v. Crosman, C. C. A., 61 Fed. 888; s. c., 57 Fed. 1021.

83 Poppenhusen v. Falke, 4 Blatchf. 493.

84 Thomson-Houston El. Co. v. Electrose Mfg. Co., 155 Fed. 543.

And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the patent-office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."[1] "Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."[2] The act creating the Court of Appeals for the District of Columbia, with power to entertain appeals from the decisions of the Commissioner of Patents in the cases mentioned in these two sections of the Revised Statutes, did not repeal them.[3] Such a bill should not be brought until the determination of an appeal to the District Court of Appeals,[4] and it is the safer practice not to file the same until after the Commissioner has obeyed the mandate of that Appellate Court.[5] But where adverse decisions in interference proceedings have been made against an applicant for a patent by the examiners, the patent office com-

§ 147. [1] U. S. R. S., § 4915, 5 Fed. St. Ann. 507, Pierce's Fed. Code, § 8780; Runstetler v. Atkinson, 23 Off. Gaz. 1025; Greeley v. Commissioner, 6 Fisher, 675; s. c., 1 Holmes, 284; Ex parte Arkell, 15 Blatchf. 437; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119; Hill v. Wooster, 132 U. S. 693, 33 L. ed. 502. See § 30 *supra*, § 279 *infra*.

[2] U. S. R. S., § 4918, 5 Fed. St. Ann. 526, Pierce's Fed. Code, § 8783.

[3] McKnight v. Metal Volatilization Co., 128 Fed. 51; Dover v. Greenwood, 143 Fed. 136.

[4] Smith v. Muller, 75 Fed. 612; McKnight v. Volatilization Co., 122 Fed. 51.

[5] Bernardin v. Northall, 77 Fed. 849.

missioner and the Court of Appeals of the District of Columbia on appeal, he may maintain a bill in equity in a District Court of the United States without waiting for the formal action of the Patent Office refusing his application.[6] Where there is no opposing party, a copy of the bill should be served on the commissioner, and it is the better practice to name him and perhaps also the Secretary of the Interior, as parties defendant.[7] The Commissioner of Patents is not a necessary party when there is a party to oppose the bill to compel the issue of a patent,[8] or in an interference case,[9] but when the patent has been issued and assigned, the assignee is a necessary party.[10] When there is an opposing party, costs are usually awarded to the one who prevails.[11] The fact that the two parties to the interference proceeding have united the interests, and neither of them has opposed the bill, does not deprive the District Court of jurisdiction, nor, at last when that matter is disclosed to it, does it render its decree subject to collateral attack.[12] Such a bill presents a case of original equitable jurisdiction; not an appeal.[13] The statutes do not authorize an injunction against the issue of a patent by the Commissioner to some one other than the plaintiff.[14] Upon an application to compel the issue of a patent, when application is made to have the bill taken *pro confesso*, the court may require a copy of the proceedings in the patent-office and call for any competent evidence that the complainants may wish to offer.[15] The decision is subject to the ordinary Equity Rules that the evidence must be relevant to the issues made by the pleading, and proof cannot be admitted which tends only to show that, because of the prior state of the art, neither party is entitled to a patent.[16] The court has power to decide the questions of priority with-

6 McKnight v. Metal Voltalization Co., 128 Fed. 51.

7 Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. ed. 1223; Davis v. Garrett, 152 Fed. 723, 725.

8 Graham v. Teter, 25 Fed. 555.

9 Butler v. Shaw, 21 Fed. 321.

10 Graham v. Teter, 25 Fed. 555. See Illingworth v. Atha, 42 Fed. 141, 145.

11 Butler v. Shaw, 21 Fed. 321.

12 Schmertz Wire Glass Co. v. Western Glass Co., 178 Fed. 973; s. c., 178 Fed. 977.

13 Wheaton v. Kendall, 85 Fed. 666, 671; Appert v. Brownsville Plate Glass Co., 144 Fed. 115.

14 Illingworth v. Atha, 42 Fed. 141, 144.

15 Davis v. Garrett, 152 Fed. 723, 725.

16 Richards v. Meissner, 163 Fed. 957.

out any exceptions or limitations; and when the decision of the patent office is based upon questions of law rather than upon any distinct finding of priority, Circuit Court will make an independent examination of the testimony and reach its own conclusions.[17] It has been said: that such decision must be given weight in the nature of a departmental decision, and, to overcome it, the evidence must be of such character, and sufficient at least to require a clear conviction that it was erroneous.[18] Such a suit is a plenary suit in equity, to which all the rules of practice and evidence in such suits apply, and a party cannot be deprived of the right to cross-examine his opponent's witnesses by the introduction of the proofs taken in the patent office, unless they are otherwise admissible as secondary evidence.[19] It has been held that a bill to compel the issue of a patent which has been refused, must be filed within one year after the refusal.[20]

§ 148. Bills to restrain infringements of trade-marks. The Trade-Mark Law of March 2, 1907, provides: "That the Circuit and Territorial Courts of the United States and the Supreme Court of the District of Columbia shall have original jurisdiction, and the Circuit Courts of Appeal of the United States and the Court of Appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act, without regard to the amount in controversy."[1] "That the several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act,

[17] Wheaton v. Kendall, 85 Fed. 666.

[18] Greenwood v. Dover, C. C. A., 194 Fed. 91. But it has been said that it should be followed, unless the contrary is established by evidence which carries thorough conviction. Richards v. Meissner, 163 Fed. 957.

[19] Dover v. Greenwood, 177 Fed. 946.

[20] Westinghouse El. & Mfg. Co. v. Ohio Brass Co., 186 Fed. 518; citing U. S. R. S., § 4894, as amended 29 St. at L. 692, § 4, 5 Fed. St. Ann. 488, Comp. St. 3384, Pierce Fed. Code, § 8760.

[1] § 148. 34 St. at L. 1251, § 17, Pierce's Fed. Code, § 8823.

on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed."[2] "That in any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any circuit court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other circuit court, or judge thereof, in the United States, or by the supreme court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the circuit court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certified copy of all the papers on which the said injunction was granted that are

[2] Ibid., § 19. Pierce's Fed. Code, § 8825.

on file in his office."[3] "That no action or suit shall be maintained under the provisions of this Act in any case when the trade-mark is used in unlawful business, or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or has been abandoned, or upon any certificate of registration fraudulently obtained."[4] "That nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this Act had not been passed."[5] "That in any case involving the right to a trade-mark registered in accordance with the provisions of this Act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trade-mark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. Any injunction that may be granted upon hearing, after notice to the defendant, to prevent the violation of any right of the owner of a trade-mark registered in accordance with the provisions of this Act, by any" District "Court of the United States, or by a judge thereof, may be served on the parties against whom such injunction may be granted anywhere in the United States where they may be found, and shall be operative, and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other" District "Court, or judge thereof, in the United States, or by the Supreme Court of the District of Columbia, or a judge thereof. The said courts, or judges thereof, shall have jurisdiction to enforce said injunction, as herein provided, as fully as if the injunction had been granted by the District Court in which it is sought to be enforced. The clerk of the court or judge granting the injunction shall, when required to do so by the court before which application to enforce said injunction is made, transfer without delay to said court a certi-

[3] Ibid., § 20, Pierce's Fed. Code, § 8826.

[4] Ibid., § 21, Pierce Fed. Code, § 8827.

[5] Ibid., § 23, Pierce Fed. Code, § 8829.

fied copy of all the papers on which the said injunction was granted that are on file in his office."[6] The bill must show that the trade-mark was used in commerce with foreign nations among the several States or with the Indian tribes.[7] The question whether, in the same bill, relief can be prayed against trade-mark and unfair competition, both parties being citizens of the same State, is still *sub judice*. It has been held that where the trade-mark is invalid,[8] the court cannot then consider the question of unfair competition, nor when it is invalid, but not infringed.[9] It has been held that where the trade-mark is valid and has been infringed, and the acts of unfair trade are not separate and distinct from the acts of infringement, that then an injunction against them may be joined with the decree forbidding the infringement of the trade-mark;[10] but that the rule is otherwise when they are separate and distinct acts.[11]

§ 149. Bills to obtain relief against interfering trade-marks. "That whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the interfering registrant, and all persons interested under him, by suit in equity against the said registrant; and the court, on notice to adverse parties and other

[6] 34 St. at L. 1251, § 20, Pierce Fed. Code, § 8826.

[7] Bernstein v. Danwitz, 190 Fed. 604. See Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, and *supra*, §§ 30, 44, 142.

[8] Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; Leschen Rope Co. v. Broderick, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. ed. 710; Bernstein v. Danwitz, 190 Fed. 604; Diederich v. W. Schneider Wholesale Wine & Liquor Co., C. C. A., 195 Fed. 35.

[9] Burt v. Smith, C. C. A., 71 Fed. 161, 17 C. C. A. 573; Hutchinson v. Loewy, C. C. A., 163 Fed. 42, 90 C. C. A. 1; Bernstein v. Danwitz, 190 Fed. 604. See §§ 24, 132.

[10] Globe-Wernicke Co. v. Fred Macey Co., C. C. A., 119 Fed. 696, 703, 56 C. C. A. 304 (a patent case); T. B. Woods Sons Co. v. Valley Iron Works, 166 Fed. 770 (a patent case); Ross v. H. S. Geer Co., 188 Fed. 731, 734. See Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 37, 41, 21 Sup. Ct. 7, 45 L. ed. 60; s. c., C. C. A., 147 Fed. 189, 77 C. C. A. 417. *Contra*, Cushman v. Atlantis Fountain Pen Co., 164 Fed. 94 (a patent case); Mecky v. Grabowski, 177 Fed. 591 (a patent case).

[11] Ross v. H. S. Geer Co., 188 Fed. 731, 734; C. L. King & Co. v. Inlander, 133 Fed. 416; Cushman v. Atlantis Fountain Pen Co., 164 Fed. 94; Mecky v. Garabowski, 177 Fed. 591; National Casket Co. v. N. Y. & Brooklyn Casket Co., 185 Fed. 533; the four last cases were patent cases.

due proceedings had according to the course of equity, may adjudge and declare either of the registrations void in whole or in part according to the interest of the parties in the trademark, and may order the certificate of registration to be delivered up to the Commissioner of Patents for cancellation."[1] The pleading and practice under bills of this sort is substantially similar to that of bills to obtain relief against interfering patents.[2] "In all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence."[3] "In all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence."[4] The suit must be brought within a year after final action thereupon in the Patent Office or the determination of any appeal from its decision, unless it is shown that the delay is unavoidable.[5] It was held to be insufficient to aver that complainants brought suit within the year against the party who succeeded in the Patent Office, and several months thereafter, after learning for the first time that the defendant had assigned the patent, dismissed such suit, and brought the present one against the assignee; there being no allegation that the assignment was not recorded, nor that the complainant had no means of ascertaining that it had been made.[6]

§ 150. Bills to restrain infringement of copyrights. The Copyright Act of March 4, 1909, provides: "That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (a) To an injunction restraining such infringement; (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which

§ 149. [1] Act of March 2, 1907, 34 St. at L. 1251, § 22, Pierce Fed. Code, § 8828.

[2] *Supra*, § 146.

[3] U. S. R. S., § 4969, 2 Fed. St. Ann. 271, Pierce Fed. Code, § 8862.

[4] U. S. R. S., § 4969, 2 Fed. St. Ann. 271, Pierce Fed. Code, § 8862.

[5] Westinghouse El. & Mfg. Co. v. Ohio Brass Co., 186 Fed. 518.

[6] Ibid.

he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty: First. In the case of a painting, statute, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees; Second. In the case of any work enumerated in section five of this Act, except a painting, statute, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees; Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery; Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance; (c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright; (d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order; (e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: Provided also, That whenever any person, in the absence of a license

agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid. Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."[1] "That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action."[2] "That civil actions, suits, or proceedings arising under this Act may be instituted in the district of which the defendant or his agent is an inhabitant, or in which he may be found."[3] "That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants."[4] "That the clerk of the court, or judge granting the injunction, shall, when required so to do by the court hearing the application to enforce said injunction, transmit without delay to said court a certified copy of all the

§ 150. [1] 36 St. at L. 1075, § 25, Pierce Fed. Code Supp., § 1587.
[2] Ibid., § 27.
[3] Ibid., § 35; Pierce Fed. Code Supp., § 1589.
[4] Ibid., § 36.

papers in said cause that are on file in his office."[5] "That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct."[6] The Copyright Rules provide: '1. The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the Act of March fourth, nineteen hundred and nine, entitled 'An act to amend and consolidate the acts respecting copyright.' 2. A copy of the alleged infringement of Copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible."[7] Where there was nothing in the bill to show that the matter copyrighted was a sculpture or other similar work or that the case fell within the other excepted classes, a motion was granted requiring the complainant to file with his petition a copy of the same.[8] The performance of the statutory requirements should be alleged.[9] Formerly the statement that the copyright was issued was held to be insufficient.[10] The bill must further show that the person in whose

5 Ibid., § 37.

6 Ibid., § 20, Pierce Fed. Code Supp., § 1584.

7 214 U. S. 536, 53 L. ed. 1074.

8 Lesser v. George Berfeldt & Co., 188 Fed. 864.

9 Waalburn v. Ingilby, 1 M. & K. 61; Atwill v. Ferrett, 2 Blatchf. C. C. 39; Chicago Music Co. v. J. W. Butler Paper Co., 19 Fed. 758; Trow City Directory Co. v. Curtin, 36 Fed. 829; Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645.

10 Ibid.

name the copyright was obtained was the owner of the article copyrighted and was entitled to the copyright.[11] It has been held that an allegation that the sole right of printing and publishing has been sold, is not sufficient to show that the copyright has been transferred.[12] 3. Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the Clerk of any Court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the Clerk a bond executed by at least two sureties and approved by the Court or a Commissioner thereof. 4. Such bond shall bind the sureties in a specified sum, to be fixed by the Court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the Court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the Marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any Marshal of the United States, directing the said Marshal to forthwith seize and hold the same subject to the order of the Court issuing said writ, or of the Court of the district in which the seizure shall be made. 5. The Marshal shall thereupon seize said articles or any smaller or larger part thereof he may them or

[11] Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642.

[12] Ford v. Charles E. Blaney Amusement Co., 148 Fed. 642, 645.

thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ and bond by delivering the same to him personally, if he can be found within the district, or if he cannot be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person cannot be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the Court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith. 6. A Marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the Court. 7. Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the Court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the Court, the property to be returned to the defendant. 8. Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the Court or a Judge thereof at the time therein stated. 9. The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the Court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright. 10. Thereupon the Court in its discretion, after such hearing as it may direct, may order such return upon the filing by the

defendant or a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the Court, and conditioned for the delivery of said specified articles to abide the order of the Court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond. 11. Upon the granting of such application and the justification of the sureties on the bond, the Marshal shall immediately deliver the articles seized to the defendant. 12. Any service required to be performed by any Marshal may be performed by any deputy of such Marshal. 13. For services in cases arising under this section, the Marshal shall be entitled to the same fees as are allowed for similar services in other cases." [13]

§ 151. Bills in equity under the Interstate Commerce Law. The appropriate courts of the United States have jurisdiction to entertain bills in equity to enforce, otherwise than by adjudication and collection of forfeiture or penalty, or by infliction of criminal punishment, any order of the Interstate Commerce Commission other than for the payment of money.[1] Such suits may be brought by the United States,[2] and also by private individuals, for whose benefit the orders were made,[3] such as an order awarding reparation to shipper for an unlawful charge.[4] The act creating the Commerce Court did not deprive the District Courts of the United States of jurisdiction of a suit to compel an interstate carrier to receive and transport property tendered for shipment,[5] nor of an action by a shipper to recover freight charges declared by the commission to be excessive [6] and to recover damages under the statute because of secret discriminations given by a carrier to the plaintiff's competitor.[7] No court of the United States has ju-

[13] 214 U. S. 533, 53 L. ed. 1073. See § 20, *supra*; § 278, *infra*.

§ 151. [1] 25 St. at L. 859; 32 St. at L. 847; U. S. v. Michigan Cent. R. Co., 122 Fed. 544; Jud. Code, § 207, 36 St. at L. 1087.

[2] U. S. v. Michigan Cent. R. Co., 122 Fed. 544.

[3] Chicago, B. & Q. R. Co. v. Feintuch, C. C. A., 191 Fed. 482.

[4] Ibid.

[5] Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 56 L. ed. 355; affirming C. C. A., 172 Fed. 117.

[6] Chicago, B. & Q. R. Co. v. Feintuch, C. C. A., 191 Fed. 482.

[7] Langdon v. Pennsylvania R. Co., 194 Fed. 486; A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12.

risdiction of a suit to enjoin an unreasonable charge for transportation until the Interstate Commerce Commission has passed upon the question;[8] but where, pending a suit to enjoin an unreasonable increase in freight rates, the complainants applied to the Interstate Commerce Commission, which decided in their favor, the court finally rendered a decree upon its findings and conclusions.[9] The appropriate court of the United States has jurisdiction of a suit to enjoin, set aside, annul, or sustain, in whole or in part, any order of the Interstate Commerce Commission.[11] Such orders will be set aside when they deprive the complainants of their property without due process of law, or take their property without just compensation, or are beyond the powers of the commission, or the commission's power was exercised with gross unreasonableness.[11] For example, when it was made without any evidence to support it;[12] or upon evidence of which the carrier was not apprised and was given no opportunity to meet,[13] but it may be that this rule does not apply to expert testimony.[14] Thus may be reviewed an order which awards reparation to a complainant.[15] The Commerce Court has no jurisdiction to entertain a complaint because of the refusal of the Interstate Commerce Commission to act,[16] such as a claim by a shipper to recover excessive freight charges which have been presented to the commission and rejected;[17] nor of a claim presented to the commission upon which

[8] Southern Ry. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124. *Cf.* Macon Grocery Co. v. Atlantic C. L. R. Co., 163 Fed. 736, 738; aff'd in 215 U. S. 501, 54 L. ed. 300. But see Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co., 156 Fed. 160; Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. 171 Fed. 713; Houston Coal & Coke Co. v. Norfolk & W. Ry. Co., 171 Fed. 723.

[9] Southern Ry. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124.

[10] Jud. Code, § 207, 36 St. at L. 1087.

[11] F. H. Peavey & Co. v. Union Pac. R. Co., 176 Fed. 409. But see Philadelphia & R. Ry. Co. v. Interstate Commerce Commission, 174 Fed. 687.

[12] Interstate Commerce Com. v. Louisville & Nashville Railroad Co., 227 U. S. 88.

[13] Atlantic Coast Line R. Co. v. Interstate Commerce Commission, Comm. Ct. 194 Fed. 449.

[14] Ibid.

[15] Arkansas Fertilizer Co. v. U. S., Comm. St. 193 Fed. 667; Southern Ry. Co. v. U. S., Comm. Ct. 193 Fed. 664.

[16] Procter & Gamble Co. v. U. S., 225 U. S. 282, 56 L. ed. 1091; reversing Comm. Ct. 188 Fed. 221.

[17] Ibid.

it has not passed,[18] nor to review the denial by the commission of a petition by a carrier for leave to refund an excessive freight charge.[19] Where the commission has refused to act, the remedy, if any, is by mandamus.[20] Any part to an order of the Interstate Commerce Commission may sue to have the same set aside without joining other persons named in the order and similarly affected by the same.[21] A bill to set aside an order of the Interstate Commerce Commission or other board fixing the amount of charges for the transportation of freight or passengers, upon the ground that they not afford reasonable compensation, must allege facts in support of such conclusions; such as the amount of revenue derived from the traffic affected and so far as possible the cost of the service, or other facts from which the court can determine for itself whether the rates fixed would produce a reasonable profit.[22] It seems, that it is insufficient to allege that the known loss resulting from the rate will be a specified amount without stating the facts from which such result is reached.[23] Where the ground of objection to such action by a State board is that it will affect interstate commerce, it is insufficient to allege that the railroad's principal business between the points affected consists of interstate commerce and that the road will be compelled to lower its interstate rates without showing what part of the predicted loss will be on the traffic affected as distinguished from the general body of traffic; and the bill should disclose facts showing with reasonable definiteness not only the present total value and gross revenue of the road affected, but also the gross revenue from each class of business, interstate and local, freight, passenger or other, and the proportionate property values devoted thereto, together with the gross operating expenses, and a proportionate application thereof to such different classes of traffic, so that the net

[18] U. S. ex rel. Stony Fork Coal Co. v. Louisville & N. R. Co., Comm. Ct. 195 Fed. 88.

[19] Arkansas Fertilizer Co. v. U. S., Comm. Ct., 193 Fed. 667.

[20] Interstate Commerce Commission v. U. S. ex rel. Humboldt S. S. Co., 224 U. S. 474, 56 L. ed. 849.

[21] Atlantic Coast Line R. Co. v. Interstate Commerce Commission. Comm. Ct. 194 Fed. 449.

[22] Atlantic Coast Line R. Co. v. Interstate Commerce Commission, Comm. Ct. 194 Fed. 449.

[23] Southern Pac. Co. v. Railroad Commission of California, 193 Fed. 699; Northern Pac. Ry. Co. v. Lee, 199 Fed. 621.

revenue from each source may be thereby ascertained.[24] It has been held to be insufficient to set forth the proceedings of the commission finding that the rates charged were unreasonable or discriminatory or otherwise in violation of the statute; [25] and an allegation that "said commission agreeable to the provisions of law in that regard duly" caused a copy of its order to be delivered to the defendant, is not a sufficient allegation of the service of the same.[26]

§ 152. **The Interrogatory Clause.** Under the old practice, discovery could not be obtained unless prayed in the bill.[1] The Equity Rules of November 4, 1912, omit any provision for these and provide that interrigatories may be filed by the plaintiff after the filing of the bill and not later than twenty-one days after the joinder of issue, and by the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, or thereafter by leave of the court or judge.[2] The practice upon this subject is discussed in the subsequent chapter on "Evidence and Discovery." [3]

§ 153. **Waivers and Offers.** It has been customary to insert in the prayer for relief, any waiver or offer which the plaintiff wishes to make,[1] although there is no reason why such should not be set forth in the narrative part of the bill.

Under the former rules, "If the complainant in his bill shall waive an answer in the oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause. But this shall not prevent a defendant from becoming a witness in his own behalf under sec-

[24] Southern Pac. Co. v. Railroad Commission of California, 193 Fed. 699.

[25] Bear Bros. Mercantile Co. v. Denver & R. G. R. Co., 200 Fed. 614.

[26] Ibid.

§ 152. [1] Eq. Rule 43, of March, 1842.

[2] Eq. Rule 58.

[3] § 348, *infra*.

§ 153. [1] Daniell's Ch. Pr., (2nd Am. ed.) 433.

tion three of the Act of Congress of July 2, 1864."[2] It rarely happened that advantage of this rule was not taken by a waiver inserted here, or more frequently in the prayer of process, in order to avoid the application of the doctrine, that otherwise an allegation responsive to the bill in a sworn answer was presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborating circumstances.[3] The rule was a restatement of the former practice in chancery.[4] It has not been copied in those promulgated in 1912, nor do the rules of 1912 prescribe the effect of an answer under oath. Until the matter has been adjudicated, a prudent practitioner should follow the former practice and insert, in this part of the bill, a waiver of an answer under oath, unless he wishes to examine the defendant upon interrogatories,[5] the effect upon which of such a waiver is still unsettled.

In accordance with the maxim that he who seeks equity must do equity, a court of equity often refuses relief to one seeking its aid, unless upon condition that he shall do what it considers equitable to the defendant, or sometimes even to a third person.[6] In some cases it enforces this by the entry of a conditional decree without reference to the pleadings.[7] This seems to be the proper practice when the defendant, by his own conduct, has so complicated matters between himself and a party seeking rescission that complete restoration is impossible.[8] In a case where the plaintiff had failed to make the tender, which was a prerequisite to his cause of ac-

[2] Eq. Rule 41, of 1842.

[3] Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765; Coonrod v. Kelly, C. C. A., 119 Fed. 841; *infra*, § 331.

[4] Bartlett v. Gale, 4 Paige (N. Y.) 503; Cooper's Eq. Pl., 325, 326; Story's Eq. Pl., § 874.

[5] See *infra*, § 348.

[6] Fosdick v. Schall, 99 U. S. 235 25 L. ed. 339.

[7] Walden v. Bodley, 14 Pet. 156, 164, 165, 10 L. ed. 398, 401, 402; Farmers' L. & Tr. Co. v. Denver, L. & G. R. Co., C. C. A., 126 Fed. 46; Johnston v. Forsyth Mercantile Co., 127 Fed. 845; Andrews v. Conolly, 145 Fed. 43; Kley v. Healy, 127 N. Y. 555; s. c., 149 N. Y. 346, 354; Hay v. Hay, 13 Hun. (N. Y.) 315; Halpin v. Mutual Brewing Co., 20 App. Div. (N. Y.) 583, 590; Pritz v. Jones, 117 App. Div. (N. Y.) 643; Joslyn v. Empire State Degree of Honor, 145 App. Div. (N. Y.) 14, 17, *infra*, §§ 197, 400.

[8] Heckscher v. Edenborn, 203 N. Y. 210, 228

tion, his prayer of relief was granted; but he was obliged to pay costs to the defendants, although they had resisted the suit.[9] It was held that a court of equity had no power to impose terms upon a defendant as a condition of the dismissal of a bill.[10] But the more usual practice is to insist that the plaintiff shall offer in his bill, which otherwise will be demurrable, to perform, or, in some cases, allege the performance of, the equitable act required of him Thus, a bill to cancel securities claimed to be usurious, or otherwise rendered void by a statute, must, in the absence of a State statute to the contrary,[11] contain an offer by the plaintiff to pay the defendant with lawful interest the money he has received therefor.[12] So a bill to redeem mortgaged,[13] or pledged,[14] property, must contain an offer to pay what is due thereon, though the particular sum need not be specified. A bill to set aside a judicial sale as void must be accompanied by a tender or offer of the purchase-money with interest, provided it was applied for the benefit of the estate; that money has been first repaid, and this the court may require to be done before the bill is filed.[15] It seems that a bill to set aside a foreclosure of a railway mortgage should contain an offer of payment of the amount admitted to be due under the mortgage, and of the costs of the foreclosure suit, or at least show some reason why such an offer should not be required.[16] A bill to set aside a tax sale ordinarily must contain an offer to repay the purchaser at least all legal taxes on the property paid by him, both those for which the property was sold and those subsequently levied

[9] Hosmer v. Wyoming Ry. & Iron Co., C. C. A., 129 Fed. 883.

[10] Columbus v. Mercantile Trust & Deposit Co., 218 U. S. 645. 54 L. ed. 1193. The terms there held to have been improperly imposed were a requirement that a city purchase part of the complainant's waterworks and the city had filed a cross-bill for defensive relief.

[11] Mo., K. & T. Tr. Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474.

[12] Mason v. Gardiner, 4 Brown, C. C. 436; Tupper v. Powell, 1 J. Ch. (N. Y.) 439; Matthews v. Warner, 6 Fed. 461, 465; s. c., 112 U. S. 600, 28 L. ed. 851.

[13] Story's Eq. Pl., § 187*a*; Harding v. Pingey, 10 Jurist (N. S.), 872; Perry v. Carr, 41 N. H. 371; Robinson v. Iron Ry. Co., 135 U. S. 522, 34 L. ed. 276; Gordon v. Smith, C. C. A., 62 Fed. 503.

[14] Uehling v. Lyon, 134 Fed. 703.

[15] Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757. But see Rush v. First Nat. Bank, C. C. A., 71 Fed. 102.

[16] Carey v. Houston & T. C. Ry. Co., 45 Fed. 438, 443.

thereupon and paid by him, with interest upon each sum.[17] A bill to restrain the collection of State taxes must aver payment of what is conceded to be due, or what can be seen to be due on the face of the bill, or can be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.[18] If it is claimed that the whole tax is void as improperly assessed, the complainant must tender the amount he would owe if the proper assessment had been made;[19] or, if it is impracticable to determine that sum, he should offer security for its payment;[20] unless there is no right to assess the property at all, either because it is exempt from taxation, or because there is no law providing for the same.[21] In a case where the whole assessment was attacked for improper discrimination against the complainant in favor of the owners of similar property, the court required, as a condition precedent to the issue of an injunction, the payment of a tax, assessed at the same rate as that levied upon other property, and on corporations of the same class, within the State.[22] The rule does not apply to a special enactment, which is fundamentally void and entirely illegal.[23] If the proper officer refuses to receive a part

[17] Gage v. Pumpelly, 115 U. S. 454, 29 L. ed. 449. But see Mendenhall v. Hall, 134 U. S. 559, 569, 33 L. ed. 1012, 1015.

[18] State Railroad Tax Cases, 92 U. S. 575, 617, 33 L. ed. 669, 674; Albuquerque v. Perea, 147 U. S. 87, 37 L. ed. 91. But see Chicago, B. & Q. R. Co. v. Republic County, C. C. A., 67 Fed. 411; Chicago, B. & Q. R. Co. v. B. of C. of Norton County, C. C. A., 67 Fed. 458; Chicago, M. & St. P. R. Co. v. Hartshorn, 30 Fed. 541; Tacoma Ry. & Power Co. v. Pierce County, 193 Fed. 90. The same rule applies to a bill to enjoin the collection of a license, increased by a recent statute, where there is no allegation that the statute imposing the original license was invalid. Morenci Copper Co. v. Freer, 127 Fed. 199.

[19] State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 669, 674; National Bank v. Kimbal, 103 U. S. 732, 26 L. ed. 469; People's Nat. Bank v. Marye, 191 U. S. 272, 281, 48 L. ed. 180, 185; Raymond v. Chicago Traction Co., 207 U. S. 20, 38, 52 L. ed. 78, 88; Chicago Union Traction Co. v. State Board of Equalization, 114 Fed. 557.

[20] Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767. But see Ritterbusch v. Atchison, T. & S. F. Ry. Co., C. C. A., 198 Fed. 46.

[21] People's Nat. Bank v. Marye, 191 U. S. 272, 281, 48 L. ed. 180, 185; Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767.

[22] Raymond v. Chicago Traction Co., 207 U. S. 20, 38, 52 L. ed. 78, 88; Chicago Union Traction Co. v. State Board of Equalization, 114 Fed. 557, 567.

[23] Norwood v. Baker, 172 U. S. 269, 293, 43 L. ed. 443, 452

of the tax, it must be tendered without the condition annexed of a receipt in full.[24] Ordinarily, where it is impracticable for the plaintiff to ascertain the amount actually due, and the defendant denies his right to any relief, a tender in the bill without a previous payment is sufficient;[25] and in such a case an offer to pay the money into court whenever so ordered is equivalent to a payment into court in the first instance.[26] Upon a bill to enjoin the enforcement of a statute reducing railroad fares, the injunction order was conditioned upon the execution of a bond by the corporation, to pay into the registry of the court from time to time as ordered, such sums of money as should be equal to the difference between the rate enjoined and the original rate, and to give to each purchaser of a ticket a coupon for the payment of that proportion of the difference, to which he was entitled in case the bill should finally be dismissed.[27] Upon a bill to enjoin a statutory reduction of the price of gas, it was required that the gas company pay into court the difference between the old and the new charges, the same to be there retained until the final determination of the case.[28] A bill to compel the specific performance of a contract by a defendant should, it seems, contain an offer by the plaintiff to perform his part thereof.[29] And formerly it was,[30] but no longer is,[31] required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if any, found due against him. Upon a stockholder's bill, no tender is required;[32] although a payment by the corporation might be made a condition of the granting of the injunction. A bill filed by the United States to vacate a patent for public lands as

24 State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 669, 674; National Bank v. Kimbal, 103 U. S. 732, 26 L. ed. 469.

25 Gordon v. Smith, C. C. A., 62 Fed. 503; Butchers' & Drovers' S. Y. Co. v. Louisville & N. R. Co., C. C. A., 67 Fed. 35.

26 Cheney v. Bilby, C. C. A., 74 Fed. 52.

27 Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747.

28 Consolidated Gas. Co. v. Mayer, 146 Fed. 150; s. c., Consolidated Gas Co. v. New York, 157 Fed. 849.

29 Stapylton v. Scott, 13 Ves. 425; Fife v. Clayton, 13 Ves. 546.

30 Godbolt v. Watts, 2 Anst. 543.

31 Columbian Government v. Rothschild, 1 Simons, 94, 103; Wells v. Strange, 5 Ga. 22.

32 Edwards v. Mercantile Trust Co., 124 Fed. 381, 391. Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co., C. C. A., 182 Fed. 607.

obtained by fraud, need not contain an offer to return the money paid therefor by the fraudulent patentee.[33] It has been held: that a bill by a trustee in bankruptcy, to set aside a fraudulent or a preferential sale, need not allege a tender of the purchase money.[34] Nor need a bill to obtain relief against an infringement of a copyright contain a waiver of the complainant's statutory right to a forfeiture of the piratical plates.[35] It is, however, a rule in equity, that no person will be compelled to discover that which may expose him to a penalty or forfeiture.[36] A discovery of such matters can only be compelled when the complainant is the only person who can enforce the penalty or forfeiture, and he is willing to waive it,[37] as, for example, in a case of infringement of copyright.[38] An omission of a waiver, tender, or offer, whenever considered necessary, is a ground for demurrer;[39] but leave to amend is in such cases usually given.[40] And in many, but not all cases,[41] when no actual tender is required, a general offer to do whatever equity requires in the premises seems to be sufficient.[42]

§ 154. The prayer for relief. The Equity Rules of 1912 require that each bill shall contain "A statement of and prayer for any special relief pending the suit or on final hearing,

[33] U. S. v. Minor, 114 U. S. 233, 29 L. ed. 110; U. S. v. Trinidad Coal & Coke Co., 137 U. S. 160, 34 L. ed. 640; U. S. v. Laam, 149 Fed. 581. See also Moffat v. U. S., 112 U. S. 24, 28 L. ed. 623; U. S. v. White, 17 Fed. 561, 565; U. S. v. Pratt C. & C. Co., 18 Fed. 708. The same rule applies for a suit by the United States to cancel a conveyance made by an Indian in violation of a statute. Heckman v. U. S., 224 U. S. 413, 56 L. ed. 820. But in a proper case a decree conditioned upon the return of the consolidation might be made. Ibid.

[34] Johnston v. Forsyth Mercantile Co., 127 Fed. 845.

[35] Farmer v. Calvert Lithog. Co., 1 Flippin, 228. But see Snow v. Mast, 63 Fed. 623.

[36] Stewart v. Drasha, 4 McLean, 563; Atwill v. Ferrett, 2 Blatchf. 39; U. S. v. White, 17 Fed. 561, 565; Snow v. Mast, 63 Fed. 623.

[37] Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Atwill v. Ferrett, 2 Blatchf. 39.

[38] Atwill v. Ferrett, 2 Blatchf. 39; Farmer v. Calver Lithog. Co., 1 Flippin, 228, 233; *infra*, § 348.

[39] U. S. v. Pratt C. & C. Co., 18 Fed. 708.

[40] Chicago, B. & Z. R. Co. v. Republic County, C. C. A., 67 Fed. 413; Chicago, B. & Q. R. Co. v. B. of C. Norton County, C. C. A., 67 Fed. 458.

[41] State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 663, 674.

[42] Gordon v. Smith, C. C. A., 67 Fed. 503.

which may be stated and sought in alternative forms."[1] There is no express provision in these rules for a prayer for general relief. It will, however, be the better practice to insert the same and to comply with the requirements of the former practice upon the subject. The prayer for general relief, Mr. Robbins, "an eminent counsel," used to say, was "the best prayer after the Lord's Prayer."[2] It is usually in one of the two following forms: "And that your orator shall have such other or further, or other and further, relief in the premises as to this court shall seem meet;" or "that your orator may be further and otherwise relieved in the premises according to equity and good conscience." Under the prayer for general relief the court will usually grant any relief[3] other than an interlocutory order, which is consistent with, and a ground for which is included in, the allegations of the bill,[4] and not inconsistent with the prayer for special relief or with the case made by the bill.[5] Less relief than that prayed may be

§ 154. [1] Eq. Rule 25. Am. Graphophone Co. v. Nat. Phonograph Co., 127 Fed. 349; Bloomfield v. Eyre, 8 Beav. 250, 259.

[2] Mansaton v. Molesworth, 1 Eden, 26, note b; Dormer v. Fortescue, 3 Atk. 124; Storey's Eq. Pl., § 41, n. 1.

[3] Tayloe v. Merchant's Fire Ins. Co., 9 How. 390, 13 L. ed. 187; Stewart v. Chesapeake & Ohio Canal Co., 1 Fed. 361; County of Mobile v. Kimball, 102 U. S. 691, 26 L. ed. 238; Chicago, St. L. & N. O. R. Co. v. Macomb, 2 Fed. 18; Adams v. Kehlor Milling Co., 36 Fed. 212. See Butterfield v. Miller, C. C. A., 195 Fed. 200.

[4] English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Curry v. Lloyd, 22 Fed. 258, 265; Mackall v. Casilear, 137 U. S. 556, 564, 34 L. ed. 776, 778.

[5] Hiern v. Mill, 13 Ves. 118; Soden v. Soden, there cited; Grimes v. French, 2 Atk. 141; Curry v. Lloyd, 22 Fed. 258, 265; Haggart v. Wilczinski, C. C. A., 143 Fed. 22. See Kerr v. Southwick, C. C. A., 120 Fed. 772. In a suit upon a bill praying an injunction against the erection and operation of coke ovens on a certain street, and for general relief, the Appellate Court modified the decree by striking out so much thereof as granted an injunction against the operation of coke ovens so near the plaintiff's premises as to injure them by the exhalations therefrom, on the ground that this was not agreeable to the case made by the bill. Rainey v. Herbert, C. C. A., 55 Fed. 443. Under a bill to enjoin a postmaster from refusing to transmit a magazine at second-class rates, it was held that the court would not enjoin him from limiting the number of copies to a smaller number than the bill alleged that complainant was entitled to send, when, pending the suit, a new permit was granted with such a limitation. Lewis Pub. Co. v. Wyman, 168 Fed.

756. Under a bill for specific performance, the equity side of the court has no power to grant a judgment for a *quantum meruit*. M'Kinney v. Big Horn Basin Development Co., C. C. A., 167 Fed. 770. Under a bill which prayed an injunction against the pollution of a spring and general relief, a Vermont court granted a decree confirming the complainant's title to the spring and enjoining interference with the same, Coffain v. Cole, 67 Vt. 226. In a suit to enforce a lien for the price of stock deposited in escrow, the court may enter a decree for specific performance of the contract, although no lien exists. David v. M'Rae, 183 Fed. 812. Under a complaint for the rescission of a sale of land to a minor and for general relief, a Texas court decreed the foreclosure of a lien for the purchase-money. Morris v. Holland, 10 Tex. Civ. App. 474; s. c., 31 S. W. R. 690. Upon a bill to compel an agent to account for illicit profits, received by him from contractors with his employers, and to follow the same into securities of other property held for him by other defendants; it was held that, under the prayer for general relief, a decree could be entered as for money had and received for the complaint's use for any difference between the cost of the specific property recovered and the profits thus corruptly obtained. U. S. v. Carter, 217 U. S. 286, 291, 54 L. ed. 769. In Michigan a bill which alleged that the defendant had levied as sheriff was held to support an injunction against him in his official capacity although the prayer for relief did not describe him as sheriff. Wight v. Roethlisberger, 116 Mich. 241; s. c., 74 N. Y. 474. Where the bill prayed merely a perpetual and not an interlocutory injunction against the construction of a street railway, and the facts proved upon the final hearing showed that an injunction then would not be justified, the Supreme Court held that the bill was properly dismissed, although it contained a prayer for general relief and averments supported by the evidence which showed that the complainant might be entitled to damages in the suit; since the averments were not introduced for that purpose and the complainant at the hearing disclaimed any desire for such relief. Osborne v. Missouri Pac. Ry. Co., 147 U. S. 248, 260, 37 L. ed. 155, 161. Where a stockholders' bill prayed that a foreclosure sale be set aside for fraud and that the defendants restore to the mortgagor the mortgaged property and the proceeds thereof, it was held that the court could not enter a judgment directing the majority of the stockholders to account to the plaintiff and other members of the minority for the profits they had gained through the foreclosure and a reorganization therewith connected. MacArdell v. Olcott, 189 N. Y. 368. Where a bill by a mortgagee, who had sought the property at a foreclosure sale, prayed that the right of redemption of a defendant, who was not a party to the foreclosure suit, might be cut off because he was in privity with one of the defendants to the same and bound by the decree; it was held, that the court might order a general foreclosure and a resale of the property under the prayer for general relief. London & San Francisco Bank v. Dexter Horton & Co., C. C. A., 126 Fed. 593. See Interstate Commerce Commission v. Southern Pac.

granted.[6] Where, however, a consolidated corporation filed a bill in equity to enjoin the enforcement of an ordinance reducing all its charges for the supply of gas, not praying in the alternative relief as regards the gas furnished by one of its constituents; it was held, that relief could not be granted so far as such constituent alone was concerned.[7] Where a bill prayed for a reformation of a policy; it was held, that a decree could not be granted reforming the policy in a different manner, not justified by the case made by the bill.[8] Where the bill which charged fraud prayed, that a location be declared void, and also general relief, a decree was allowed declaring that the defendants hold the mine, as trustees *ex malificio*, for the complainant's benefit.[9] It seems that if there be no objection to the specific relief prayed for, the plaintiff cannot at the hearing abandon that and obtain a decree for different relief.[10] It has been held in England, that, in some cases of fraud, where no other relief can be given against a party deeply involved in the fraud charged by the bill, the payment of the costs of the suit by him ought to form the subject or a specific prayer, and that otherwise his demurrer to the bill will be sustained.[11] In a case where the bill contained allegations showing threatened injury to rights of property, not however mentioned as an independent ground of relief, while it was mainly occupied with complaints of a threatened invasion of rights of a political nature, as the specific prayers for relief were confined to the protection of the political rights, although the bill contained a prayer for general relief, the court refused to consider the allegations concerning the threatened injury to property.[12] A bill

Co., 132 Fed. 829; holding, that the court could enforce an order by the plaintiff, upon different reasons than those assigned by the Commission for its conclusion, when the bill alleged generally that the rule of the company, set aside by the Commission, was in violation of the Interstate Commerce Act. But see authorities cited *supra*, §§ 136, 137.

6 Bay State Gas Co. v. Rogers, 147 Fed. 557, 574; A. B. Dick Co v. Fuller, 198 Fed. 404.

7 People's Gas Light & Coke Co. v. Chicago, 194 U. S. 1, 16, 48 L. ed. 851, 856.

8 Baldwin v. Liverpool & L. G. Ins. Co., C. C. A., 124 Fed. 206.

9 Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263.

10 Allen v. Coffman, 1 Bibb (Ky.), 469; Pillow v. Pillow, 5 Yerg. (Tenn.) 420.

11 Le Texier v. The Margravine of Anspach, 15 Ves. 159; 164; Daniell's Ch. Pr. (2d Am. ed.) 441.

12 Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721.

may pray relief in the alternative, when it is said to have a double aspect.[13] If a different state of facts, under which the complaint is entitled to relief, appears upon the hearing, the court may allow the case to stand over, and give the plaintiff leave to amend his bill in conformity with them, and then obtain relief.[14] And if the complainant be an infant or the representative of a charity, it would formerly grant relief without regard to the allegations in the bill.[15] "Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct."[16]

§ 155. The signature to a bill. "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signature shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."[1] Formerly, the requirement was that the bill should have the signature of counsel.[2] This practice

[13] Shields v. Barrow, 17 How. 130, 144, 15 L. ed. 158, 162; Kilgour v. New Orleans Gas-Light Co., 2 Woods, 144, 148; Gaines v. Chew, 2 How. 619, 643, 11 L. ed. 402, 411. See *supra*, § 138.

[14] Beaumont v. Boultbee, 5 Ves. 485; Palk v. Lord Clinton, 12 Ves. 63; Daniell's Ch. Pr. (2d Am. ed.), 439, 440.

[15] Stapilton v. Stapilton, 1 Atk. 2; Attorney-General v. Jeanes, 1 Atk. 355; Story's Eq. Pl., § 40, note.

[16] Eq. Rule 40.

§ 155. [1] Eq. Rule 24. In England, it has been held: that the signature of the solicitor should be in manuscript and not lithographed (Regina v. Cowper, 24 Q. B. D. 533); but, in an earlier case, that his clerk might sign on his behalf (France v. Dutton, 2 Q. B. 208); and that when the counsel had signed a draft, that was sufficient, and his name might be printed at the end of the pleading. "The Annual Practice 1913," p. 317.

[2] Eq. Rule 24, of 1842.

began, it is said, in the time of Sir Thomas More.[3] Before that time it was the practice for a master in chancery to examine the bill and determine whether it was better to dismiss it originally or retain it by subpœna.[4] A signature upon the back of the bill has been held to be sufficient.[5] Under the former practice, the remedy for a defect in this respect was by a motion to take the bill off the file,[6] or by demurrer.[7] The remedy would now probably be a motion to dismiss.[8] The court could, of its own motion, order the bill taken off the file.[9] If the defendant should answer without taking the objection, such a defect would probably be waived.[10] Leave to amend by adding the signature was always granted.[11] If the complainant sues in person, the signature of the solicitor might also be dispensed with.[12] In such a case, the plaintiff himself should sign the bill.

§ 156. Affidavits to bills. The Equity Rules of November 4, 1912, contain but two provisions requiring an oath to a bill. A stockholders' bill must be verified by oath.[1] In every case, "If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."[2] Under the former practice, in such a case it was not necessary that the affidavit should be filed with the bill, nor before the notice of a motion for the interlocutory relief, and its omission did not make the bill demurrable.[3] It is doubtful whether, when an affidavit is required, one is sufficient which merely alleges that the bill is true to the best of the affiant's knowledge, information and belief.[4]

3 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed). 357.

4 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

5 Dwight v. Humphreys, 3 McLean, 104.

6 Dillon v. Francis, 1 Dickens, 68.

7 Kirkley v. Burton, 5 Madd. 378; Dwight v. Humphreys, 3 McLean, 104.

8 See Eq. Rule 29.

9 French v. Dear, 5 Ves. 547.

10 See U. S. R. S., § 954.

11 Kirkley v. Burton, 5 Madd. 378; Dwight v. Humphreys, 3 McLean, 104.

12 See U. S. R. S., § 747; 1 Hoffman's Ch. Pr. 97.

§ 156. 1 Eq. Rule 27.

2 Eq. Rule 25.

3 Hughes v. Northern Pac. Ry. Co., 122 Ala. 409, 25 So. 169, 910. Henry E. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 622; Cobb v. Clough, 83 Fed. 604.

4 Burgess v. Martin, 111 Ala. 636, 20 S. 506; Pollard v. So. Fertilizer Co., 122 Ala. 409, 25 So. 169, 910.

The former practice further required that an affidavit be annexed to the bill in the following cases: A bill to obtain the benefit of an instrument upon which an action at law would lie, were it not either lost or out of the possession of the complainant and believed to be in that of the defendant, had to be supported by an affidavit of those facts which are necessary to give the court jurisdiction.[5] A bill to perpetuate the testimony of witnesses, or to take testimony *de bene esse,* had to be supported by an affidavit stating the reasons which render such a proceeding necessary.[6] A bill of interpleader, and perhaps also a bill in the nature of an interpleader, had to be supported by an affidavit by the plaintiff that he does not collude with either of the defendants;[7] or if the plaintiff were a corporation by one of its officers, that, to the best of his knowledge and belief, the plaintiff does not so collude.[8]

§ 157. Bills of interpleader. A bill of interpleader is a petition filed by a disinterested person holding a fund or thing to which two or more who are defendants set up conflicting claims, between whom he cannot decide without incurring the risk, if he delivers the property to one, of being finally obliged to pay the other damages for having done so.[1] It can only be filed by one who claims no interest in the property in question, and who seeks no other relief than leave to deposit it in the care of the court, and be relieved from all danger of further vexation concerning the same.[2] The conflicting claims must be doubtful.[3] The claimants must seek the same thing, not mere-

[5] Walmsley v. Child, 1 Ves. Sen. 343; Whitfield v. Faussett, 1 Ves. Sen. 392; Story's Eq. Pl., §§ 313, 477; Daniell's Ch. Pr. (2d Am. ed.) 449, 450.

[6] Philips v. Carew, 1 P. Wms. 117; Daniell's Ch. Pr. (2d Am. ed.) 452.

[7] Metchalf v. Hervey, 1 Ves. Sen. 248.

[8] Bignold v. Audland, 11 Simons, 23.

§ 157. [1] Mitford's Eq. Pl., Ch 1; Story's Eq. Pl., §§ 291–297; Daniell's Ch. Pr. (2d Am. ed.) ch. xxxii.

[2] Killian v. Ebbinhaus, 110 U. S. 568, 28 L. ed. 246; Langston v. Boylston, 2 Ves. Jr. 101; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 384; Jackson & Sharp Co. v. Pearson, 60 Fed. 113, 123.

[3] Shaw v. Coster, 8 Paige (N. Y.) 339, 35 Am. Dec. 690; Cochrane v. O'Brien, 2 Jones & La T. 380; Story's Eq. Pl., § 292.

ly the same amounts under different contracts.[4] A tenant or agent may not, by filing such a bill, dispute the title of his lessor or principal when a demand is made upon him, by a stranger claiming under title paramount;[5] nor can he thus compel an interpleader of two adverse claimants from whom he has taken independent leases of the same property.[6] He may, however, thus obtain relief when different persons claim under assignments from the person to whom he first owed the debt,[7] or when there is a dispute between the principal and a stranger concerning an assignment, which the latter claims the former made to him.[8] A licensee, in an action by his licensor for royalties, cannot interplead a third person who claims an interest in the patent.[9] A bill of interpleader may be filed before or after proceedings at law have been begun against the complainant;[10] but no injunction can be granted to restrain a proceeding already begun in a State court;[11] nor, according to the English rule, to stay proceedings in ejectment in any court.[12] If a suit in equity has been already begun against the stakeholder, he may perhaps obtain relief by a petition therein;[13] but the more prudent course is for him to file a new bill.[14] The fact that one of the conflicting claims is actionable at law and the other is purely equitable, will not deprive him of relief.[15] The enactment of a State statute giving similar relief upon motion by the defendant to an action at law, does not deprive equity of its original jurisdiction.[16] The most common kind of interpleader suits at the present time are those

4 Hoggart v. Cutts, 1 Cr. & Ph. 187; Story's Eq. Pl., § 293.

5 Dungey v. Angove, 2 Ves. Jr. 304, 310; Lowe v. Richardson, 3 Madd. 277; Story's Eq. Pl., § 295. But it has been held that a lessee might obtain such relief by a cross-bill. Robinson v. Brast, C. C. A., 149 Fed. 149.

6 Standley v. Roberts, 59 Fed. 836.

7 Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 386; Hoggart v. Cutts, 1 Cr. & Ph. 197, 205.

8 Hayward & Clark v. McDonald, C. C. A., 192 Fed. 890.

9 Pusey & Jones Co. v. Miller, 61 Fed. 401.

10 Richards v. Salter, 6 J. Ch. (N. Y.) 445.

11 U. S. R. S., § 720.

12 Metcalf v. Hervey, 1 Ves. Sen. 248.

13 Badeau v. Rogers, 2 Paige (N. Y.), 209.

14 Birch v. Corbin, 1 Cox Eq. 144.

15 Richards v. Salter, 6 J. Ch. (N. Y.) 445.

16 Barry v. Mutual Life Ins. Co., 53 N. Y. 536; Wood v. Swift, 81 N. Y. 31, 35; Board of Education v. Scoville, 13 Kan. 17, 30; Prudential

brought by insurance companies against conflicting claimants to the proceeds of policies issued by them.[17] A bill of interpleader should state the manner in which the plaintiff obtained possession of the property in question, and admit that he has no interest therein. It should set forth the claims of the defendants, showing that they conflict, and that he is ignorant of their respective rights, and cannot determine between them without hazard to himself. It should offer to deposit the fund or other property in the custody of the court; and conclude with a prayer that upon such deposit the defendants may be enjoined from further molesting him about the matter in question; that they be required to interplead and settle their respective rights among themselves; and that he may have his costs out of the fund, if there be one, otherwise from the defendant.[18] Under the former practice the bill had to be accompanied by an affidavit; which, when filed by a natural person, should be sworn to by him, and state that "this bill is not filed in collusion with either of the defendant named, but merely of his own accord for relief in this Honorable Court."[19] If a corporation be the complainant, one of its officers should make the affidavit, swearing that, to the best of his knowledge and belief, the corporation does not collude with either of the defendants.[20] The omission of the affidavit was a ground for a demurrer.[21] The bill should also conform to the provisions of the rules regulating original bills. No other step can be taken in the cause until after deposit in court of the fund or other property in dispute.[22] It has, however, been held in England that the bill is not demurrable for the omission of an offer so to do.[23] It is better practice to obtain an order *ex parte* permitting such payment.[24] When that is done, an injunction will be granted restraining the defendants from suing the plaintiff,

Assurance Co. v. Thomas, L. R. 3 Ch. App. 74, 77.

17 Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614.

18 Mitford's Eq. Pl., ch. 1; Story's Eq. Pl., §§ 291–297.

19 Metcalf v. Hervey, 1 Ves. Sen. 248.

20 Bignold v. Augland, 11 Simons, 23.

21 Metcalf v. Hervey, 1 Ves. Sen. 248; Tobin v. Wilson, 3 J. J. Marsh. (Ky.) 67; Mitford's Eq. Pl., ch. 1.

22 Meux v. Bell, 6 Simons, 175; Williams v. Walker, 2 Rich. Eq. (S. C.) 291.

23 Meux v. Bell, 6 Simons, 175.

24 Williams v. Walker, 2 Rich. Eq. (S. C.) 291.

and from continuing any action already begun touching the matter in dispute.[25] The injunction is usually granted to take effect upon payment of the fund into court.[26] Under special circumstances, however, a stay order might be granted until the complainant had an opportunity to do so.[27] Upon an argument to dissolve this injunction before hearing, it seems that the defendants cannot contradict the affidavit that there is no collusion,[28] but a reference may be directed when such a charge is made, and at the hearing collusion may be shown.[29] In England, a bill of interpleader can be successfully maintained though all the defendants are beyond the jurisdiction of the court.[30] Interpleader suits are usually heard on bill and answers; although there is no reason why testimony should not be taken. If at the hearing the cause is ripe for a decision, the court will then decide the controversy between the defendants.[31] If not, it will enter a decree dismissing the plaintiff with his costs, enjoining the defendants in accordance with the prayer of the bill, and directing them to interplead.[32] An order directing one of the defendants to plead under oath within ten days, and to file a bond with a surety for the payment, if he lost the case, of the costs and expenses to the other defendant, was held to be erroneous.[33] If the claims on both sides are purely legal, an action or an issue at law will usually be directed. If one of them is of an equitable nature, and sometimes when both are legal, a reference to a master is usually ordered.[34] At the

25 Sieveking v. Behrens, 2 Myl. & Cr. 581.

26 Sieveking v. Behrens, 2 Myl. & Cr. 581.

27 Sieveking v. Behrens, 2 Myl. & Cr. 581; U. S. R. S., § 718.

28 Stevenson v. Anderson, 2 Ves. & B. 407; Manby v. Robinson, L. R. 4 Ch. App. 347; Fabie v. Lindsay, 8 Oreg. 474.

29 Manby v. Robinson, L. R. 4 Ch. Ap. 347; Langston v. Boylston, 2 Ves. Jr. 101; Dungey v. Angove, 2 Ves. Jr. 304.

30 Martinius v. Helmuth, C. Cooper, 248; Stevenson v. Anderson, 2 Ves. & B. 412. *Contra*, Herndon v. Ridgeway, 17 How. 424, 15 L. ed. 100; and see § 96.

31 Daniell's Ch. Pr. (2d Am. ed.) 1765; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

32 Daniell's Ch. Pr. (2d Am. ed.) 1765; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

33 Buck v. Mason, C. C. A., 135 Fed. 304.

34 Daniell's Ch. Pr. 1765; Story's Eq. Jur., § 822; Angell v. Hadden, 16 Ves. 202; City Bank v. Bangs, 2 Paige (N. Y.), 570.

hearing, each defendant may read the other's answer against him.[35] If one of them has allowed the bill to be taken as confessed against him, this is considered as an admission that the bill was properly filed, and that he made an improper claim against the fund;[36] and the defendant, who has answered him, may obtain suitable relief, including a decree against the defaulter for his costs and the costs paid the plaintiff.[37] If, after answer, one of them defaults at the hearing, the court will enter a decree after hearing the other.[38] The plaintiff, if successful, is entitled to his costs,[39] including a counsel fee,[40] out of the fund, if there be one. Otherwise, from the defendant whose claim is finally held bad.[41] These costs, as well as the costs of the successful defendant, must eventually be paid by him whose claim is finally dismissed.[42] It has been said that when the bill is dismissed, there can be no further proceedings in the cause as between the defendants; not even by consent; inasmuch as the court has thereby lost jurisdiction.[43] After a decree in the plaintiff's favor, the cause is terminated as to him; and in case of his subsequent death the cause will proceed without a revivor.[44]

§ 158. Bills in the nature of interpleader. Where the plaintiff claims for himself some interest in the fund or matter in question, or does not admit the whole of a defendant's claim,

35 Bowyer v. Pritchard, 11 Price, 103; Daniell's Ch. Pr. 1765. See Penn Mut. L. I. Co. v. Union Tr. Co., 83 Fed. 891.

36 Badeau v. Rogers, 2 Paige (N. Y.), 209; Fairbrother v. Prattent, 1 Daniel, 64. But see Standley v. Roberts, 59 Fed. 836.

37 McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

38 Hodges v. Smith, 1 Cox Eq. 357.

39 Dunlop v. Hubbard, 19 Ves. 205; Dowson v. Hardcastle, 2 Cox Eq. 279; McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

40 Where the face value of a life insurance policy was $50,000, the sum of $1,000 was allowed as a counsel fee. Mutual Life Ins. Co. v. Lane, 151 Fed. 276. Where the amount was $10,000 or less, $150 was allowed. McNamara v. Provident Sav. Life Assur. Soc., C. C. A., 114 Fed. 910, 912. See Mutual Life Ins. Co. v. Farmers' & Mechanics' Nat. Bank, 173 Fed. 390, 402; § 422, *infra*.

41 Aldridge v. Mesner, 6 Ves. 418; Mason v. Hamilton, 5 Simons, 19; Daniell's Ch. Pr. 1767.

42 Mason v. Hamilton, 5 Simons, 19; Cowtan v. Williams, 9 Ves. 107; Daniell's Ch. Pr. (2d Am. ed.) 1766, 1767.

43 Jennings v. Nugent, 1 Molloy, 134.

44 Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 134; Daniell's Ch. Pr. 1765.

or the defendants claim different amounts, although a bill of interpleader may not, a bill in the nature of an interpleader may be sustained.[1] It has been held that such a suit may be maintained by a mortgagee, to compel the mortgagor and a municipal corporation to submit to the court a dispute between them concerning the right to forfeit a franchise.[2] A bill by a trustee praying leave to resign a trust and to return the subject-matter thereof to a new trustee, in accordance with the terms of the trust agreement, is not a bill in the nature of an interpleader.[3] A pleading, filed as a bill of interpleader, may be sustained as a bill in the nature of an interpleader.[4] The frame of such a bill and the proceedings thereunder should conform, *mutatis mutandis*, to those of a strict bill of interpleader.[5] After payment of what he admits to be due, a decree may be entered discharging the plaintiff as to that, and directing the suit, or if an action at law has previously been begun, the latter, to proceed till his disputed rights are determined.[6]

§ 159. Bills of certiorari. A bill of certiorari was a bill filed in a superior court of equity for the purpose of removing thither a suit in equity pending in an inferior court, on account of some alleged incompetency in the latter or some defect in its proceedings.[1] Such a bill first stated the proceedings in the inferior court; then the cause of its incompetency, as, for example, that the subject of the action or the parties were not within its jurisdiction, or that, for some other cause, equal justice could not be done there; and finally prayed a writ of *certiorari*, to certify and remove the record and the cause to

§ 158. [1] Dorn v. Fox, 61 N. Y. 264; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 385; Provident Sav. Life Assur. Soc. v. Loeb, 115 Fed. 357; Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865; Hayward & Clark v. McDonald, C. C. A., 192 Fed. 890. See Robinson v. Brast, C. C. A., 149 Fed. 149; Story's Eq. Pl., § 297*b*; Daniell's Ch. Pr. (2d Am. ed.), 1768. *Contra*, New England Mutual Life Ins. Co. v. Odell, 50 Hun (57 N. Y. S. C. R.) 279.

[2] Knickerbocker Tr. Co. v. City of Kalamazoo, 182 Fed. 865.

[3] Moore Printing Typewriter Co. v. National Savings & Tr. Co., 218 U. S. 422, 54 L. ed. 1093.

[4] McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

[5] McNamara v. Provident Sav. Life Assur. Soc., 114 Fed. 910.

[6] City Bank v. Bangs, 2 Paige (N. Y.), 570. See Groves v. Senteel, 153 U. S. 465, 38 L. ed. 785; s. c., 66 Fed. 179.

§ 159. [1] Mitford's Pl. ch. 1; Story's Eq. Pl., § 298.

the superior court.[2] It did not pray that the defendant should answer, or even that he should appear to the bill, and, consequently prayed for no writ of subpœna, although a subpœna had to be sued out and served.[3] It was considered as an original bill, and filed as such in the superior court. Thereupon, the plaintiff was required to execute a bond in the penalty of £100, with one surety conditioned to prove the suggestions of the bill in fourteen days. A subpœna was next sued out and served; and a writ of *certiorari* issued directed to the judge of the inferior court, requiring him to certify or send to the court issuing the writ the tenor of the bill or plaint below, with the process or proceedings thereon. The writ having been served and returned, together with the required statement and papers, an order directing them to be filed was then obtained. Testimony to prove or disprove the suggestions of the bill was immediately taken, and the cause referred to a master to report whether they were proven or no. This was required to be done within fourteen days, unless the court specially enlarged the time. If the allegations were proved and showed a sufficient reason for retaining the suit, an order to retain the bill was granted; and the defendant below was obliged to answer, and the cause removed proceeded in the same manner as if it had been originally instituted in the superior court.[4] In no reported case has such a bill been filed in a court of the United States, although petitions for writs of *certiorari* in proceedings at common law are not uncommon.[5]

2 Story's Eq. Pl., § 298.

3 Story's Eq. Pl., § 298; Mitford's Pl., ch. 1.

4 Hinde's Pr. 28–32 and 581, 582.

5 See *infra*, § 460.

CHAPTER VI.

SUBPŒNA TO ANSWER.

§ 160. Definition and form of subpœna. The first process in a court in equity is the subpœna *ad respondendum* which is a writ requiring the defendant to answer the bill under penalty therein expressed. A similar writ, called *quibusdam certis de causis*, in the form of a subpœna without any penalty, is also found in some of the early English chancery cases.[1] The process of subpœna constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.[2] These writs, like all writs and processes issuing from the courts of the United States, must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court must bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence. Those issuing from a District Court must bear teste of the Judge, or, when that office is vacant, of the clerk thereof.[3] When issued from the Supreme Court the writ must be in the name of the President of the United States.[4] In the Supreme Court, the return day of the writ must be at least sixty days from the service thereof;[5] In the District Courts, the return day is twenty days from its issue.[6] In the District Courts, whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the

§ 160. [1] Mr. Justice Holmes, in an article on Early English Equity, 1 Law Quart. Rev. 162, note 2, citing Palgrave, King's Council, 131, 132, note x; Scaldewell v. Stormesworth, 1 Cal. Ch. 5.

[2] Equity Rule 7.

[3] U. S. R. S., § 911.

[4] U. S. S. C. Rule 5.

[5] U. S. S. C. Rule 5.

[6] Equity Rule 12.

bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.[7] If a defendant is sued in a representative capacity, or in both an individual and a representative capacity, he should be so described in the subpœna; which should in this respect follow the prayer of process in the bill.[8] A subpœna addressed to John Moore, guardian of John Stiles, is sufficient to give jurisdiction over him individually although it might not be to give jurisdiction over him as guardian.[9] If a subpœna is not properly addressed, its service may be set aside upon motion, as made without authority.[10] Such a defect will, however, be waived, if the defendant enter his general appearance in his representative capacity.[11] Where an unincorporated partnership was described in the subpœna and bill as a corporation, and no appearance was made, it was held that the order thereupon was void, although the writ was served upon one of the partners, who failed to notify the plaintiff of his mistake.[12] There, before suit, the attorney for the co-partnership had inadvertently written to the complainant a letter which implied that the company had a board of directors, and the partnership did business under the name of the Newport Pressed Brick Company. The penalty named in the

7 Eq. Rule 12. This is copied in part from Eq. Rule 12 of 1842. It makes the return day twenty days, instead of "the next rule day or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issue thereof." It omits the phrase, added to the former rule Dec. 17, 1900 (180 U. S. 641), "which shall contain the Christian names as well as the surnames of the parties." It adds the words, "and not before," in order to make clear the practice under the former rule. See Armstrong Cork Co. v. Merchants' Refrigerating Co., 171 Fed. 778.

8 Carter v. Ingraham, 43 Ala. 78; Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 247; see Cornell v. Green, 88 Fed. 821.

9 Cornell v. Green, 88 Fed. 821; s. c. in C. C. A., 95 Fed. 334.

10 Walton v. Herbert, 3 Green Ch. (N. J.) 73; Brasher v. Van Cortlandt, 2 J. Ch. (N. Y.) 242, 247.

11 Ibid.; Buerk v. Imhaeuser, 8 Fed. 457.

12 Baxter v. Jones, 185 Fed. 900.

writ is now usually two hundred and fifty dollars; in earlier times it might be the or limb;[13] but it is never enforced, since the taking of the bill as confessed affords a far more substantial remedy. The subpœna should be addressed to the defendant against whom it is issued.[14]

The usual form of a subpœna in a District Court of the United States is substantially as follows:—

The President of the United States of America, To John Aber:

Greeting,—You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by William Terhune and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you John Aber of two hundred and fifty dollars ($250).

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the first day of February, in the year one thousand nine hundred and thirteen and of the Independence of the United States of America the one hundred and thirty-seventh.

Alexander Gilchrist, Jr., *Clerk.*

Robert Jones, *Sol'r.*

The Defendant John Aber is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso.*

Alexander Gilchrist, Jr., *Clerk.*

[13] Mr. Justice Holmes, in an article on Early English Equity, 1 Law Quar. Rev., 162, note 2, citing 1 Proceedings Privy Council (21 R. 2. 1397).

[14] Daniell's Ch. Pr. (2d Am. ed.) 495.

§ 161. Issue of the subpœna. No process of subpœna can issue from the clerk's office in any suit in equity until the bill is filed in the office.[1] Whenever a bill is filed the clerk must issue the process of subpœna thereon, as of course, upon the application of the plaintiff.[2] The signature of counsel is a sufficient warrant for his so doing. A præcipe or written order for the subpœna, signed by the attorney is usually first given him. In the early times, the bill was first examined by one of the masters in chancery, whose duty it was to determine whether to dismiss the bill by original or to retain it by subpœna.[3] The present practice, it is said, originated when Sir Thomas More was Keeper.[4] In the Supreme Court of the United States a motion for leave to file a bill must first be made. This is usually heard *ex parte*;[5] but when leave was asked to file a bill against the President of the United States, under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave.[6] Under special circumstances the court will require notice to be served upon the proposed defendant, and leave to file a bill has been denied.[7] Whenever any subpœna is returned not executed as to any defendant, the plaintiff is entitled to another subpœna, *toties quoties*, against him, if he required it, until due service is made.[8] It has been held that the clerk may issue to an attorney a summons duly sealed and signed without specifying the title of the cause, the names of the parties, or the return day; and that the attorney may fill in the blanks when he wishes to serve the paper.[9]

§ 161. [1] Equity Rule 12. For the rule where a district is divided into two or more divisions, see U. S. v. Eddy, 28 Fed. 226.

[2] Equity Rule 12.

[3] Treatise on Masters of the Chauncerie, 1 Harg. Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

[4] Ibid.

[5] Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848.

[6] Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant, 6 Wall. 241, 242, 18 L. ed. 848; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; Washington v. Northern Securities Co., 185 U. S. 254, 46 L. ed. 897.

[7] Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Grant, 6 Wall. 241, 18 L. ed. 848; Minnesota v. Northern Securities Co., 184 U. S. 199, 46 L. ed. 499; *supra*, § 33.

[8] Equity Rule 14.

[9] Jewett v. Garrett, 47 Fed. 625.

§ 162. When a subpœna is necessary. No defendant can be brought before the court against his will without the service of a subpœna upon him.[1] A general appearance will, however, waive such an omission.[2] After a bill has been amended with no further change than the bringing in of new parties defendant, they alone need be served with a new subpœna.[3] If, however, it were otherwise substantially amended, according to the English practice a subpœna to answer the amendments had to be served upon all the defendants.[4] A subpœna to appear and answer a bill of revivor if required, should be substantially in the form of a subpœna to an original bill, except that it requires the proper representatives of the party against whom it issues to appear at the next rule-day, which shall occur after fourteen days from the time of the service of the process, and there show cause, if any they have, why the cause should not be revived.

§ 163. Personal service of a subpœna. Except in certain exceptional cases the service of the subpœna must be personal,[1] and made within the district.[2] It must be made by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise.[3] "When the marshal or his deputy is a party in any cause, the writs and præcepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and

§ 162. [1] Equity Rule 7.

[2] Buerk v. Imhaeuser, 8 Fed. 457.

[3] Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, 1 Ves. Jr. 250; Skeffington v. ———, 4 Ves. Jr. 66.

[4] Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Simons, 458. See Kendall v. Beckett, 1 Russ. 152.

[5] Equity Rule 56.

§ 163. [1] Equity Rule 13.

[2] Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104; Picquet v. Swan, 5 Mason, 35; Bourke v. Amison, 32 Fed. 710; Winter v. Koon, Schwarz & Co., 132 Fed. 251; *supra*, § 61.

[3] Equity Rule 15; Deacon v. Sewing M. Co., 14 Rep. 43. A copy of an order, that non-resident defendants appear and plead before a day specied therein, may be served by any one, under an order for substituted service, although the usual practice is to serve it by a deputy marshal of the district where the defendants are found. Forsyth v. Pierson, 9 Fed. 801. It was held that the marshal might give an attorney an appointment of a special deputy with the name in blank with oral permission to the attorney to fill in the same. Jewett v. Garrett, 47 Fed. 625.

return them."[4] If the marshal or his deputy make the service, his unverified return is sufficient.[5] He may be contradicted,[6] although there is a remedy by an action against the officer for a false return.[7] It has been specifically held: that the marshal's return, that the corporation served was transacting business within the district, could be contradicted;[8] and that so could be his return, that the person on whom the service was made was authorized to represent the defendant for that purpose,[9] and that it was not conclusive as against strangers to the writ.[10] It is insufficient in the case of service upon a corporation, unless it shows that the defendant was transacting business within the district, or that appears elsewhere in the record.[11] It is capable of subsequent amendment;[12] and when the return shows that the service was insufficient, a motion may be made to set the same aside.[13] Where there has been personal service upon the defendant by a special deputy the fact that the return was in the name of such deputy instead of in the name of the marshal was held an irregularity which did not avoid the judgment when attacked in a collateral proceeding.[14] It has been held that the return to a State court by a sheriff cannot be amended after a removal.[15] The return should state where the service was made, if the defendant reside

[4] U. S. R. S., § 922.

[5] Von Roy v. Blackman, 3 Woods, 98, 101; Phœnix Ins. Co. v. Wulf, 1 Fed. 775; Equity Rule 16. Where the defendant was named in the bill as Jacob Kraig, a return that the subpoena had been served on Jacob King was held insufficient. McClaskey v. Barr, 45 Fed. 151.

[6] Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. ed. 272. See McClaskey v. Barr, 45 Fed. 151; Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. St. 453, 54 Atl. 334. *Contra*, Dicta in Von Roy v. Blackman, 3 Woods, 98, 100; Joseph v. New Albany S. F. & R. M. Co., 53 Fed. 180; U. S. Bank v. City of Kendall, 179 Fed. 914; U. S. v. McHie, 194 Fed. 894.

[7] Von Roy v. Blackman, 3 Woods, 98, 100.

[8] Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245.

[9] Higham v. Iowa State Travelers' Ass'n, 183 Fed. 845.

[10] U. S. v. McHie, 194 Fed. 894.

[11] Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235; Jackson v. Del. R. A. Co., 131 Fed. 134; Green v. Chicago, B. & Q. Ry. Co., 147 Fed. 767; Allen v. Yellowstone Park Transp. Co., 154 Fed. 504.

[12] Phœnix Ins. Co. v. Wulf, 1 Fed. 775.

[13] Scott v. Stockholders' Oil Co., 122 Fed. 835.

[14] Hill v. Gordon, 45 Fed. 276.

[15] Tallman v. B. & O. R. Co., 45 Fed. 156.

without the district,[16] and probably in any event. If another than the marshal or his deputy serve the subpœna, proof must be made by the affidavit of the process-server.[17] "The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof."[18] When a husband and wife are parties a copy should be served upon each, although the former practice was complied with by service upon the husband alone.[19] When a defendant was sued both individually and in a representative capacity, it was held that only one copy of the subpœna need be left with him.[20] Such service at the door of the defendant's dwelling,[21] and at his place of business when he lives in rooms above the same,[22] has been held to be sufficient. In an English case, where infant defendants were secreted, service upon their mother was allowed, and held sufficient.[23] Where a guardian *ad litem* has been appointed it will be presumed, in the absence of evidence to the contrary, that his wards were duly served.[24] Chief Baron Gilbert, in his "Forum Romanum," says of the subpœna: "The service is good in the night or on Sunday, if it be before the time of the return; for this being only process of notice, and not to arrest the parties, it can create no disturbance, though it be served in the night or on Sunday."[25] It has, however, since been held in England

16 Allen v. Blunt, 1 Blatchf. 480, 487; Thayer v. Wales, 5 Fisher's Pat. Cas. 448.

17 Equity Rule 15.

18 Eq. Rule 15, copied in substance from Eq. Rule 15 of 1842. See Phœnix Ins. Co. v. Wulf, 1 Fed. 775; Hyslop v. Hoppock, 5 Ben. 447.

19 O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840; Robinson v. Catheart, 2 Cranch C. C. 590.

20 Cornell v. Green, 88 Fed. 821; s. c. in C. C. A., 95 Fed. 334.

21 Phœnix Ins. Co. v. Wulf, 1 Fed. 775. For cases where the proof of service was held insufficient, see Blythe v. Hinckley, 84 Fed. 228; Swift v. Meyers, 37 Fed. 37.

22 Lovin v. Hicks, 116 Minn. 179, 133 N. W. 575.

23 Smith v. Marshall, 2 Atk. 70, Mr. William Allen Butler, in a learned opinion when referee, held that, where a guardian *ad litem* was appointed, service of a subpœna upon his infant ward was not indispensable to the jurisdiction. Sloane v. Martin, 77 Hun, 249. See *supra*, § 106.

24 Sloane v. Martin, 77 Hun (N. Y.), 249. See *supra*, § 106.

25 Gilbert's Forum Romanum (Tyler's ed.), 42.

that a service on Sunday may be set aside.[26] A decision of Circuit holds that, in an extraordinary case, a warrant of arrest in admiralty can be issued on Sunday.[27] Personal service of the subpœna cannot, in the absence of any special statutory provision, be made beyond the territorial jurisdiction of the court;[28] except that in a case of a local nature, at law or in equity, where the land or other subject-matter of a fixed nature, such as a railroad, is in both districts of the same State or is situated entirely in either district of a State which is divided into two or more districts, a defendant resident therein may be served by the marshal of any district in that State where he resides.[29] It has been held that a suit brought solely for the purpose of appointing a receiver of a railroad, with an injunction against its creditors,[30] a suit to determine the rightful owners of a fund in court,[31] and a suit by the United States to determine the right of an Indian tribe to a fishery,[32] are such cases of a local nature. In a suit not of a local nature, a duplicate writ may be issued against a defendant residing in a different district of the State directed to the marshal of such district. "The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."[33] Where defendants reside in different divisions of a district, all mesne and final process may be served and executed in any or all of the divisions of the district.[34] In other cases where a State is divided into

26 Mackreth v. Nicholson, 19 Ves. 367.

27 Pearson v. The Alsalfa, 44 Fed. 358 (U. S. D. C. D., S. C.)

28 Toland v. Sprague, 12 Pet. 300, 328, 9 L. ed. 1093, 1104; Picquet v. Swan, 5 Mason, 35; Bourke v. Amison, 32 Fed. 710; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119.

29 Jud. Code, §§ 54, 55, 56, 36 St. at L. 1087.

30 East Tenn., V. & G. R. Co. v. Atlanta & T. F. R. Co., 49 Fed. 508.

31 Winter v. Ludlow, 3 Phila. 464,

32 U. S. v. Winans, 73 Fed. 72.

33 Jud. Code, § 52, 36 St. at L. 1087.

34 Jud. Code, § 53, 36 St. at L. 1087.

two or more districts the defendant cannot be served out of the district.[35]

When a petition is filed by a district attorney of the United States praying an injunction against a combination in restraint of commerce among the several States or with foreign nations, the subpœna may be served by leave of the court in any district by the marshal thereof.[36] In suits for the infringement of patents, service may be made in the district where the suit is brought upon any agent of the defendant engaged in conducting the defendant's business there, provided that the defendant has a regular place of business in the district and has committed acts of infringement there.[37] At common law, where the State statutes permit the practice,[38] and in equity by leave of the court,[39] a receiver of a foreign railroad company may be served by leaving the writ with one of his station agents. It has been held that an attorney cannot accept service of a subpœna *ad respondendum* before the entry by him of a formal appearance;[40] but an acceptance and appearance by him without any authority may be ratified by estoppel.[41] A subpœna will not be set aside because addressed to a non-resident over whom the court could exercise jurisdiction with his consent, but not otherwise, although the service upon him might be set aside.[42] A motion to set aside the service,[43] or a motion to quash the return,[44] accompanied by a special appearance for that purpose,[45] is the proper method of testing the sufficiency of the service; unless the defendant prefers to disregard it and subsequently to raise the objection upon an appeal from the de-

35 Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248. But see Winter v. Ludlow, 3 Phila. 464.

36 26 St. at L., §§ 5, 210.

37 Jud. Code, § 38, 36 St. at L. 1087; *supra*, § 22.

38 Eddy v. Lafayette, 163 U. S. 456, 41 L. ed. 225.

39 Central Tr. Co. v. St. L. A. & T. Ry. Co., 40 Fed. 426.

40 U. S. v. Cooper, 196 Fed. 584,

41 Cowden v. Wild Goose Mining & Trading Co., C. C. A., 199 Fed. 561.

42 Mason v. N. Y. Steam Power Co., 87 Fed. 241.

43 Ibid.; Bourke v. Amison, 32 Fed. 710; Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245.

44 Am. Cereal Co. v. Eli P. C. Co., 70 Fed. 276; Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245; Higham v. Iowa State Travelers' Ass'n, 183 Fed. 845.

45 *Infra*, §§ 169, 170.

cree,[46] or to resist the execution of the decree as void.[47] Before the Equity Rules of 1912, it was held that the objection could not be joined with an answer to the merits.[48] A motion to set aside the service, made six weeks after the service, was held not to be barred by laches.[49] Where such a motion had been made and denied in the State court, and no appeal taken from the decision, it was held that it could not be renewed in the Federal court after a removal,[50] although the motion may be made for the first time in the Federal court after a removal.[51] A defendant has no right to a trial by jury upon the issues raised upon his motion.[52] In one case such a motion was granted without prejudice to the right of the complainant to apply for leave to amend his complaint by stating the facts relating to the presence of property within the district and his claim against the same, which brought the case within the statute.[53].

§ 164. Service upon corporations. If the United States are sought to be made parties defendant, the subpœna should be served upon the Attorney-General or the District Attorney of the district where the suit is brought.[1] "When process at common law or in equity shall issue against a State, the same shall be served on the Governor, or chief executive magistrate, and Attorney-General of such State."[2] When a suit is brought against a domestic corporation, that is, one chartered within the State which contains the district where the suit is brought, the subpœna should be served upon one of its officers; or where that is impossible, by leaving a copy at its principal place of business; or where it has no place of business nor officers within the State, by service upon its managing agents, or where

[46] O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 840; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119.

[47] Meyer v. Kuhn, C. C. A., 65 Fed. 705.

[48] Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245. See Chadeloid Chemical Co. v. Chicago Wood Finishing Co., 180 Fed. 770.

[49] Phelps v. Connecticut Co., 188 Fed. 765.

[50] Hoyt v. Ogden Portland Cement Co., 185 Fed. 889.

[51] Goldey v. Morning News, 156 U. S. 518.

[52] Peper Automobile Co. v. Am. Mortor Car Sales Co., 180 Fed. 245.

[53] Jackson v. Hooper, 171 Fed. 597, 598.

§ 164. [1] Hoffman's Ch. Pr. 108; Daniell's Ch. Pr. (2d Am. ed.) 517, note 4.

[2] Supreme Court Rule 5; Grayson v. Virginia, 3 Dall, 320, 1 L. ed. 619; *supra*, § 3.

there is no agent there, perhaps upon one of its stockholders.[3] Where the State practice prescribed a specific method of service, that must be followed in actions at common law,[4] and will usually be followed in a suit in equity.[5] If not obnoxious to the Constitution, it is binding in a collateral proceeding;[6] but when the proceeding is attacked by a motion to set aside the service upon a foreign corporation, the Federal court determines the objection for itself and is not necessarily controlled by the State law.[7] It has been held: that a corporation created by an act of Congress can, in the absence of a special statute of the United States, be served with process from a Federal court only in the district where its principal office is situated and its corporate business is transacted, and not in another district where it has stipulated, in accordance with the State statute, to accept service of process;[8] and in Pennsylvania, that, in the absence of an express provision in its charter a corporation created by an act of Congress can be sued by service upon its president in any State.[9] An irregularity in service upon the agent of a corporation may be validated by his admission of service.[10]

When the jurisdiction rests solely upon the existence of a Federal question in a case which is not brought for the infringement of a patent, nor against a surety company, nor un-

[3] Daniell's Ch. Pr. (1st Am. ed.) 564. "If a bill be filed against a corporation the process must be served upon some one of the members." Citing Hinde's Ch. Pr. 87, which uses the same words. But see St. Clair v. Cox, 106 U. S. 353, 359, 27 L. ed. 223, 226; Rand v. Proprietors, etc., Co., 3 Day (Conn), 441; O'Brien v. Stair's F. & T. C. Co., 10 Cal. 343.

[4] Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. ed. 946; Lemon v. Imperial Window Glass Co., 199 Fed. 927, holding that, in West Virginia, a corporation which had failed to fix its place of residence in the State, by appointing an attorney resident in one of its counties, might be served either by attachment and publication or by serving process upon the State auditor.

[5] Eby v. Northern Pac. R. Co., 13 Phila. 144. But see *infra*, § 455.

[6] Swarts v. Christie Grain & Stock Co., 166 Fed. 338.

[7] West v. Cincinnati, N. O. & T. P. Ry. Co., 170 Fed. 349, and cases cited *infra*.

[8] A. L. Wolff & Co. v. Choctaw, O. & G. R. Co., 133 Fed. 601. *Cf.* Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. ed. 540.

[9] Thornburgh v. Savage Mining Co., 1 Pac. Law Mag. 267.

[10] Union Pac. Ry. Co. v. Novak, C. C. A., 61 Fed. 573. Not, however, one by a statutory agent. Farmer v. Nat. Life Ass'n, 50 Fed. 829.

der the statute against combinations in restraint of commerce, a District Court of the United States has no jurisdiction over a foreign corporation[11] which is not an alien. But when the defendant is an alien corporation,[12] or when jurisdiction is claimed on account of a difference of citizenship, a foreign corporation may be served with process in the State of the complainant's residence, provided it be "found" within the district.[13] What constitutes such a finding is a matter hard to define with accuracy. If a State statute forbids a foreign corporation to transact business within its borders except upon condition that the corporation stipulate to allow legal process to be served upon it, and the company execute such a stipulation, not in express terms restricted to the process of a State court; it will be considered to apply to the Federal courts, and a subpœna from a Federal court may be served upon the foreign corporation in the same manner as a similar process of a State tribunal.[14] Such condition and stipulation may be implied as well as expressed.[15] If a State permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is deemed to be a condition of the permission; and corporations that subsequently do business in the State are deemed to assent to such conditions as fully as though they had specially authorized their agents to receive service of the process.[16] Such condition must

[11] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833; In re Keasby & Mattison Co., 160 U. S. 221, 40 L. ed. 402; *supra*, § 61.

[12] In re Hohorst, 150 U. S. 653, 37 L. ed. 1211; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964.

[13] McCormick H. M. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833; *supra*, § 61.

[14] Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810; Gale v. So. Building & L. Ass'n, 117 Fed. 732; Buckingham & Hecht v. North German Fire Ins. Co. of New York, 149 Fed. 622; Castagnino v. Mutual Reserve Fund Life Ass'n, C. C. A., 157 Fed. 29. Overruling several cases to the contrary previously decided in the Circuit Courts.

[15] St. Clair v. Cox, 106 U. S. 350, 356, 27 L. ed. 222, 225.

[16] Mr. Justice Field in St. Clair v. Cox, 106 U. S. 350, 356, 27 L. ed. 222, 225; Railroad Co. v. Harris, 12 Wall. 65, 81, 20 L. ed. 354, 358; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 21, 51 L. ed. 345, 350; Hayden v. Androscoggin Mills, 1 Fed. 93; Estes v. Belford, 22 Fed. 275.

not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. It has been said, "that in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without territorial limits of the State in which the court is held, viz: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the State.[17] It seems that by the common law a court has jurisdiction over a foreign corporation to enforce a cause of action arising in the jurisdiction.[18] Service upon an agent who stood in no representative character to the company, whose duties were limited to those of a subordinate employee or to a particular transaction, or whose agency had ceased when the matter in dispute arose, would, probably, be held insufficient;[19] but where, while transacting business there, it had appointed an agent, for the purpose of the service of process, and his authority had not been revoked, the corporation was held to be subject to the jurisdiction.[20] A State statute providing that a public officer shall be the attorney in fact for every foreign corporation doing business in the State and every non-resident domestic corporation, with authority to accept service of process on its behalf, is constitutional, so far as actions upon contracts made within the State are concerned,[21] but not, it has been

[17] U. S. v. Am. B. Tel. Co., 29 Fed. 17, 35, per Jackson, J. See Maxwell v. Atchinson, T. & S. F. R. Co., 34 Fed. 286, 289; Buffalo Glass Co. v. Manufacturer's Glass Co., 142 Fed. 373.

[18] Newby v. Von Opper, etc., Co., L. R. 7 Q. B. 293.

[19] St. Clair v. Cox, 106 U. S. 350, 359, 360, 27 L. ed. 222, 226; Mexican C. Ry. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. 286; Carron Iron Co. v. McClaren, 5 H. L. C. 416.

[20] Hill v. Empire State-Idaho Mining & Developing Co., 156 Fed. 797.

[21] Saint Mary's Franco-American

held, as regards suits upon contracts executed in another State with citizens of the State where the suit is brought, although the defendant has transacted some business in the latter State.[22] It has been held that the Superintendent of the Insurance Department of the State of New York cannot be served by mail; and that he has no power to waive a defect in the service of process upon him so as to bind a foreign insurance company.[23] In order thus to subject itself to the service of process the foreign corporation must actually transact business in the district where the suit is brought.[24] The maintenance of an office or

Petroleum Co. v. West Virginia, 203 U. S. 183, 51 L. ed. 144, 7 Ann. Cas. 1018.

22 Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 51 L. ed. 345; Simon v. Southern Ry. Co., C. C. A., 195 Fed. 56.

23 Farmer v. National Life Ass'n, 50 Fed. 829.

24 Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137; Hayden v. Androscoggin Mills, 1 Fed. 93; Zambrino v. Galveston, H. & S. A. Ry. Co., 38 Fed. 449; Riddle v. N. Y., L. E. & W. R. Co., 39 Fed. 290; Maxwell v. Atchison, T. & S. F. R. Co., 37 Fed. 286; Filli v. D., L. & W. R. Co., 37 Fed. 65; Denton v. International Co. of Mexico, 36 Fed. 1; Block v. Atchison, T. & S. F. R. Co., 21 Fed. 529; Johnson v. Computing Scale Co., 139 Fed. 339; Phelps v. Connecticut Co., 188 Fed. 765; Chinn v. Foster-Milburn Co., 195 Fed. 158; Cody Motors Co. v. Warren Motor Car Co., 196 Fed. 254. That otherwise, the statute would be unconstitutional, was held in Moredock v. Kirby, 118 Fed. 180; Cella Commission Co. v. Bohlinger, C. C. A., 8 L.R.A.(N.S.) 537, 147 Fed. 419. See Brooks v. Dun, 51 Fed. 138. It has been held that the following acts do *not* amount to a transaction of business within the State, which will subject a foreign corporation to the jurisdiction of the courts, State or Federal, there held: A single act of business, such as the making of a contract there for the sale of an article to be manufactured elsewhere and there delivered, when there was no purpose to do any other business or to have a place of business within the district. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 735, 28 L. ed. 1137, 1139; Good Hope Co. v. Railway B. F. Co., 22 Fed. 635; Maxwell v. Atchison, T. & S. F. R. Co., 34 Fed. 286; Frawley v. Pennsylvania Cas. Co., 124 Fed. 259. *Cf.* Doe v. Springfield B. Co., C. C. A., 104 Fed. 684; Eirich v. Donnelly C. Co., C. C. A., 105 Fed. 1. The residence of three directors of the corporation and its assistant secretary, who, at various times, received and gave information indirectly affecting the business of the corporation elsewhere. Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235. The residence of the officers or directors served, and a by-law providing that the directors may meet within the district once a month, where there is no proof of a compliance with such a by-law. Conley v. Mathieson Alkali Works, 190 U. S. 406, 408, 411, 47 L. ed. 1113, 1114, 1115.

The maintenance of an office for the registration of transfers of stock, the meeting of the directors at the office of one of them, and the maintenance of a bank account, where it was not shown what business had been transacted at such meetings, nor how recently before the attempted service such meeting had been held. Honeyman v. Colorado Fuel & Iron Co., 133 Fed. 96. That the holding of directors' meetings is an element to be considered in determining whether a corporation is found within the State, is *held* in Sleicher v. Pullman Co., 170 Fed. 365. That so in the transfer of stock is holding, Ibid; Westinghouse A. B. Co. v. Great N. Ry. Co., C. C. A., 88 Fed. 258. The presence of the principal officers of a corporation when they have with them property of the corporation merely for the purpose of exhibition, does not make the corporation liable to the service of process upon them. Carpenter v. Westinghouse Air-Brake Co., 32 Fed. 434. See Reifsnider v. American Imp. Pub. Co., 45 Fed. 433; Donovan v. Dixieland Amusement Co., 152 Fed. 661. See Cody Motors Co. v. Warren Motor Car Co., 196 Fed. 254. The attendance of the secretary of the corporation upon the taking of depositions, in a suit to which his company is a party. Ladd Metals Co. v. American Mining Co., 152 Fed. 1008. The transaction of business by another company, which owns practically its entire capital stock. Peterson v. Chicago, Rock Island & Pacific Ry. Co., 205 U. S. 364, 51 L. ed. 841. The maintenance of an office with an agent, merely for the solicitation of business and without authority to make contracts. Green v. Chicago, B. & Q. Ry. Co., 205 U. S. 530, 51 L. ed. 916; Denver & Rio Grande R. Co. v. Roller Co., C. C. A., 49 L.R.A. 77, 100 Fed. 738; Weller v. Pennsylvania R. Co., 113 Fed. 502; Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235; Buffalo Glass Co. v. Manufacturers' Glass Co., 142 Fed. 273; McGuire v. Great Northern Ry. Co., 155 Fed. 230; West v. Cincinnati, N. O. & T. P. Ry. Co., 170 Fed. 349; Hefner v. Am. Tube & Stamping Co., 163 Fed. 866; William Grace Co. v. Henry Martin Brick Mach. Mfg. Co., C. C. A., 174 Fed. 131; Fawkes v. Am. Motor Car Sales Co., 176 Fed. 1010; Cody Motors Co. v. Warren Motor Car Co., 196 Fed. 254; although samples are shown there, Cody Motors Co. v. Warren Motor Car Co., 196 Fed. 254, and repairs there made. Fawkes v. Am. Motor Car Sales Co., 176 Fed. 1010. The collection of news paid for by the item. Evansville Courier Co. v. United Press, 74 Fed. 918. Advertisements Boardman v. S. S. McClure Co., 123 Fed. 614. The negotiations of loans upon a mortgage, and a successful application to have the bonds thereby secured listed on the stock exchange. Clews v. Woodstock Iron Co., 44 Fed. 31. The lease by a foreign to a domestic corporation of personal property, and the payment by the latter to the former of a part of the profits derived from the use of such property within the jurisdiction of the court. U. S. v. Am. B. Tel. Co., 29 Fed. 17. The acceptance of a lease by a railroad within a State, where the terms of the lease did not appear. Green v. Chicago, B. & Q. Ry. Co., 147 Fed. 767.

storeroom, where goods are kept for sale,[25] or where contracts are closed,[26] or railroad tickets sold,[27] or the maintenance of an office there by its president, where he performs his presidential duties, is sufficient to authorize service upon him within a foreign State.[28] An insurance company is engaged in business in a State when it is accustomed to send its agents there to adjust fire losses.[29] An insurance company does not cease to do business in a State when it receives premiums upon policies previously issued there; although such premiums are sent by the insured to an agent in another State, and the company issues no new policies in the former State.[30] Where the busi-

[25] Toledo Computing Scale Co. v. Computing Scale Co., C. C. A., 142 Fed. 919; Chadeloid Chemical Co. v. Chicago Wood Finishing Co., 180 Fed. 770. But see Hefner v. Am. Tube & Stamping Co., 163 Fed. 866.

[26] Sleicher v. Pullman Co., 170 Fed. 365; Michigan Aluminum Foundry Co. v. Aluminum Castings Co., 190 Fed. 879. Where the corporation acted as a broker of grain and stock it was held to transact business in a State where it maintained an office, at which orders, written or oral, were received by persons called its correspondents, the correspondents participating in neither the loss nor the profits of the transaction. Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 49 L. ed. 1111.

[27] Chesapeake & O. Ry. Co. v. Stojanowski, C. C. A., 191 Fed. 720. But *not* the sale by another corporation, in connection with its own tickets, of coupons, good over the defendant's railway, accounting each month to the defendant for its proportion of the proceeds. Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235.

[28] Revans v. So. Mo. & A. R. Co., 114 Fed. 982.

[29] Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810. But see Louden Machinery Co. v. Malleable Iron Co., 127 Fed. 1008. It has been held that service upon an agent of a foreign corporation, who has been sent into the State to negotiate with the plaintiff for a settlement of the controversy, is sufficient; although the company has never done any other business within the jurisdiction. Brush Creek Coal & Min. Co. v. Morgan-Gardner El. Co., 136 Fed. 505 (W. D. Mo.). See Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569; where, however, the company was transacting business within the State. *Contra*, Louden Machinery Co. v. Am. Malleable Iron Co., 127 Fed. 1008 (S. D. Ia.); Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co., 136 Fed. 505 (W. D. Mo.); Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co., 141 Fed. 211 (W. D. N. Y.); Wilkins v. Queen City Savings Bank & Trust Co., 154 Fed. 173 (S. D. N. Y.). Hoyt v. Ogden Portland Cement Co., 185 Fed. 889 (N. D. N. Y.). Where service upon the President was held to be sufficient.

[30] Connecticut Mut. Life Ins. Co.

ness within the State has ceased, and there is no official appointment of an agent for the service of process outstanding unrevoked, service upon a former agent is insufficient.[31] Service upon the president,[32] secretary,[33] or other principal officers[34] of a foreign corporation within the State, is not sufficient to confer jurisdiction upon the court, unless the corporation is found there or waives the objection. A surety company may be served in any district where it is found in a suit upon a bond or undertaking given in such district under the statutes of the United States.[35] Service upon a surety company is made upon its agent in the district appointed by it for that purpose or in his absence, or, in case there is no such appointment, by service upon the clerk of the court where the suit is brought.[36] Service of process in the manner prescribed by the State practice may subject a foreign corporation to the jurisdiction of the Federal court, in a case over which the State statutes deprive her courts of jurisdiction because the cause of action arose without the State.[37]

By stipulation in the suit, the corporation may be estopped from objecting that a person upon whom service was made was not authorized to represent it.[38] A marshal's return, which recited the delivery of a true copy on the managing agent of a foreign corporation found in the county, that he was the only agent of the corporation therein, that it was a non-resident,

v. Spratley, 172 U. S. 602, 43 L. ed. 569.

31 Cooper v. Brazelton, C. C. A., 135 Fed. 476.

32 Carpenter v. Westinghouse Air-Brake Co., 32 Fed. 434; Hoyt v. Ogden Portland Cement Co., 185 Fed. 889. The New York courts still follow the statute (Code of Civil Procedure, § 432) authorizing service upon a foreign corporation by delivering a copy of the summons to the president, secretary or treasurer within the State, whether the defendant transacts business there or not. Pope v. Terre Haute Car & Mfg. Co., 87 N. Y. 137; Sadler v. Boston & Bolivia Rubber Co., 140 App. Div. (N. Y.) 367, aff'd. 202 N. Y. 547; Mallory v. Virginia Hot Springs Co., New York Supreme Court (Kings County, Sp. Tm.) N. Y. L. J. February 13, 1913.

33 Phelps v. Connecticut Co., 188 Fed. 765.

34 Carpenter v. Westinghouse Air-Brake Co., 32 Fed. 434.

35 28 St. at L., p. 279, *supra*, §§ 5, 61.

36 Ibid.

37 Carstairs v. Mechanic's & Traders' Ins. Co. of N. Y., 13 Fed. 823.

38 Cowden v. Wild Goose Mining & Trading Co., C. C. A., 199 Fed. 561.

and that none of its principal officers resided in the State, and that all of its officers, except its managing agent, were absent from the State; was held to be *prima facie* evidence of legal service;[39] but a return of service upon a general agent was not.[40] A return that a foreign corporation was found within the State, may be contradicted.[41] It has been held that upon a motion to set aside service upon a foreign corporation because the writ was not served upon the proper person, the defendant need not show upon whom the service should be made or that it has no agent in the district.[42] A plea in abatement, which denied that the person served "is" an agent or officer of the corporation, was held to be insufficient; since it did not negative the fact that he was such an agent on the date of service.[43] Under the former practice, it was held that a plea to the jurisdiction did not raise the question that the stenographer in the employ of defendant transacting business within the State was not the proper person upon whom service should be made.[44] A corporation is not entitled to a trial by jury of the questions whether it was transacting business within the State and whether the person upon whom service was made was its authorized representative.[45]

§ 165. Substituted service of a subpœna. Independently of an express statutory authority, there is no power in a court of equity to order actual personal service to be effected upon a defendant beyond its territorial jurisdiction;[1] but, in a few cases, such courts have for more than a century assumed the power of ordering service to be made within their jurisdiction upon some person for the absent defendant, and have treated such service as valid.[2] In suits to stay proceedings at law in the

39 Chinn v. Foster-Milburn Co., 195 Fed. 158.

40 Swarts v. Christie Grain & Stock Co., 166 Fed. 338.

41 Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245; *supra*, § 163.

42 Wall v. Chesapeake & O. Ry. Co., C. C. A., 95 Fed. 398, Ward, J., dissenting.

43 Scott v. Stockholders' Oil Co., 129 Fed. 615.

44 Chadeloid Chemical Co. v. Chicago Wood Finishing Co., 180 Fed. 770.

45 Peper Automobile Co. v. Am. Motor Car Sales Co., 180 Fed. 245.

§ 165. 1 This passage was quoted and approved by Maxey, J., in Batt v. Proctor, 45 Fed. 515, 516.

2 Hales v. Sutton, 1 Dickens, 26; s. c., *sub nom.* Hallett v. Sutton, 12 Simons, 145, note; Carter v. De Brune, 1 Dickens, 39; Hyde v. For-

same court, the service of a subpœna upon the attorney of the plaintiff at law may be allowed, and it will then bind the latter if he be beyond the territorial jurisdiction of the court.[3] It has been held that this cannot be done after the judgment at law has been enforced, since the attorney's authority to represent his client is then terminated.[4] Nor where an injunction is also asked against a non-resident, who is not a party to the suit a stay of which is prayed;[5] unless he is in privity with one of the original defendants, in which case it was held, that service might be made upon him in another district.[6] A similar practice would in all probability be allowed in serving process under bills not original; namely, bills of revivor, supplemental bills, and bills of revivor and supplement, which are nothing more than continuations of the suits upon which they operate.[7] So, it has been held: That, under a bill to reform an insurance policy pending an action at law upon the policy, a subpœna may be thus served upon the attorney for the party to the action at law.[8] That under a bill to enjoin the prosecution of a suit to compel the transfer of stock, a subpœna may be served upon the attorney for the plaintiff in the former suit.[9] And that under a bill to collect out of equitable assets a decree of the same court of equity for costs, such service of a notice without a subpœna is sufficient.[10] The Federal courts have refused to extend this class of cases so as to include a bill of interpleader, two

ster, 1 Dickens, 102; Lady Carrington v. Cantillon, Bunb. 107; Hobhouse v. Courtney, 12 Simons, 140, and cases there cited: Daniell's Ch. Pr. (2d Am. ed.) 502–508.

[3] Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845; Hitner v. Suckley, 2 Wash 465; Eckert v. Bauert, 4 Wash. 370; Ward v. Seabry, 4 Wash. 426; Read v. Consequa, 4 Wash. 174; Bartlett v Sultan of Turkey, 19 Fed. 346. See also Logan v. Patrick, 5 Cranch, 288, 3 L. ed. 103; Dunlap v. Stetson, 4 Mason, 349.

[4] Kamms v. Stark, 1 Sawyer. 547.

[5] Manning v. Berdan, 132 Fed. 382.

[6] O'Connor v. O'Connor, 146 Fed. 994.

[7] Norton v. Hepworth, 1 H. & T. 158; Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845, p. 449*a*. But see Henderson v. Meggs, 2 Brown Ch. C. 127; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown Ch. C. 478. This passage was quoted with approval by Morrow, J., in Shainwald v. Davids, 69 Fed. 701, 703.

[8] Abraham v. North German Fire Ins. Co., 3 L.R.A. 188, 37 Fed. 731.

[9] Kelley v. T. L. Smith Co., C. C. A., 196 Fed. 466.

[10] Maitland v. Gibson, 79 Fed. 136.

of the defendants to which were engaged in an action between themselves in the same court concerning the same matter,[11] although in England such a mode of service might have been allowed.[12] Nor, it seems, can a subpœna thus be served under a bill to set aside a sale made under a decree of the same court to which persons are joined as defendants who were not parties to the former suit.[13] Substituted service of a subpœna to appear and answer to a cross-bill has been allowed,[14] but not when the cross-bill sought to introduce new and distinct matters into the original suit.[15] The safer practice when a defendant to a cross-bill cannot be served personally seems to be to procure an order staying his proceedings in the original cause until he answers the cross-bill.[16] Substituted service of process or notice upon a petition of intervention is allowed in the same cases in which it would be allowed upon a cross-bill.[17] Substituted service has also been allowed in England upon the agent of a defendant beyond the jurisdiction, who had authority to represent the latter with respect to the property which was the subject of the suit.[18] When substituted service is wished, an order must be obtained that service upon the attorney employed in the former

[11] Herndon v. Ridgway, 17 How. 424, 15 L. ed. 100. See § 88.

[12] Martinius v. Helmuth, G. Cooper. 248; Stevenson v. Anderson, 2 Ves. & B. 407. See § 88.

[13] Pacific R. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. 772; s. c., on appeal, 111 U. S. 505, 522, 28 L. ed. 498, 504.

[14] Johnson R. R. S. Co. v. Union S. & S. Co., 43 Fed. 331, § 201; Kingsbury v. Buckner, 134 U. S. 650, 676, 33 L. ed. 1047, 1057; Lowenstein v. Glidewell, 5 Dill. 325; Sawyer v. Gill, 3 Woodb. & M. 97; Segee v. Thomas, 3 Blatchf. 11; Hitner v. Suckley, 2 Wash. 465; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown. Ch. C. 478; Waterton v. Croft, 5 Simons, 502; *infra*, § 201.

[15] Rubber Co. v. Goodyear, 9 Wall. 307; Heath v. Erie Ry. Co., 9 Blatchf. 316; Lowenstein v. Glidewell, 5 Dillon 325; Ledbetter v. Mandell, 141 App. Div. (N. Y.) 556, aff'd 205 N. Y. 537. But see Kingsbury v. Buckner, 134 U. S. 650, 676, 33 L. ed. 1047, 1057. See *infra*, § 201.

[16] Sawyer v. Gill, 3 W. & M. 97; Segee v. Thomas, 3 Blatchf. 11; Hitner v. Suckley, 2 Wash. 465; Anderson v. Lewis, 3 Brown Ch. C. 429; Gardiner v. Mason, 4 Brown Ch. C. 478; Watertown v. Croft, 5 Simons, 502.

[17] Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. 850; *infra*, § 259.

[18] Hobhouse v. Courtney, 12 Sim. 140; Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. 850; Gasquet v. Fidelity T. & S. V. Co., C. C. A., 57 Fed. 80; Gregory v. Pike, 79 Fed. 520.

suit or action shall be deemed good service.[19] If service be made upon the attorney without such an order having been obtained, it may be set aside,[20] and all subsequent proceedings will be void.[21] The motion for such an order ordinarily may be *ex parte*.[22] It must be supported by an affidavit, made by the plaintiff or by some person having personal knowledge of the facts therein stated, setting forth the reasons why such service is necessary and verifying the allegations of the bill.[23] Written admissions of the defendant may, however, be sufficient to support the motion without such affidavit.[24] A previous request of the attorney and his refusal to accept service of the subpœna are not a necessary preliminary to such a motion.[25] Where the bill is demurrable for want of equity, the motion for substituted service may be denied.[26] Where the order has been improvidently made, it may be set aside on motion at the same term.[27]

§ 166. Statutory service of a subpœna. The statutes of the United States, which in this respect are analogous to those of England,[1] provide: "That when in any suit, commenced in any district court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practica-

19 Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. 772; s. c., 1 McCary. 647; Daniell's Ch. Pr. (2d Am. ed.) 502.

20 Ibid.

21 Gregory v. Pike, 79 Fed. 520.

22 Daniell's Ch. Pr. (2d Am. ed.) 502. But see Crew v. Martin, 1 Fowler Ex. Pr. 225.

23 Pacific Ry. Co. of Mo. v. Mo. Pac. Ry. Co., 3 Fed. 772; s. c., 1 McCrary, 647; Delaney v. Wallis, 3 Brown's C. C. 12; Stephen v. Cini, 4 Ves. 359; Kenworthy v. Accunor, 3 Madd. 550.

24 Royal Exch. Ins. Co. v. Ward, 1 Fowler Ex. Pr. 225.

25 French v. Roe, 13 Ves. 593.

26 Muhlenburg County v. Citizens' Nat. Bank, 65 Fed. 537.

27 Fidelity T. & S. D. Co. v. Mobile St. Ry. Co., 53 Fed. 850.

§ 166. 1 2 Wm. IV. ch. 33; 4 & 5 Wm. IV. ch. 82.

ble, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State said suit may be brought in either district in said State: *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the courts shall deem just; and according to law."[2] It seems that this statute applies to the

[2] Jud. Code, § 57, 36 St. at L. 1087. A similar method of service is authorized in bankruptcy, in case personal service cannot be made. 30 St. at L., § 18, pp. 544, 551; *infra*, § 97. All statutes which authorize proceedings against absent defendants and unknown heirs upon service by publication must be strictly followed. Hunt v. Wickliffe, 2 Pet. 201; Boswell v. Otis, 9 How. 336, 13 L. ed. 164. In Fanning v. Krapfl, 61 Iowa, 417, 420, the court said: "A published notice is not necessarily sufficient if it is such that the defendant, upon actually seeing it, would probably conclude that it was intended for him. The office of the notice is in part to give the pendency of the action notoriety. It should be such that others than the defendant, seeing it and

knowing the defendant, or knowing of him, would not probably be misled by it as to the person for whom it was intended."

In Karr v. Karr, 19 N. J. Eq. 427, the court said: "Two substantial parts of the notice are that it shall *not* be entitled in the cause and *shall* be directed to the defendant. The notice published is entitled in the cause and is not directed to the defendant, although he was named in the title." In Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424, it was held that the publication by an Illinois court of a notice to the "unknown holders and owners of bonds issued by the town of Pana" was insufficient to acquire jurisdiction over non-resident bondholders. In Meyer v. Kuhn, 65 Fed. 705, C. C. A., per Fuller, C. J., it was held that publication of a summons against "Sarah E. Meyers, and the unknown heirs of Henry Meyers, deceased," was *insufficient* to acquire jurisdiction over Elizabeth Meyer, who was the executrix and devisee of Henry Meyer, deceased, and was so described in the bill. That a judgment against George W. Leslie was not affected by a partition suit in which the judgment creditor was named in service by publication as George H. Leslie. In Hardester v. Sharretts, 84 Md. 146, 34 Atl. 1122, that where a bill was filed "against the unknown heirs of the children of Benjamin Hardester, deceased," a publication summoning the children of Abraham Hardester was insufficient, although they were the persons referred to in the bill and came within that description, Abraham being the son of Benjamin. In Purdy v. Henslee, 97 Ill. 389, that a publication addressed to "the unknown heirs and legal representatives of Thomas Osborn, deceased," was insufficient to bring the heirs at law of Susanna Osburn before the court, although her heirs at law were the same as those of Thomas. In Ferriss v. Louis, 2 Tenn. Ch. 291, that a publication against the unknown heirs of Doolin did not bring before the court Doolin's devisees in remainder. In Corrigan v. Schmidt, 126 Mo. 304, 28 S. W. 874: that service by publication against "Owen Corrigan" and "Elisha Corrigan" did *not* bind John Owen Corrigan and Elizabeth Alicia Corrigan. In Colton v. Rupert, 60 Mich. 318, 27 N. W. 520, that a publication against "Grant B. Hunt" did not bind Garrett B. Hunt. In Entrekin v. Chambers, 11 Kan. 368, that service by publication against "Robert Brimford" did not bind Robert Binford. In Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44, that a publication against "M. B. Miller" did not bind M. B. Millen, although the tract books of the county gave the name of the landowner as Miller. In Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, that notice of the sale for taxes of the property of "Ida J. Hawthorn" gave no jurisdiction over the property of Ida J. Hanthorn. In Gonzalia v. Barelsman, 143 Ill. 634, 32 N. E. 532, that an affidavit referring to "Fred Meyers" could not be construed as applicable to Fred Meyer. But see Smurr v. State, 88 Ind. 504. In Detroit v. Detroit City Ry. Co., 54 Fed. 1, that where the advertisement named the defendant as "The Washington Trust Co.," a Michigan court did not acquire jurisdiction over "The Washington Trust Co. of the City of New York."

But in Steinmann v. Strimple, 29 Mo. App. 478, it was held that an order intended for Benjamin F. S. was *sufficient* when directed to

District Court for Porto Rico in a case where the same has general jurisdiction.[3]

The statute applies, although there is but one defendant.[4] It is no defense to such a suit that neither of the defendants thus served, nor the plaintiff, is a resident of the district.[5] Nor, it has been held, that the property in question has been attached by a State sheriff.[6] Process can thus be served in an action of ejectment;[7] in a suit to foreclose a railway,[8] or other mortgage,[9] but not so as to justify a decree for the deficiency

Frank S., that being the name by which Benjamin was usually known. In Lane v. Innes, 43 Minn. 137, 45 N. W. 4, that a change of the name of "Berlah M. Plimpton" to "Beulah M. Plimpton" was not fatal. That a partition sale was valid when the parties had been designated, by publication, under thirteen fictitious names, as "being fictitious, and being intended to designate the wife, if any, of the said Lawrence Kelly, and if he be dead, his widow, heirs at law, devisees, and their legal representatives, and their wives, widows, or husbands, if any, and the heirs at law, devisees, and legal representatives of any who may be dead." Snyder v. Parezo, 151 App. Div. (N. Y.) 110. In Emery v. Kipp, 154 Cal. 83, 19 L.R.A.(N.S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792, 97 Pac. 17, that a judgment quieting the title to land deeded to a woman under the name of Louisa Munro was not void because, when sued, she was married and was known as Madeline Louisa Munro Emery, the record of her marriage designating her as Madeline L. Munro. D'Autremont v. Anderson Iron Co., 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 15 Ann. Cas. 114. In Green v. Myers (Mo. App.), 72 S. W. 128, that Seibert and Sibert are *idem sonans*, and the variance between them immaterial. In Gottlieb v. Alton Grain Co., 87 App. Div. (N. Y.) 380, a judgment against W. B. Gottlieb was enforced by an action in another State against William B. Gottlieb. In White v. McClellan, 62 Md. 347, that the omission of a middle initial of a party's name did not invalidate the notice; and in Fanning v. Krapfl, 61 Iowa, 417; s. c., 68 Iowa, 544, 14 N. W. 727, 16 N. W. 293, 26 N. W. 133, and Buchanan v. Roy's Lessee, 2 Ohio St. 257, that the publication was sufficient where the names were incorrectly spelled but they were accompanied by another description which made the identification clear.

[3] Perez v. Fernandez, 220 U. S. 224, 55 L. ed. 443.

[4] Ames v. Holderbaum, 42 Fed. 341; Wheelwright v. St. L., N. O. & O. C. Tr. Co., 50 Fed. 709; *supra*, § 61.

[5] Ibid.

[6] Wheelwright v. St. L., N. O. & O. C. & Tr. Co., 50 Fed. 709; *supra*, § 56.

[7] Spencer v. Kansas City S. F. Co., 56 Fed. 741.

[8] Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co., 44 Fed. 115.

[9] Du Pont v. Abel, 81 Fed. 534.

against a mortgagor, who does not appear;[10] in a suit to foreclose an attorney's lien upon personalty[11] a stockholders' lien upon the books and funds of a foreign corporation, after its dissolution, in the State of its domicile.[12] In a partition suit[13] and a suit to quiet title;[14] for example, a suit by the United States to cancel land patents,[15] or by a private individual to cancel a deed,[16] or by stockholders to set aside a judgment in the district against a foreign corporation obtained by non-residents,[17] or to cancel stock[18] and bonds,[19] or by claimants to shares of stock in a domestic corporation to set aside an unlawful transfer of their shares and enforce their right to new certificates,[20] although the stock certificates and bonds sought to be cancelled

10 Ibid.

11 Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208; reversing on another point C. C. A., 148 Fed. 169; modifying and affirming 136 Fed. 689.

12 Kent v. Honsinger, 167 Fed. 619.

13 German Sav. & Loan Soc. v. Tull, C. C. A., 136 Fed. 1.

14 U. S. v. Southern Pac. Ry. Co., 63 Fed. 481; U. S. v. American Lumber Co., 80 Fed. 309; Evans v. Charles Scribner's Sons, 58 Fed. 303; Duff v. First Nat. Bank, 13 Fed. 65; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201; Citizens' Sav. & Trust Co. v. Illinois Cent. R. Co., 205 U. S. 46, 51 L. ed. 703; Miller v. Ahrens, 150 Fed. 644; Evans v. Charles Scribner's Sons, 58 Fed. 303. See Canton Roll & Machine Co. v. Rolling Mill Co. of America, 155 Fed. 321; Gage v. Riverside Trust Co., 156 Fed. 1002; Schultz v. Diehl, 217 U. S. 594, 54 L. ed. 896; Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. ed. 647; State Nat. Bank v. Syndicate Co., 178 Fed. 359; Howard v. Nat. Telephone Co., 182 Fed. 215; Sohege v. Singer Mfg. Co., Ch. N. J., Nov. 1907. As to the validity of statutes authorizing similar methods of service in the State courts, see Hart v. Sanson, 110 U. S. 151, 28 L. ed. 101; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520.

15 U. S. v. Southern Pac. Ry. Co., 63 Fed. 481; U. S. v. American Lumber Co., 80 Fed. 309.

16 Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201; Citizens' Sav. & Trust Co. v. Illinois Cent. R. Co., 205 U. S. 46, 51 L. ed. 703; Miller v. Ahrens, 150 Fed. 644; Evans v. Charles Scribner's Sons, 58 Fed. 303. See Canton Roll & Machine Co. v. Rolling Mill Co. of America, 155 Fed. 321; Gage v. Riverside Trust Co., 156 Fed. 1002.

17 Schultz v. Diehl, 217 U. S. 594, 54 L. ed. 896.

18 Howard v. Nat. Telephone Co., 182 Fed. 215.

19 State Nat. Bank v. Syndicate Co., 178 Fed. 359.

20 Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. ed. 647; Sohege v. Singer Mfg. Co., Ch. N. J., Nov. 1907. See Merritt v. Am. Steel Barge Co., 79 Fed. 228; Ryan v. Seaboard R. Co., 83 Fed. 889. *Contra*, Kilgour v. N. O. G. L. Co., 2 Woods, 144.

were held by non-residents outside of the jurisdiction; but not where the corporation is domiciled without the district even it has been held, if it appears therein, when the stock is held by a non-resident defendant;[21] nor, it has been held, in a suit by a subscriber to a syndicate, to enforce his right to stock, in which the managers had invested the syndicate funds.[22] An absent judgment debtor may thus be served in a suit by the creditor to appropriate his assets;[23] but the statute does not authorize a simple contract creditor to maintain a creditor's bill, to set aside a fraudulent conveyance of property.[24] Process may thus be served in a suit by a receiver to adjust equities between himself and non-resident defendants, when a resident defendant has obtained for his own benefit, as well as theirs, a judgment within the jurisdiction, which he is seeking to enforce against the fund in the receiver's hands.[25] In a suit by the creditors of a corporation to set aside a conveyance of its land and a mortgage of its personalty, and also to obtain a dissolution of the corporation and a receiver.[26] In a suit by a bondholder, to restrain the trustee of his mortgage from paying to the mortgagor, in fraud of his rights, the proceeds of the sale of land, which, by the terms of the mortgage, should be used as a sinking fund for the redemption of the bonds.[27] And so in a suit to compel specific performance of a contract to sell real estate in a State whose laws make a decree, where the defendant does not appear, as effectual as a conveyance by him;[28] but where there was no such statute it was held that process could not thus be served.[29] Nor, it has been held, where the relief sought requires the performance, by the non-resident defendant, of a personal act, such as the acceptance of a building and payment

21 McKane v. Burke, 132 Fed. 688.

22 Jones v. Gould, C. C. A., 149 Fed. 153; affirming 141 Fed. 698.

23 Brigham v. Luddington, 12 Blatchf. 237. Compare Picquet v. Swan, 5 Mason, 35; s. c., 5 Mason, 561.

24 Canton Roll & Machine Co. v. Rolling Mill Co., 155 Fed. 321.

25 Brown v. Pegram, 143 Fed. 701.

26 Mellen v. Moline Iron Works, 131 U. S. 352, 33 L. ed. 178; Single v. Scott Paper Mfg. Co., 55 Fed. 553, 557.

27 Pollitz v. Farmers' Loan & Trust Co., 39 Fed. 707.

28 Morrison v. Marker, 93 Fed. 692.

29 Municipal Inv. Co. v. Gardiner, 62 Fed. 954; Nelson v. Husted, 182 Fed. 921. See Spurr v. Scoville, 3 Cushing (Mass.) 578. But see Sohege v. Singer Mfg. Co., Ch. N. J., Nov. 1907.

for the same, which cannot, like the execution of a deed, be performed on his behalf by a master.[30] It has been suggested that a lien on partnership assets may be thus enforced.[31] The phrase, "claim to * * * property," is used in the statute in contrast to liens or encumbrances upon the property, and relates only to claims in the nature of an assertion of ownership or proprietory interest, or other direct right or claim to the property itself.[32] The statute does not apply to all suits

[30] York County Sav. Bank v. Abbot, 139 Fed. 988. See § 64, *supra*, § 441, *infra*.

[31] Jackson v. Hooper, 171 Fed. 597.

[32] Ladew v. Tennessee Copper Co., 179 Fed. 245, 251, per Sanford, J.: "There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute. The statement in Shainwald v. Lewis (D. C.) 5 Fed. 310, 317, that by the words 'legal or equitable lien or claim against real or personal property' Congress 'intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity' which is cited in 1 Rose's Code, Fed. Pro. § 856, note C, as authority for a similar statement, was purely obiter; the only point involved in the case being that Rev. St. § 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word 'claim' given by Mr. Justice Story in Prigg v. Pennsylvania, 16 Pet. 536, 615, 10 L. ed. 1060, as 'a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty,' this definition being given in a case involving the construction of a statute providing that slaves should be delivered up 'on claim of the party' to whom their service was due; the meaning of the word 'claim' as used in a statute of this character in reference to the 'claim of' one person upon another to do a certain thing, being manifestly different from its meaning as used in the act of 1875 in reference to the claim of one person 'to' the property of another. Evidently its meaning as used in the act of 1875 in the phrase a 'claim to . . . property' is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in Stowel v. Zouch, 1 Plowd. 359, that:

'A claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him.' On the whole, I am of the opinion that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the 'subject,' and as the words 'claim to . . . property' are evidently used in contrast to liens or encumbrances upon prop-

of a local nature,[33] nor to a suit in equity to enjoin a nuisance.[34] Nor to a suit to set aside a transfer of insurance policies, issued by a foreign insurance company and not within the district although secured by bonds within the district,[35] nor to a suit to collect an insurance policy, issued by a domestic corporation, when a necessary party, is a non-resident.[36] Nor to a suit by heirs against testamentary trustees, to recover a balance in the hands of the defendants.[37] Nor to a suit upon a bond, given to release an attachment by a State court.[38] Nor to a suit to establish and enforce a right of membership in the Associated Press, in a district where the latter corporation is not domiciled; although the right is to be exercised in such district.[39] Nor to a suit to cancel a promissory note.[40] It has been held that a subpœna cannot thus be served when the main object of the bill is for an accounting by an absent and non-resident defendant, although there is also a prayer for the appointment of a receiver of property within the district;[41] but it seems that service can thus be made in a suit to establish a trust in real estate although the bill also prays an accounting.[42] Process cannot thus be served in a suit to remove a cloud upon the title to a patent-right although the official letters-patent evidencing the patent-right are within the jurisdiction.[43] The property affected must be actually, and not merely constructively, within the district.[44] The court within the dis-

erty and are the only words in the section under which a claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself," affirmed Ladew v. Tennessee Copper Co., 218 U. S. 357, 54 L. ed. 1069.

[33] Ladew v. Tennessee Copper Co., 218 U. S. 357, 54 L. ed. 1069; affirming 179 Fed. 245.

[34] Ibid.

[35] Evans v. Charles Scribner's Sons, 58 Fed. 303.

[36] Stockbridge v. Phœnix Mut. Life Ins. Co., 193 Fed. 558.

[37] Fayerweather v. Ritch, 89 Fed. 385.

[38] Filer & Stowell Co. v. Rainey, 120 Fed. 718.

[39] Lawrence v. Times Printing Co., 90 Fed. 24.

[40] Manning v. Berdan, 132 Fed. 382.

[41] Ellis v. Reynolds, 35 Fed. 394. But see Porter Land & Water Co. v. Baskin, 43 Fed. 323.

[42] Porter Land & Water Co. v. Baskin, 43 Fed. 323.

[43] Non-Magnetic Watch Co. v. Association H. S. of Geneva, 44 Fed. 6.

[44] Chase v. Wetzlar, 225 U. S. 79, 56 L. ed. 990.

trict where a will was probated cannot thus acquire jurisdiction of a suit against an absent executor, who has removed the funds from the State;[45] but after the jurisdiction of the Federal court has attached, it seems that it cannot be defeated by an order of the State court directing such a removal.[46] The existence of property within the district should be stated positively and not by inference.[47]

It has been held at Circuit: that an order in pursuance of this statute may be obtained immediately on filing the bill, upon proof by affidavit that the defendant does not dwell within the district, and cannot be served or found therein;[48] that there is need in such case of a previous attempt to serve a subpœna within the district;[49] that the day named for his appearance need not be one of the rule-days of the court;[50] that personal service of the order must be made in all cases where the residence of the absent defendant is known or can be ascertained, or service upon him can be made within a reasonable time and by the exercise of reasonable diligence; that its service by publication can only be authorized upon proof by affidavit of the facts showing that personal service without the jurisdiction is impracticable;[51] that the order itself must be served; and

[45] Ibid.

[46] Ingersoll v. Coram, 211 U. S. 335, 359, 53 L. ed. 208, 225; reversing on another point C. C. A., 148 Fed. 169; modifying and affirming 136 Fed. 689.

[47] Jackson v. Hooper, 171 Fed. 597, 598.

[48] Forsyth v. Pierson, 9 Fed. 801; U. S. v. American Lumber Co., 80 Fed. 309. But see Bronson v. Keokuk, 2 Dill. 498.

[49] Ibid.

[50] Forsyth v. Pierson, 9 Fed. 801.

[51] Bronson v. Keokuk, 2 Dill. 498; Batt v. Proctor, 45 Fed. 515. *Cf.* Marx v. Egner, 180 U. S. 314, 45 L. ed. 547; Hicks v. Crawford Coal & Iron Co., 190 Fed. 334. In Jacob v. Roberts, 223 U. S. 261, 264, 265, 56 L. ed. 429, 431, the following affidavit in proceedings in the State court which were attacked collaterally, when it had been supported by a sheriff's return that the defendant was not found within the district, was held to be sufficient: "That the cause of action is fully set forth in his verified complaint on file herein; that said defendants, or either or any of them, after due diligence, cannot be found within this State, and this affiant, in support thereof, states the following facts and circumstances: That affiant, for the purpose of finding said defendants and ascertain their place of residence, has made due and diligent inquiry of the old residents of the City of San Diego, the former neighbors of said defendants, and is informed by D. Choate, who has lived in the City of San Diego over twenty-five years, that he thinks the de-

that the requirements of the statute are not met by service of a subpœna by the marshal of the other district, in accordance with an order so directing, made by the court where the suit

fendants are not within the State of California, and he does not know of their residence and has not heard anything of them, or either of them or of their residence or post-office address, for more than twenty years, and this affiant is informed by George W. Hazzard, who has lived in San Diego for over twenty-five years, that he has no knowledge as to the whereabouts of the said defendants, or either of them. Plaintiff also made inquiry of Ed. Dougherty, who is an old resident of San Diego, and said Ed. Dougherty informed plaintiff that he did not know the address or residence or where the defendants, or either of them, could be found, and did not believe that they were in the State." "The affidavit also stated that inquiry was made of certain county, and city officers and that they all—'stated to affiant that they did not know the residence of the defendants, or either of them, their post-office address or where they could be found; and none of the above-named parties had heard of the post-office address or residence of the defendants, or either of them, since they have resided in the said city of San Diego. The affiant has made other diligent inquiry to find said defendants, or either or any of them, and has not been able to find them or any of them within—. The affiant has no knowledge of the residence or post-office address of the defendants or either of them or where the defendants, or either of them, could be found. This affiant, therefore, says that personal service of said summons cannot be made on the defendants—Thomas E. Jacob, Thomas Hobson, Edward Hobson, Jacob Hobson and Frank Hobson, or either or any of them.'" The court said (267): "We have set out the affidavit. It shows inquiry of the 'whereabouts of plaintiffs in error of their former neighbors and other residents of San Diego. One of them replied that he had not heard of them, of their residence or post-office address, for over twenty-five years. Another also had not heard from them and did not believe they were in the State. Inquiry was also made of nineteen county officers and three state officers, sheriffs, county clerks; tax collectors, county and state; assessors, county and state, and of the postmasters of the State. Neighbors, residents and officers who, in the intercourse and business of life would almost necessarily come in contact with plaintiffs in error or hear from them, had no knowledge of them. It may, however, be said, and indeed is said, that other parts of the State were not searched, and that this was necessary, as the process of the court could run to every county in the State. The requirement is extreme and we are cited to no cases in which it is decided to be necessary. The affidavit shows besides that defendant in error made diligent inquiry to find plaintiffs in error and had no knowledge of their residence or post-office address or of either of them or where they or either of them could be found. We think plaintiffs in error were afforded due process."

is pending.[52] The affidavit should state the known places of residence of the absent defendants, and show that diligence has been used to ascertain the places of residence which are unknown.[53] The fact that it would be very expensive to make personal service upon the absent defendant whose residence was known was held no ground for allowing service by publication.[54] If the absent defendant reside in another district of the United States, the safer practice is to obtain an order directing the marshal of that district to serve him.[55] A misnomer of a defendant, thus served, who does not appear, will invalidate the whole proceedings.[56] A defect in personal service, or the fact that personal service was obtained by fraud, will not prejudice proceedings regularly taken under this statute.[57] This statute does not change the law as to the difference of citizenship essential to jurisdiction.[58] It has been doubted whether it can be applied to a suit removed from a State court.[59] Compliance with State statutes providing for service upon non-residents, by publication[60] or by attachment,[61] will not give a Federal court jurisdiction either in law or equity. An order of a Federal court for such service is, when attacked collaterally, at least *prima facie* evidence of the existence of the jurisdictional facts.[62] Upon a motion to vacate the order for substituted service, the sufficiency of the bill may be considered and the order vacated, where the bill shows no cause for relief in equity; although the subject matter is within the statute.[63] It has been held: that the order for service may be set aside

52 Jennings v. Johnson, C. C. A., 148 Fed. 337; Kent v. Honsinger, 167 Fed. 619.

53 Batt v. Procter, 45 Fed. 515. An affidavit sworn to four months previously was held to be insufficient. Spreen v. Delsignore, 94 Fed. 71.

54 Batt v. Procter, 45 Fed. 515.

55 Bronson v. Keokuk, 2 Dill. 498; Forsyth v. Pierson, 9 Fed. 801.

56 Meyer v. Kuhn, 65 Fed. 705.

57 Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608.

58 Tug River Coal & Salt Co. v. Brigel, 67 Fed. 625.

59 Adams v. Heckscher, 80 Fed. 742, 744.

60 Bracken v. Union Pac. Ry. Co., C. C. A., 75 Fed. 347; s. c., 56 Fed. 447.

61 U. S. v. Brooke, 184 Fed. 341.

62 Woods v. Woodson, C. C. A., 100 Fed. 515.

63 Canton Roll & Machine Co. v. Rolling Mill Co., 155 Fed. 321; Gage v. Riverside Trust Co., 156 Fed. 1002.

as to part of the bill and left in force as to the remainder.[64] The right of the defendant to appear and defend within a year is absolute.[65] It is not lost because he had knowledge of the proceedings.[66] The court cannot impose any other condition than that prescribed by the statute, namely, the payment of costs.[67] An order requiring the application to show a meritorious defense to the bill is erroneous.[68] Where the defendants, who have been served by publication, appear and defend upon the merits, the suit is converted from a proceeding *in rem* to a suit *in personam*.[69]

The Act of June 29, 1906, which authorizes proceedings to cancel certificates of citizenship, provides: "If the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."[70].

In the eastern district of Louisiana, it was held to be sufficient to serve the notice upon an attorney-at-law, appointed *curator ad hoc* to represent an absentee, without publication.[71]

§ 167. Exemptions from service of subpœna or other process, legal or equitable, other than arrest. Chief Justice Marshall, in the course of the trial of Aaron Burr, ordered that a *subpœna duces tecum* should issue against President Jefferson. Jefferson, however, refused to obey the subpœna, while expressing his perfect willingness to furnish the paper desired, if requested in what he considered a proper way. The dispute went no farther.[1] Subsequently, a motion was made for leave to file a bill in the Supreme Court, praying for an injunction against President Johnson to restrain him from executing the reconstruction laws. The Attorney-General then took the position that the President was not amenable to process; but that point was not then and has not since been

[64] Evans v. Charles Scribner's Sons, 58 Fed. 303.

[65] Perez v. Fernandez, 220 U. S. 224, 55 L. ed. 443.

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Beamer v. Werner, C. C. A., 159 Fed. 99. See Ingersoll v. Coram, 136 Fed. 689, 692, 693; affirmed 211 U. S. 335, 53 L. ed. 208, which reversed C. C. A., 148 Fed. 169.

[70] Ch. 3592, § 15, 34 St. at L. 596, 601, Comp. St. Supp. 1909, p. 485.

[71] U. S. v. Ellis, 185 Fed. 546.

§ 167. [1] Burr's Trial.

decided.[2] On the trial of Guiteau for the murder of President Garfield, a written statement signed by President Arthur was admitted in evidence by consent without his personal attendance.[3] No other officer or person has been claimed to be above the law. The Federal Constitution provides that Senators and Representatives "shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."[4] This has been construed at Circuit to exempt them from service of process, unaccompanied by arrest of the person, when on their way to attend a session of Congress;[5] and it has been further held that such exemption is not lost by a slight deviation from the most direct road to the capital.[6] In a State court the privilege has been extended to members of a Constitutional Convention.[7] In certain cases individuals are temporarily exempt from the service of process. A person temporarily and voluntarily with-

[2] Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437. See Jefferson's Works, vol. v, p. 102.

[3] Guiteau's Trial, 741, 896. In Coler v. Brooklyn Eagle, New York Supreme Court (Kings County), the plaintiff requested President Roosevelt to give his testimony. The following answer was received: "Hon. Bird S. Coler; The President of the United States does not testify in court nor does he give evidence by deposition. Wm. Loeb, Jr., Secretary." Plaintiff then applied for an order to show cause why a commission should not issue. His application was denied by Thomas, J., as follows: "The order to show cause is denied for the following reasons: First, the papers do not show that the evidence sought relates to the plaintiff. This is technical. Second, the Executive of a sovereign nation may, with the highest right and dignity, decide whether he will lay aside his official duties to become a witness in the court of another jurisdiction and if the evidence pertain to his duties as a Governor of a State some eight years earlier his refusal to testify would be doubly justified. In the present instance, through his secretary, he has made a statement tantamount to such refusal and the issuance of a commission would be a useless if not indecorous act, inasmuch as he is the Commander-in-Chief of the army and navy of the United States, and in effect paramount executive authority in the District of Columbia, and his refusal could not and should not be gainsaid. The law and its history may be found in the appeal of Hartranft 85 Penn. 433, 27 American Reporter 667. See also Rice vs. Austin 19 miscellaneous 103." (N. Y. Sun, February 10, 1909.)

[4] Const., art. I, § 6.

[5] Miner v. Markham, 28 Fed. 387.

[6] Miner v. Markham, 28 Fed. 387.

[7] Bolton v. Martin, 1 Dallas, 296, 1 L. ed. 144.

in the district for the purpose of attending, in a State[8] or Federal[9] court, either as witness,[10] party,[11] attorney, or counsel,[12] a trial or other proceeding,[13] civil or criminal,[14] including the argument of a demurrer,[15] or attendance before a referee in bankruptcy,[16] is, while there, exempt from the service of process *eundo, morando, et redeundo.* Service upon a foreign corporation by delivering the process to its secretary while attending court as a witness in the corporation's liti-

[8] Juneau Bank v. McSpedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568.

[9] Parker v. Hotchkiss, 1 Wall. Jr. 269; U. S. v. Bridgman, 8 Am. L. Rec. 541; Brooks v. Farwell, 2 McCrary, 220; s. c., 4 Fed. 167; Bridges v. Sheldon, 7 Fed. 17; Matthews v. Puffer, 10 Fed. 606; Larned v. Griffin, 12 Fed. 590.

[10] Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35, and cases there cited; Kauffman v. Kennedy, 25 Fed. 785. A non-resident voluntarily came to another jurisdiction to plead to an indictment against him, under which he might have been compulsorily removed, and on the same day was served with a subpœna requiring him to testify before a Grand Jury on a specified date. He then appeared and testified and was directed, without service of further process, to reappear eight days later. He then again attended and was not asked to testify further, but was privately interrogated by an Assistant District Attorney, and while leaving the Federal Building was served with a summons in a civil action brought in the State court. After removal of the case, the Federal court set aside the summons. Dwelle v. Allen, 193 Fed. 546. The Appellate Division of the New York court *held* subsequently to the contrary. Dwelle v. Allen, 151 App. Div. (N. Y.) 717.

[11] Parker v. Hotchkiss, 1 Wall. Jr. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Matthews v. Tufts, 87 N. Y. 568; Brooks v. Farwell, 2 McCrary, 220; s. c., 4 Fed. 167; Bridges v. Sheldon, 7 Fed. 17; Matthews v. Puffer, 10 Fed. 606; Larned v. Griffin, 12 Fed. 590. A service of process, made upon a party attending especially the trial of a case in another State, was set aside by a Federal court, although the suit was begun in a court of the State whose courts held such service good. Holt v. Wharton, C. C. A., 73 Fed. 392. But see Skinner & Mounce Co. v. Waite, 155 Fed. 828.

[12] Matthews v. Tufts, 87 N. Y. 568.

[13] U. S. v. Bridgman, 8 Am. Law Record, 541; Newton v. Askew, 6 Hare, 319; Matthews v. Tufts, 87 N. Y. 568; Parker v. Marco, 136 N. Y. 585, 20 L.R.A. 45, 32 Am. St. Rep. 770. But see Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988.

[14] U. S. v. Bridgman, 8 Am. L. Rec. 541. But see Jenkins v. Smith, 57 How. Pr. (N. Y.) 171.

[15] Kims v. Lant, 68 Fed. 436.

[16] Morrow v. U. H. Dudley & Co., 144 Fed. 441; Peet v. Fowler, 170 Fed. 618; U. S. v. Zavelo, 177 Fed. 536.

gation is invalid.[17] A similar exemption would probably be applied to any person while temporarily within the district in the discharge of a public duty.[18] The privilege of a witness does not exempt him from liability to service in a suit arising out of his acts upon that same visit to the jurisdiction.[19] Nor where the witness remains within the jurisdiction more time than is reasonably necessary for his attendance upon the case.[20] A Federal court will not punish as a contempt the arrest or service of process by a State court upon a foreign witness in attendance before it;[21] though it might perhaps upon *habeas corpus* discharge the witness from such arrest,[22] or punish the party who molested the witness by a stay of proceedings in a case pending between him and the witness in the Federal court.[23] In a recent case, a party to a suit in a Circuit Court of the United States was granted a protective writ to prevent, during his attendance upon the trial, his arrest as a lunatic under a previous order of a court of the State, when subsequently thereto his sanity had been adjudicated by a court of another State, where he then lived.[24] If a person be fraudulently enticed within the district and then served with process by those who thus induced him to come, the service may be set aside.[25] In one case, when a man was induced by a forged telegram to enter the jurisdiction of the court, the party who served him there was held to be presumptively connected with the fraud.[26] The service of a notice that a deposition will be

[17] American Woodenware Co. v. Stem, 63 Fed. 676.

[18] Lyell v. Goodwin, 4 McLean, 29; Nichols v. Horton, 14 Fed. 327; 4 McCrary, 560.

[19] Iron Dyke Copper Min. Co. v. Iron Dyke R. Co., 132 Fed. 208.

[20] Finch v. Gallagher, 25 Abb. N. C. (N. Y.) 404; 12 N. Y. Supp. 487; Marks v. La Societe, 19 N. Y. Supp. 470; Woodruff v. Austin, 37 N. Y. Supp. 22. But see Pope v. Negus, 3 N. Y. Supp. 796.

[21] Ex parte Schulenburg, 25 Fed. 211.

[22] Ex parte Hurst, 1 Wash. C. C. 186. See Ex parte Schulenburg, 25 Fed. 211, 212.

[23] Bridges v. Sheldon, 7 Fed. 17, 42; Ex parte Schulenburg, 25 Fed. 211, 212.

[24] Chanler v. Sherman, C. C. A., 22 L.R.A.(N.S.) 992, 162 Fed. 19.

[25] Union Sugar Refinery v. Mathiesson, 2 Cliff. 304; Steiger v. Boon, 4 Fed. 17; Blair v. Turtle, 5 Fed. 394; s. c., 23 Alb. L. J. 435; Baker v. Wales, 15 Abb. Pr. N. S. (N. Y.) 331; Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98, 105, 34 L. ed. 608, 611.

[26] Steiger v. Bonn, 4 Fed. 17.

taken in another city, when such deposition is subsequently taken in pursuance thereof, cannot be considered a fraudulent device to entice the party within the jurisdiction.[27] It has been held that a party to a suit in a State court is not on his journey there exempt from service of process in another State.[28] The privilege must be claimed promptly, or otherwise will be waived.[29] It was waived by a delay of nearly four months and a half, during which plaintiff had entered judgment by default;[30] but a delay of three weeks was held not to operate as a waiver.[31] A voluntary appearance waives the objection;[32] but, it has been held, that the objection may be raised by a plea in abatement;[33] even when united with a defense upon the merits.[34] It has been held: that the execution of a bail bond is not a waiver.[35] A judgment is not void so that it can be attacked collaterally, where process was served upon a party while attending a trial.[36]

[27] Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988.

[28] Holyoke & S. H. F. I. Co. v. Ambden, 21 L.R.A. 319, 55 Fed. 593.

[29] Matthews v. Puffer, 10 Fed. 606. 20 Blatchf. 233; Watson Town Nat. Bank v. Messenger, 6 Pa. Co. Ct. 609.

[30] Sebring v. Streyker, 10 Misc. (N. Y.) 289, 30 N. Y. Supp. 1053.

[31] Morrow v. U. H. Dudley & Co., 144 Fed. 441.

[32] Anonymous, 9 N. J. L. J. 166. But see Larned v. Griffin, 12 Fed. 590; Stewart v. Howard, 15 Barbour (N. Y.) 26; *infra*, § 170.

[33] Larned v. Griffin, 12 Fed. 590.

[34] Larned v. Griffin, 12 Fed. 590; Christian v. Williams, 35 Mo. App. 297; O'Loughlin v. Bird, 128 Mass. 600.

[35] Larned v. Griffin, 12 Fed. 590; Washburn v. Phelps, 24 Vt. 506; U. S. v. Edme, 9 S. & R. (Pa.) 147.

[36] Jaster v. Currie, 198 U. S. 144, 49 L. ed. 988; Walker v. Collins, 59 Fed. 70. A number of authorities are collected in an article by Mr. Alexander H. Robbins, 65 Cent. L. J. 105.

CHAPTER VII.

APPEARANCE.

§ 168. Definition of an appearance. An appearance is the process by which a defendant submits himself to the jurisdiction of the court. An appearance is either general or special. By a general appearance a defendant appears for all purposes in the suit. By a special appearance he appears solely for the purpose of objecting to the jurisdiction on account of a defect, omission, or irregularity in the service of the subpœna upon him, or perhaps for some other jurisdictional defect.[1] An appearance *gratis* is an appearance by a defendant who has not been served with process.[2] Under the former practice, a formal appearance was required.[3] The Equity Rules of 1912 make no provision for an appearance other than such as is implied by the law from the filing of an answer.

§ 169. What constitutes an appearance. The formal method of entering an appearance is to deliver to the clerk a præcipe, that is, a written direction, ordering him to enter the appearance of the defendant who subscribes it.[1] A defendant may appear in person[2] or by his attorney. No attorney-at-law can appear in a court of the United States unless authorized by a power of attorney, if he is not a member of the bar of such court.[3] The rules as to admission to the bar of the District and Circuit Courts vary with the different courts. It

§ 168. [1] National F. Co. v. Moline Malleable I. Works, 18 Fed. 863; Elliott v. Lawhead, 43 Ohio St. 171; Dorr v. Gibboney, 3 Hughes, 382; U. S. v. Am. B. T. Co., 29 Fed. 17.

[2] Daniell's Ch. Pr. (2d Am. ed.) 590–595.

[3] Eq. Rule 17 of 1841.

§ 169. [1] Daniell's Ch. Pr. (2d Am. ed.) 590, 591.

[2] U. S. R. S., § 747.

[3] *Ex parte* N. K. Fairbank Co., 194 Fed. 978; Matter of Joseph Wood, S. D. N. Y., explained *infra*, sections on "*Habeas Corpus*." It has been *held* that the court may admit an attorney to practice *nunc pro tunc* so as to validate a writ in the Federal court which he had previously obtained. Jewett v. Garrett, 47 Fed. 625.

is the usual practice to recognize in each District and Circuit Court a member of the bar of the Supreme Court of the United States as a member of the bar of such inferior court without requiring any formal order or motion for his admission.[4] The Circuit Court of the United States for the Southern District of New York[5] and the district of New Jersey have, in one or more cases refused to recognize members of the bar of the Supreme Court of the United States who had not been admitted to practice there. The taking of any proceeding,[6] other than a special appearance and a motion or plea founded thereupon, is equivalent to a general appearance and a submission of the pdefendant's person to the jurisdiction of the court.[7] Such are: the obtaining of an order extending the time "to plead, answer, or take such action as he may be advised,"[8] unless the application is for an order extending the time to appear, for the purpose of pleading to the jurisdiction, or otherwise;[9] a petition of intervention, even where the petitioner disclaims any intention to be made a party;[10] a special appearance, ac-

[4] See Goodyear D. V. Co. v. Osgood, 13 Off. Gaz. 325.

[5] See Matter of Joseph Wood, *infra*, §§ 466, 467.

[6] Jones v. Andrews, 10 Wall. 327, 19 L. ed. 935; Thornburgh v. Savage M. Co., 1 Pac. Law Mag. 267; Livingston v. Gibbons, 4 J. Ch. (N. Y.) 94, 99. It has been held in New York: that service of a notice of a motion to set aside an attachment, Wood v. Furtick, 17 Misc. (N. Y.) 561, and to make a complaint more definite and certain, Valentine v. Myers, 36 Hun (N. Y.) 201, and the obtaining of stipulations extending the time to answer by an attorney, who signs one of them as attorney for the defendant, Paine Lumber Co. v. Galbraith, 38 App. Div. (N. Y.) 68; Bell v. Good, 22 Civ. Proc. Rep. (N. Y.) 356, 46 N. Y. St. Rep. 572; Benedict v. Arnoux, 38 N. Y. Supp. 882, do not operate as a general appearance.

[7] New Jersey v. New York, 6 Pet. 323; Van Antwerp v. Hulburd, 7 Blatchf. 426, 440; Livingston v. Gibbons, 4 J. Ch. (N. Y.), 94; Blackburn v. Selma, M. & M. R. Co., 2 Flippin, 525; Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608; *infra*, § 170.

[8] Hupfeld v. Automaton Piano Co., 66 Fed. 788; Kneeland v. Austin, 2 Law Bull. (N. Y.) 56; Krause v. Averill, 66 How. Pr. (N. Y.) 97; Briggs v. Stroud, 58 Fed. 717; Midland Contracting Co. v. Toledo Foundry & Machine Co., C. C. A., 154 Fed. 797. In Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495, 498, it was so held when the defendants procured the order *ex parte* at chambers and did not serve the same, nor file it, until long after the removal of the case, when they procured a certified copy of the record.

[9] Waters v. Central Trust Co. (2d Ct.), C. C. A., 126 Fed. 469.

[10] Bowdoin College v. Merritt, 59

companied by an answer to the mirits,[11] at least when such answer does not formally object to the jurisdiction;[12] it has been held, a special appearance accompanied by a motion to set aside an order reviewing a judgment upon the ground of an irregularity in the proceedings;[13] obtaining a stay of proceedings pending a motion to vacate judgment;[14] the filing of a pleading before the court has passed upon the question of jurisdiction,[15] even when filed pending the decision of a motion to set aside the service of process,[16] at least when such pleading does not specifically take that objection,[17] and a motion to set aside the service because of want of jurisdiction over both the person and the subject-matter.[18] Where the deefndant, appearing specially for that purpose, moved to quash a return of service of a summons and prayed judgment whether it should be compelled to plead on the ground that it was a non-resident corporation, it was held that the appearance was not thereby made general.[19] It was so held of a motion to quash service upon a party in another district on the ground that "it appears from the face of the bill of complaint that the relief sought is of such nature that he cannot lawfully be called upon to defend

Fed. 6; Jack v. D. M. & Ft. D. R. Co., 49 Iowa, 627; Frank v. Wedderin, C. C. A., 68 Fed. 818.

[11] Caskey v. Chenoweth, C. C. A., 62 Fed. 712. See Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90; Hankinson v. Page, 31 Fed. 184.

[12] Wood v. Wilbert, 226 U. S. 384, 57 L. ed. —.

[13] Crawford v. Foster, 84 Fed. 939.

[14] Crane v. Penny, 2 Fed. 187.

[15] Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

[16] Barnes v. W. U. Tel. Co., 120 Fed. 550. *Cf.* Wetzel & T. Ry. Co. v. Tennis Bros. Co., C. C. A., 145 Fed. 458.

[17] See Eq. Rule 79; Wood v. Wilbert, 226 U. S. 384, 57 L. ed. —.

[18] Mahr v. Union Pac. R. Co., 140 Fed. 921.

[19] N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. Ry. Co., C. C. A., 54 Fed. 420; Am. Cereal Co. v. Eli Pettijohn C. Co., 70 Fed. 276. It is said in the Encyclopedia of Pleading and Practice, article II, section 626, that "where a party appears in court and objects to the jurisdiction of the court over his person, he must state specifically the grounds of objection; by not so stating them his appearance will be construed a general one, although he moves to dismiss on that ground." Citing Bell Bros. v. White Lake Lumber Co., 21 Neb. 525; Aultman v. Steinman, 8 Neb. 109; Bucklin v. Strickler, 32 Neb. 602; Layne v. Ohio River R. Co., 35 W. Va. 438.

against the same in this district."[20] A removal of a cause from a State to a Federal court is not a general appearance whether or not the petitioner states that he appears specially for the purpose of the removal only,[21] nor, it has been held, is a demand for service of a copy of the complaint, made by a defendant in person or by an attorney,[22] nor a motion to quash an attachment against a non-resident.[23] The later authorities hold that when an objection to the jurisdiction over the person of the defendant is filed with a formal appearance, the latter will be considered to be special and not general,[23] and that a party may file a special appearance with an objection to the jurisdiction over his person joined with other objections, such as a want of equity,[24] or want of jurisdiction over the subject-matter of the suit,[25] without submitting to the jurisdiction of the court.[26] The defense by its attorneys at its expense of a suit against another in pursuance of a contract with him is not an appearance by a foreign corporation; nor will it support an application by the plaintiff to make it a party.[27] It has been held: that after the question of jurisdiction has been properly raised, and the court has reserved its decision thereupon, a subsequent defensive proceeding, such as an appeal from an injunction order,[28] or the cross-examination of a witness, whose deposition is taken by the plaintiff, and stipulating that copies of letters and telegrams may be used by either party in lieu of the originals,[29] is no waiver of the objection. It has been

[20] Jones v. Gould, C. C. A., 149 Fed. 153.

[21] Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517; Wabash W. R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431; National Accident Society v Spiro, 164 U. S. 281, 41 L. ed. 435.

[22] Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495; Hoyt v. Ogden Portland Cement Co., (N. D. N. Y.) 185 Fed. 889.

[23] Davis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 217 U. S. 157, 54 L. ed. 708.

[24] Wood v. Wilbert, 226 U. S. 384, 386, 57 L. ed. —.

[25] Southern Pac. Co. v. Arlington Heights Fruit Co., C. C. A. 191 Fed. 101. But see Peale v. Marian Coal Co., 172 Fed. 639.

[26] Kelley v. T. L. Smith Co., C. C. A. 196 Fed. 466.

[27] Nelson v. Husted, 182 Fed. 921. But see Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90; Hankinson v. Page, 31 Fed. 184; Caskey v. Chenoweth, 62 Fed. 712.

[28] Bidwell v. Toledo Canal St. Ry. Co., 72 Fed. 10.

[29] Central Grain & Stock Exchange v. Board of Trade, C. C. A., 125 Fed. 463.

held: that a general appearance does not authorize an amendment of the complaint, so as to allege a different cause of action, upon which the defendant could not, without its consent, have been sued within the district.[30] A State statute providing that a special appearance for the sole purpose of questioning the jurisdiction is equivalent to a general appearance is constitutional;[31] and has been followed in collateral proceedings, in which a State judgment was offered in evidence,[32] but it does not bind the Federal courts at law or in equity even in a case originally instituted in a State court and brought into a court of the United States by removal.[33]

A special appearance, it would seem, is regularly made by special leave of the court obtained by an *ex parte* motion,[34] and it is the safer practice to accompany it with an undertaking by the defendant to abide by the further orders of the court.[35] Rule 22 of the Circuit Court of the Ninth circuit provides that any party appearing specially shall state in the paper which he serves and files that the appearance is special, "and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court he will appear generally in the cause," and that if such statements be not made "the appearance shall be deemed and treated as a general appearance." This has been upheld.[36] By styling a paper a special appearance the draftsman does not prevent the appearance from becoming general.[37]

30 Stonega Coal & Coke Co. v. Louisville & N. R. Co., 139 Fed. 271.

31 Western Wheeled Scraper Co., v. Gahagan, 152 Fed. 648.

32 York v. Texas, 137 U. S. 15, 34 L. ed. 604; Chinn v. Foster-Milburn Co., 195 Fed. 158.

33 Southern Pacific Co. v. Denton, 146 U. S. 202, 36 L. ed. 943; Mexican Central Ry. Co. v. Pinckney, 149 U. S. 194, 37 L. ed. 699; Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248; all of which arose under the Texan statute. Louden Machinery Co. v. Am. Mercantile Iron Co., 127 Fed. 1008, under the Iowa statute.

34 Thayer v. Wales, 5 Fisher's Pat. Cas. 448; Romaine v. Union Ins. Co., 28 Fed. 625. But see Dorr v. Gibboney, 3 Hughes, 382; National F. Co. v. Moline M. I. Works, 18 Fed. 863; York County Sav. Bank v. Abbot, 139 Fed. 988.

35 Romaine v. Union Ins. Co., 28 Fed. 625.

36 Mahr v. Union Pac. R. Co., 140 Fed. 921.

37 Crawford v. Foster, C. C. A., 84 Fed. 939; Caskey v. Chenoweth, C. C. A., 62 Fed. 712; Chicago Title & Trust Co. v. Newman, C. C. A., 187 Fed. 573.

An appearance *gratis* can only be made by a defendant named in the introduction or prayer for process in the bill, unless by consent of all the parties to the suit.[38]

§ 170. Effect of an appearance. A general appearance waives all objections to the form or manner of service of the subpœna,[1] including the objections that the defendant was not found and did not reside within the district[2] and that neither party resides within the district even where the case was originally brought in the District Court of the United States, and the jurisdiction depends upon diversity of citizenship.[3] Where the want of a residence essential to the jurisdiction appears upon the face of the plaintiff's pleading, the objection may be

[38] Attorney-General v. Pearson, 7 Simons, 290, 302; Kentucky S. Min. Co. v. Day, 2 Saw. 468, 473. See Anderson v. Watt, 138 U. S. 694, 34 L. ed. 1078; Beck & Pith Co. v. Wacker & B. B. & M. Co., C. C. A., 76 Fed. 10; Roberts v. Brooks, 71 Fed. 914.

§ 170. [1] Segee v. Thomas, 3 Blatchf 11; Goodyear v. Chaffee, 3 Blatch. 268; Hale v. Continental L. Ins. Co., 12 Fed. 359; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 639, 29 L. ed. 261, 263; Robinson v. Nat. S. Co., 12 Fed. 361; s. c., 20 Blatchf. 513; Buerk v. Imbacuser, 8 Fed. 457.

[2] Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 603, 36 L. ed. 829, 832; St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132, 35 L. ed. 659, 661; Sayles v. Northwestern Ins. Co., 2 Curt. 212; Shields v. Thomas, 18 How. 253, 259, 15 L. ed. 368, 370; Toland v. Sprague, 12 Pet. 300, 331, 9 L. ed. 1093, 1105; Provident Sav. L. Assur. Soc. v. Ford, 114 U. S. 635, 639, 29 L. ed. 261, 263; Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Int. Constr. & I. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401; Texas & Pac. Ry. Co. v. Saunders, 151 U. S. 105, 38 L. ed. 90. But see Noyes v. Canada, 30 Fed. 665; Reinstadler v. Reeves, 33 Fed. 308. Held, that a general appearance waived the objection that the defendants were not residents of the district. Lowry v. Tile M. & G. Ass'n, 98 Fed. 817; Fosha v. W. U. Tel. Co., 114 Fed. 701; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co., 133 Fed. 601; Mahr v. Union Pac. R. Co., 140 Fed. 921. *Cf.* Mexican Central Ry. Co. v. Robinson, C. C. A., 128 Fed. 1020. The above statement in the text was quoted with approval in McKane v. Burke, 132 Fed. 688.

[3] Matter of Moore, 209 U. S. 490, 52 L. ed. 904; Western L. & Sav. Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368, 52 L. ed. 1101; Horn v. Pere Marquette R. Co., 151 Fed. 626; Midland Contracting Co. v. Toledo Foundry & Machine Co., C. C. A., 154 Fed. 797; U. S. Gypsum Co. v. Sliwienska, C. C. A., 183 Fed. 688; Title Guaranty & Surety Co. v. U. S., C. C. A., 187 Fed. 98. See Southern Pac. Co. v. Denton, 146 U. S. 205, 36 L. ed. 945; *supra*, § 61.

raised by a motion to dismiss.[4] It is not waived by answer after a motion upon this ground has been overruled.[5] Where the complaint misstates the residence, the objection can be raised by answer.[6] It has been held that a general appearance waives the objection that an action by the trustee in bankruptcy was not brought in the proper district,[6a] and that a general appearance by a foreign receiver waives any question of the jurisdiction of the court to adjudicate concerning the internal affairs of a foreign corporation.[7] A general appearance does not waive an objection to the jurisdiction of the court upon the ground of a lack of the requisite difference of citizenship;[8] nor admit the validity of a writ of foreign attachment previously issued,[9] nor, it has been held, authorize an amendment of the plaintiff's pleading so as to set forth a new cause of action, upon which the defendant could not originally have been sued in the jurisdiction.[10] It has been held: That if a party joins with a special appearance and motion to set aside service of process a motion to dismiss the suit on another ground, he thereby waives his objection to the irregularity of service, and his proceeding is equivalent to a general appearance.[11] After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit upon the merits.[12] The court has power

4 Southern Pac. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943; Tice v. Hurley, 145 Fed. 391. But see *contra* Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

5 Leonard v. Merchants' Coal Co., C. C. A., 162 Fed. 885.

6 Leonard v. Merchant's Coal Co., C. C. A., 162 Fed. 885.

6a McEldowney v. Card, 193 Fed. 475.

7 Chicago Title & Trust Co. v. Newman, C. C. A., 187 Fed. 573.

8 Romaine v. Union Ins. Co., 28 Fed. 625; U. S. R. S. 1 Supp., pp. 137, 175; 18 St. at L. 470; Act of March 3, 1875, § 5.

9 Sackett v. Rumbaugh, 45 Fed. 23.

10 Western Wheeled Scraper Co. v. Gahagan, 152 Fed. 648.

11 Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608; Jones v. Andrews, 10 Wall. 327, 19 L. ed. 935; St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, 132, 35 L. ed. 659, 661; Edgell v. Felder, C. C. A., 84 Fed. 69. But see U. S. v. Am. Bell. Tel. Co., 29 Fed. 17; McGillin v. Claflin, 52 Fed. 657. But see Kelley v. T. L. Smith Co., C. C. A., 196 Fed. 466; see § 169 *supra*.

12 Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237, Mexican C. Ry. Co. v. Pinckney, 149 U. S. 194, 37 L. ed. 699. See § 169, *supra*.

to allow a general appearance to be changed by amendment to a special appearance,[13] or to be withdrawn.[14] This has been permitted when the original complaint has misstated the plaintiff's residence and that subsequently appears to be such as to defeat the jurisdiction;[15] and where a general appearance was made, after the service of a summons, but before a pleading was filed or served, and the defendant did not then know that the sole ground of jurisdiction was a diversity of citizenship;[16] but not ordinarily where, before appearing, a defendant had notice of the facts upon which he relies or reasonable opportunity to ascertain them and his employment in the case was not limited by his client.[17] Permission to withdraw a general appearance, if conditioned that it is granted without prejudice to the plaintiff, does not deprive the latter of rights founded upon a rule that a general appearance is a waiver of a defect in the service of process.[18] Otherwise it does.[19]

[13] U. S. v. Yates, 6 How. 605, 12 L. ed. 575; Hohorst v. Hamburg Am. P. Co., 38 Fed. 273.

[14] Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41; First Nat. Bank v. Cunningham, 48 Fed. 510; Chicago Title & Trust Co. v. Newman, C. C. A., 187 Fed. 573, 577.

[15] Hagstoz v. Mutual Life Ins. Co. of New York, 179 Fed. 569. See Leonard v. Merchants' Coal Co., C. C. A., 162 Fed. 885.

[16] Crown Cotton Mills v. Turner (S. D. N. Y.), 82 Fed. 337.

[17] Lamborn v. Louisiana Sugar Co., Mack, J., N. Y. L. J. Dec. 2, 1912.

[18] Graham v. Spencer, 14 Fed. 603.

[19] Graham v. Spencer, 14 Fed. 603, 607; First Nat. Bank of Denver v. Cunningham, 48 Fed. 510, 517.

CHAPTER VIII.

TAKING BILLS PRO CONFESSO.

§ 171. When a bill may be taken pro confesso. "It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*"[1] "If the answer in-

§ 171. [1] Eq. Rule 16. By the early practice of the civil law failure to appear on the day to which the cause was adjourned, was deemed to be a confession of the action; but later this rule was changed, so that the plaintiff, notwithstanding the defendant's contumacy only obtained judgment in accordance with the truth of the case as established by an ex-parte examination. Keller Proced. Rom. § 69. The original Chancery practice was in accordance with the later Roman law. Hawkins v. Crook, 2 Peere Williams, 556. But at least as early as the Seventeenth Century, bills were taken *pro confesso* for contumacy. Ibid. This, however, was not done until after an attachment to compel an answer, an attachment with proclamations, a commission of rebellion, and sequestration. Forum Romanum, 36; Boudinot v. Symmes, Wallace, C. C. 139, Fed. Cas. No. 1,695. In Thomson v. Worcester, 114 U. S. 104, 119, 29 L. ed. 105, 110. See the report of Master Hoffman to Chancellor Sanford in Williams v. Corwin, Hopkins, Ch. 471. The English Chancery practice prevailed in the courts of the United States as late as 1801. Boudinot v. Symmes, Wallace, C. C. 139, Fed. Cas. No. 1,695. A decree taking a bill in equity *pro confesso* presents striking analogies to a judgment by *nil dicit*, and to judgment for plaintiff on demurrer to the defendant's plea. Davis v. Davis, 2 Atk. 21; Hawkins v. Crook, 2 Peere Williams, 556, quoted in 2 Eq. Cas. Ab. R., 179.

Eq. Rule 12 of 1842 provided: "The defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso.*" According to Eq. Rule 18 of 1842, the defendant was allowed until the rule day next succeeding that of entering his appearance before he was required to file his plea, demurrer, or answer to the bill. "In default thereof, the plaintiff may,

clude a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."[2] "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer."[3] Under the former practice, where the bill when the subpœna was served did not show jurisdiction against a defendant, a subsequent amendment stating facts sufficient to

at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."

[2] Eq. Rule 31.

[3] Eq. Rule 32. Under the Equity Rules of 1842, in a proper case part of the bill might be taken as confessed. Snydam v. Beals, 4 McLean 12; Hale v. Continental Life Ins. Co., 20 Fed. 344. Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed. Hale v. Continental Life Ins. Co., 20 Fed. 344. Eq. Rule 64 of 1842 provided: that where exceptions to an answer for insufficiency had been sustained, the defendant might, if he chose, enter an order taking as confessed the parts of the bill to which the exceptions related. It seems that, in the absence of a rule upon the subject, the complainant in such a case might, at his election, have either the whole bill or the parts insufficiently answered, taken as confessed.

show jurisdiction against it would not warrant the entry of an order taking the bill as confessed without a second service of the subpœna, or an appearance by such defendant.[4] The same practice seems to have been observed when the bill was amended so as to state a new case or to bring in new parties.[5] As to the rule when trivial amendments are added to the bill, the practice in the United States was unsettled.[6] Where an amended bill filed without leave after a default in defendant's appearance was withdrawn without the payment of costs or furnishing a copy to him, it was held that the right to have the original bill taken as confessed had not been waived.[7] In a proper case, part of the bill might be taken as confessed.[8] Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed.[9] So where exceptions to an answer for insufficiency had been sustained, the complainant might, if he chose enter an order taking as confessed the parts of the bill to which the exceptions relate.[10] It seems, that, in the absence of a rule upon the subject, the complainant in such a case might, at his election, have either the whole bill or the parts insufficiently answered taken as confessed.[11] It was formerly uncertain whether, when the defendant after answering the original bill fails to file a further answer to material amendments thereof, the complainant was to have the whole bill taken

[4] Cuebas v. Cuebas, 223 U. S. 376; Non-Magnetic Watch Co. v. Asso. H. of Geneva, 45 Fed. 210. But see Brown v. Lake Sup. Iron Co., 134 U. S. 530, 33 L. ed. 1021; Nelson v. Eaton, 66 Fed. 376.

[5] Nelson v. Eaton, 66 Fed. 376; Bank of Utica v. Finch, 1 Barb. Ch. (N. Y.) 75; Weightman v. Powell, 2 De G. & S. 570; Beecher v. Ireland, 46 Kan. 97.

[6] The English rule was that a new subpœna must be served. Weightman v. Powell, 2 De G. & S. 570. See also Blythe v. Hinckley, 84 Fed. 228; Harris v. Deitrich, 29 Mich. 366. *Contra*, Bond v. Howell, 11 Paige (N. Y.), 233.

[7] Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 576, 37 L. ed. 853, 855.

[8] Suydam v. Beals, 4 McLean, 12; Hale v. Cont. L. Ins. Co., 20 Fed. 344.

[9] Hale v. Cont. L. Ins. Co., 20 Fed. 344.

[10] Eq. Rule 64 of 1842; *infra*, § 194.

[11] Abergavenny v. Abergavenny, 2 Eq. Ca. Abr. 178; Weaver v. Livingston, Hopk. Ch. (N. Y.) 595; Turner v. Turner, 1 Dickens, 316; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 605. But see Bacon v. Griffith, 2 Dickens, 473;

as confessed, or only the part unanswered.[12] It is doubtful whether a bill can be taken as confessed against an infant or other person under a disability.[13] Certainly, it cannot before a guardian *ad litem* has been appointed.[14] Should the guardian refuse to answer, the safer course for the complainant would be to obtain a reference to a master and prove the allegations of the bill before him.[15]

§ 172. Practice in taking a bill pro confesso. When a defendant fails to appear or to plead in due time, "the plaintiff may, at his election, enter an order (as of course) in the orderbook, that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*"[1] The order is entered by the clerk without the intervention of a judge.[2] Doubts have been expressed as to the propriety of entering such an order pending a motion upon a special appearance to quash a subpœna, or in the case of a cross-bill pending a motion to dismiss the original bill as against the cross-complainants.[3] If a bill is fatally defective and shows that the court has no jurisdiction, it is improper to enter an order or decree taking the same *pro confesso.*[4] By the former practice, there was no need of serving the order taking the bill *pro confesso.*[5] "When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso;* and such decree shall be deemed absolute, unless the court shall, at the

Dennison v. Bassford, 2 Paige (N. Y.), 370.

12 Suydam v. Beals, 4 McLean, 12, 15. The latter practice seems to be favored in Trust & Fire Ins. Co. v. Jenkins, 8 Paige (N. Y.), 589, 593, 594; Hawkins v. Crook, 2 P. Wms. 559; Davis v. Davis, 2 Atk. 23.

13 Compare the positive language of Equity Rule 16 of 1842, with Mills v. Dennis, 3 J. Ch. (N. Y.) 367; O'Hara v. Mac Connell, 93 U. S. 151, 23 L. ed. 842; Massie v. Donaldson, 8 Ohio, 377; Chaffin v. Kimball, 23 Ill. 36, 38.

14 O'Hara v. MacConnell, 93 U. S. 151, 23 L. ed. 842.

15 Mills v. Dennis, 3 J. Ch. (N. Y.) 367.

§ 172. 1 Eq. Rule 16 copied from Eq. Rule 18 of 1842. See Read v. Consequa, 4 Wash. 174; O'Hara v. MacConnell, 93 U. S. 150, 152, 23 L. ed. 840, 842.

2 Eq. Rule 5.

3 Blythe v. Hinckley, 84 Fed. 228.

4 Cuebas v. Cuebas, 223 U. S. 376, 56 L. ed. 476.

5 Eq. Rule 17; Bank of U. S. v. White, 8 Peters 262, 8 L. ed. 938. See Oakley v. O'Neill, 2 N. J. Eq. 287.

same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit. No such motion shall be granted unless upon payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause."[6] The application in the Federal courts should be made by motion[7] supported by an affidavit showing the excuse for his default, and also, unless a verified answer accompanies the application, which is the better practice, showing the nature of the defense.[8] Great liberality should be shown to non-residents served by publication. An error of the clerk of the court,[10] or a default, which resulted from an oversight of the defendant's counsel;[11] or was caused by his attorney's lack of knowledge of the proper mode of procedure in equity;[12] or a justifiable reliance upon the defense of a suit by a person in privity with the default,[13] is a reason for allowing the defendant to appear and defend. Where due service was made, a default will not be opened unless a defense on the merits is shown.[14] It has been said: that the same rule applies when there is color of claim that due service was made.[15] If the defense seems to the court to be unconscientious, the application may be denied.[16] In the

6 Eq. Rule 17, copied in substance from Eq. Rule 19 of 1842. See Maynard v. Pomfret, 3 Atk. 468; Heyn v. Heyn, Jacob, 49.

7 French v. Stewart, 22 Wall. 238, 22 L. ed. 854.

8 Schofield v. Horse S. C. Co., 65 Fed. 433; Massachusetts B. L. Assn v. Lohmiller, 74 Fed. 23; Wells v. Cruger, 5 Paige (N. Y.), 164; Winship v. Jewett, 1 Barb. Ch. (N. Y.) 173; Goodhue v. Churchman, 1 Barb. Ch. (N. Y.) 596; Keil v. West, 21 Fla. 508; Emery v. Downing, 13 N. J. Eq. 59; U. S. v. Whitmire, C. C. A., 188 Fed. 422. But see Metcalf v. Landers, 3 Baxt. (Tenn.) 35.

9 American F. L. M. Co. v. Thomas, C. C. A., 71 Fed. 782.

10 Blythe v. Hinckley, 84 Fed. 228.

11 Benjamin Schwarz & Sons v. Kennedy, 156 Fed. 316. But see City of Kansas City, Kan. v. Union Pac. R. Co., C. C. A., 192 Fed. 316.

12 McFarland v. State Savings Bank, 129 Fed. 244.

13 D. & W. Fuse Co. v. Trumbull El. Mfg. Co., 183 Fed. 784.

14 Massachusetts Ben. Life Ass'n v. Lohmiller, C. C. A., 74 Fed. 23. See White v. Crow, 110 U. S. 183, 28 L. ed. 113.

15 Massachusetts Ben. Life Ass'n v. Lohmiller, C. C. A., 74 Fed. 23.

16 Parker v. Grant, 1 J. Ch. (N.

State courts, applications to open defaults have been denied where the defendants wished to plead a discharge in bankruptcy,[17] and in one case where the complainant's principal witness had died between the default and the motion.[18] Where defendants wished to plead usury, relief has been conditioned upon payment of the principal,[19] and upon a waiver of defense to the claim for the principal and legal interest.[20] An assignee of the subject-matter of the suit, by an assignment made after the default, has no more right to come in and defend than was possessed by the original defendant;[21] but special favor is shown to assignees for the benefit of creditors.[22] It has been held that after the term, a decree taking a bill as confessed cannot be set aside on motion,[23] unless the motion was made or noticed at the term when the decree was entered,[24] even where there is a rule of the State court permitting such a practice.[25] Thus, the entry of a final decree by default upon notice to the defendants, without the entry of a formal order or interlocutory decree taking the bill as confessed, was held to be an irregularity for which the decree would not be set aside upon motion at a subsequent term.[26] But a decree taking a bill as confessed was set aside upon motion at a later term when it had been entered after appearance and before the time to plead had expired.[27] And in a proper case such a decree can be set aside by an original bill.[28] A decree *pro confesso* is not as of course according to the prayer of the bill, nor such as the complainant

Y.) 434; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Freeman v. Warren, 3 Barb. Ch. (N. Y.) 635; Baxter v. Lansing, 7 Paige (N. Y.), 350; National Fire Ins. Co. v. Sackett, 11 Paige (N. Y.), 660.

17 Freeman v. Warren, 3 Barb. Ch. (N. Y.) 635.

18 Wooster v. Woodhull, 1 J. Ch. (N. Y.) 529.

19 Bard v. Fort, 3 Barb. Ch. (N. Y.) 632.

20 Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Watt v. Watt, 2 Barb. Ch. (N. Y.) 371; National Fire Ins. Co. v. Sackett, 11 Paige (N. Y.) 660.

21 Watt v. Watt, 2 Barb. Ch. (N. Y.) 371.

22 Blanchard v. Cooke, 144 Mass. 207.

23 Allen v. Wilson, 21 Fed. 881; Linder v. Lewis, 1 Fed. 378; Stuart v. St. Paul, 63 Fed. 644; Electric Vehicle Co. v. De Dietrich Import Co., 159 Fed. 492.

24 Stuart v. St. Paul, 63 Fed. 664.

25 Austin v. Riley, 55 Fed. 833.

26 Linder v. Lewis, 1 Fed. 378. See Stuart v. St. Paul, 63 Fed. 688.

27 Fellows v. Hall, 4 McLean, 281.

28 Thomson v. Wooster, 114 U. S. 104, 112, 29 L. ed. 105, 107; *infra*. §§ 450–452.

chooses to take; but it is made by the court according to what is proper to be decreed upon the assumption that the statements in the bill are true.[29] It has been held that there is an exception to this rule in the case of a bill to compel the issue of a patent, since the public are interested in the result, and that then the court may require a copy of the proceedings and testimony in the patent-office and call for any other competent evidence that the complainant may have to offer.[30] "The matter of the bill ought at least to be opened and explained to the court whenever the decree is applied for, so that the court may see that the decree is a proper one."[31] "The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which, from their nature and the course of the court, require an examination of details, the obligation to furnish proofs rests on the complainant."[32] In the State courts a decree *pro confesso* is usually not taken against an infant without proof of the facts.[33] The Federal practice in this respect is not settled. When the bill relates to an unsettled account, a reference to a master is always necessary.[34] The equity rules provide that, after an order taking the bill *pro confesso* for a default in pleading, "thereupon the same shall be proceeded in *ex parte*."[35] Whether this deprives the defendant of the right to notice of subsequent proceedings and to appear before the master is doubtful.[36] It has been held that he has no right to a notice

[29] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 113, 29 L. ed. 105, 108; Andrews v. Cole, 20 Fed. 410; Rose v. Woodruff, 4 J. Ch. (N. Y.) 547, 548.

[30] Davis v. Garrett, 152 Fed. 723, 725.

[31] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 113, 114, 29 L. ed. 105, 108.

[32] Master Hoffman in Williams v. Corwin, Hopkins Ch. 471; quoted by Bradley, J,. in Thomson v. Wooster, 114 U. S. 104, 110, 111, 29 L. ed. 105, 107. See Ohio Central R. Co. v. Central Tr. Co., 133 U. S. 83, 91, 33 L. ed. 561, 563.

[33] Chaffin v. Kimball, 23 Ill. 36, 38; Ingersoll v. Ingersoll, 42 Mass. 155; Massie v. Donaldson, 8 Ohio, 377, 381. *Cf.* O'Hara v. MacConnell, 93 U. S. 151, 23 L. ed. 842.

[34] Pendleton v. Evans, 4 Wash. 104, 112.

[35] Equity Rule 17. This phrase is not used in the Rules of 1822. 7 Wheat. vii, 5 L. ed. 376.

[36] Bradley, J., in Thomson v. Wooster, 114 U. S. 104, 119, 120, 29 L. ed. 105, 110.

and hearing on the settlement of the final decree.[37] By the English practice, the defendant, after a decree *pro confesso* and a reference for an account, was entitled to have notice of the proceedings and to a hearing before the master.[38] The same rule prevails in the Second,[39] in the Third,[40] and in the Ninth,[41] Circuits. It has been held otherwise in the Eighth Circuit.[42] Where a bill for the infringement of a patent alleges infringement of "the invention" of the plaintiffs, and is taken as confessed, it seems that it cannot be claimed in subsequent proceedings in the same suit that the patent is void upon its face.[43] When more than one defendant is charged with a joint liability, after the bill has been taken as confessed against one, no final decree can be made against him, unless and until a decree is entered against those who appear and defend the suit;[44] and if the bill is finally dismissed upon the merits as to them, it will be dismissed as to the defaulter also.[45] But the rule seems to be otherwise where his liability is distinct and several.[46] Where a decree *pro confesso* had been entered, adjudicating that one of the defendants had no right to the fund mentioned in the bill, it was held to be error for a final decree, after a hearing on issues raised by other defendants, to give to the defaulter an interest in the fund.[47] It seems that a decree taking a bill as confessed is of no effect unless followed

37 Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854 (Third Circuit).

38 Bennett v. Hoefner, 17 Blatchf. 341.

39 Davis v. Garrett, 152 Fed. 723.

40 Southern Pac. Co. v. Temple, 59 Fed. 17.

41 Austin v. Riley, 55 Fed. 833.

42 Heyn v. Heyn, Jacob, 49. So in the New York Chancery, 1 Hoffman Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey the rule was discretionary. Brundage v. Goodfellow, 4 Halst. Ch. 513; Thomson v. Wooster, 114 U. S. 104, 119, 120, 29 L. ed. 105, 110.

43 Dobson v. Hartford Carpet Co., 114 U. S. 439, 446, 447, 29 L. ed. 177, 179; Reedy v. Western El. Co., C. C. A., 83 Fed. 709.

44 Frow v. De La Vega, 15 Wall. 552, 21 L. ed. 60.

45 Terry v. Fontaine's Adm'r, 83 Va. 451; Petty v. Hannum, 2 Humph. (Tenn.) 102, 36 Am. Dec. 303; Butler v. Kenzie, 90 Tenn. 31; s. c., 15 S. W. 1068; Clason v. Morris, 10 Johns. (N. Y.) 524; Kooper v. Dyer, 59 Vt. 477, 59 Am. Rep. 742.

46 Andrews v. Lee, 1 Dev. & B. Eq. (N. C. 318; Simpson v. Moore, 5 Lea (Tenn.) 376.

47 Third Nat. Bank v. Atlantic City, C. C. A., 130 Fed. 751.

by, or included in, a final decree.[48] An appeal can be taken from the decree, after a bill had been taken as confessed. Upon such an appeal the decree may be reversed for a defect in the service of the subpœna;[49] for failure to appoint a guardian *ad litem*, when required;[50] it seems for a want of indispensable parties,[51] and for a failure to set aside the decree upon a proper application.[52] The only question for the consideration of the court is whether the allegations in the bill are sufficient to support the decree.[53] It seems that the objection that the complainant had an adequate remedy at law rests in the discretion of the court of first instance, and that it cannot be waived in the appellate court by a defendant who is in default.[54] Where the deefndant had not moved until nine months after the appointment of a receiver, and meanwhile the bill had been taken as confessed, it was held to be too late to take this objection.[55]

[48] Frow v. De La Vega, 15 Wall. 552, 51 L. ed. 60; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119.

[49] O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840; Butterworth v. Hill, 114 U. S. 128, 29 L. ed. 119.

[50] O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840.

[51] Ibid.

[52] American F. L. M. Co. v. Thomas, C. C. A., 71 Fed. 782; Nelson v. Eaton, C. C. A., 66 Fed. 376.

[53] Masterson v. Howard, 18 Wall. 99, 21 L. ed. 764; Ohio C. R. Co. v. Central Tr. Co., 133 U. S. 83, 33 L. ed. 561.

[54] Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021; Western Elec. Co. v. Reedy, 66 Fed. 163.

[55] Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021.

CHAPTER IX.

ANSWERS.

§ 173. **Answers in general.** "It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*"[1] "Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered."[2] "The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other

§ 173. [1] Eq. Rule 16. [2] Eq. Rule 29.

than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense. The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."[3] "If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof."[4] An answer in equity serves two purposes: the setting up of the defenses to the suit and discovery. It may now pray relief against the complainant[5] and against a co-defendant.[6] Formerly this could not ordinarily be done without the filing of a cross-bill.[7]

§ 174. Admissions and denials and discovery. The Equity Rules now provide that the answer must specifically admit, deny, or explain the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial.[1] The rules are silent as to whether an answer under oath to the bill is required, although they make a provision for answers under oath to interrogatories filed after issue is joined.[2] They are also silent as to whether the complainant may waive an answer under oath and as to the effect of an answer under oath as evidence. The Equity Rules of 1842, which seem in this re-

3 Eq. Rule 30.
4 Eq. Rule 31.
5 Eq. Rule 30.
6 Eq. Rule 31.
7 Carnochan v. Christie, 11 Wheat. 446, 6 L. ed. 516; Veach v. Rice, 131 U. S. 293, 33 L. ed. 163. *Infra*, § 197.

§ 174. 1 Eq. Rule 30.
2 Eq. Rule 58.

spect to follow the former practice in chancery,[3] provided: "If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though not under oath, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit with the same effect as heretofore upon a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864."[4] Consequently, under those rules, an answer under oath was usually waived by the complainant.[5] It was held that, where an answer under oath was waived, a discovery could not be required,[6] and that defendant then could not be required to answer inter-

[3] See Daniell's Ch. Pr., First Am. Ed., 846; Curling v. Townshend, 19 Vesey 628, 629; Billingslea v. Gilbert, 1 Bland (Md.) 567; Contee v. Dawson, 2 Bland (Md.) 264; Fulton Bank v. Beach, 2 Paige, (N. Y.) 307; Story's Eq. Pl., §§ 874, 875a.

[4] Eq. Rule 41 of 1842 as amended December, 1871. The statute cited is now U. S. R. S., § 858. See Woodruff v. Dubuque & S. C. R. Co., 30 Fed. 91.

[5] See Slessinger v. Buckingham, 17 Fed. 454, 456.

[6] Tillinghast v. Chace, 121 Fed. 435; McFarland v. State Sav. Bank, 132 Fed. 399; Victor G Bloede Co. of Baltimore City v. Carter, 148 Fed. 127; Gorham Mfg. Co. v. Weintraub, 180 Fed. 639. See also Harrington v. Harrington, 15 R. I. 341, 5 Atl. 502; McCulla v. Beadleston, 17 R. I. 20, 26, 20 Atl. 11; Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003; Ward v. Peck, 114 Mass. 121; Badger v. McNamara, 123 Mass. 117, 120; McCormick v. Chamberlain, 11 Paige (N. Y.) 543; U. S. v. McLaughlin (C. C.) 24 Fed. 823; Sheppard v. Akers, 1 Tenn. Ch. 326; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Field v. Hastings & Bradley Co., 65 Fed. 279; Story's Eq. Pldg. § 875; Daniell's Ch. Pr. (3d. Am. ed.) 799. But see Johnston v. Forsyth Merc. Co., 127 Fed. 845, 848; John Church Co. v. Zimmerman, 131 Fed. 652. *Contra.* Bates on Equity Federal Procedure, Vol. I, § 355; criticised by Brewer, J., in Tillinghast v. Chace, 121 Fed. 435, 436. Citing Kittredge v. Claremont Bank, 1 Woodb. & M. 244, Fed. Cas. No. 7,859; Whittemore v. Patten, 81 Fed. 527; Nat'l Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 83 Fed. 26; Uhlmann v. Arnhold & Schaeffer Brewing Co., 41 Fed. 369; Gamewell Fire-Alarm Tel. Co. v. Mayor, (C. C.), 31 Fed. 312; Colgate v. Compagnie Francaise, 23 Fed. 82; Reed v. Cumberland Mut. Ins. Co., 36 N. J. Eq. 393; Manley v. Mickle, 55 N. J. Eq. 567, 37 Atl. 738.

rogatories attached to the bill.[7] Where no such waiver was made, the former rule then still prevailed; and the sworn statement by the defendant, in direct response to an allegation in the bill, was deemed to be true, unless contradicted by two witnesses or a single witness and corroborating circumstances.[8] Irresponsive allegations were not evidence,[9] nor was the court bound by the construction placed in the answer upon facts that were therein pleaded.[10] Such an answer was not evidence of new facts, set up by way of evidence of the allegations of the bill.[11] Neither were allegations upon information and belief,[12] nor allegations sworn to positively, concerning facts of which it was evident the respondent could have no personal knowledge.[13] The admissions of the defendant are binding upon him; and unless he can obtain leave to amend his answers by withdrawing them, he cannot disprove them at the hearing.[14] The defendant must answer every allegation in the bill which is material to the plaintiff's case, and an answer admitting which would not expose him to a penalty, forfeiture or criminal prosecution, or expose a privileged communication.[15] Under the chancery practice, the complainant was obliged to answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.[16]

7 Independent Baking Powder Co. v. Boorman, 130 Fed. 726; Victor G. Bloede Co. v. Carter, 148 Fed. 127. But where he undertook to answer, it was held, that he must answer fully. Ibid.

8 Clark's Ex'rs v. Van Reimsdyk, 9 Cranch, 153, 160, 3 L. ed. 688, 690; Union Bank of Georgetown v. Geary, 5 Pet. 99, 110, 8 L. ed. 60, 64; Seitz v. Mitchell, 94 U. S. 580, 582, 24 L. ed. 179, 180; Vigel v. Hopp, 104 U. S. 441, 26 L. ed. 765; Slessinger v. Buckingham, 17 Fed. 454, 456; Kennedy v. Custer, C. C. A., 174 Fed. 972. See the Responsive Answer in Equity, considered as Evidence for the Defendant, by J. M. Gest, 52 Am. L. Reg. 5.

9 Pennsylvania Co. v. Cole, 132 Fed. 668.

10 Northern Pac. Ry. Co. v. Boyd, C. C. A., 177 Fed. 804.

11 Sargent v. Larned, 2 Curt. 340; Seitz v. Mitchell, 94 U. S. 580, 24 L. ed. 179.

12 Berry v. Sawyer, 19 Fed. 286; Allen v. O'Donald, 28 Fed. 17; Earle v. Art L. Pub. Co., 95 Fed. 54.

13 Clarks Ex'rs v. Van Riemsdyk, 9 Cranch, 153, 161, 3 L. ed. 688, 690; Allen v. O'Donald, 28 Fed. 17.

14 Gold & S. O. S. Co. v. U. S. Dis. O. Co., 6 Blatchf. 307, 310. See Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 336.

15 Atwill v. Ferrett, 2 Blatchf. 39, *infra*, §§ 348, 349.

16 Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 3 Story, 596; s. c., 1 W. & M. 244;

He had then to answer not only as to all facts within his knowledge, but as to all which he could ascertain from an inspection of books and papers in his possession or under his control.[17] He was also required to give a full answer concerning any information that he could obtain upon the subject from persons in his employ.[18] If he asserted ignorance as to any matter, he was required to aver that he was ignorant both of his own knowledge and as to information and belief.[19] But if he denied knowledge and information he was not required to state his belief.[20] He could not deny that he had knowledge as to a subject which the bill charged as a personal transaction in which he took part.[21] This last rule, it has been said applies, as well as the others to officers of corporations.[22] If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.[23] It has been said that "a corporate answer should be made by the principal officer of the corporation, who should be able to admit or deny the facts charged and interrogated about,

Victor G. Bloede Co. v. Carter, 148 Fed. 127. It has been said that the defendant must answer not only as to all facts within his knowledge, but to all which he can ascertain from an inspection of books and papers in his possession or under his control. Davis v. Mapes, 2 Paige (N. Y.) 105.

17 Davis v. Mapes, 2 Paige (N. Y.) 105.

18 Rasbotham v. Shropshire Union Ry. Co., 24 Ch. D. 110.

19 Odger's Pleading, 4th ed. p. 271. See *infra*, § 348. It has been held that it is insufficient to deny fraud charged to have been committed by an agent upon the information of the agent and the belief of the principal. Mason v. Jones, 1 Hayw. & H. 329; s. c., Fed. Cas. No. 9,240. Brooks v. Byam, 1 Story, 296; Kittredge v. Claremont Bank, 1 W. & M. 244. It has been held that when the bill asks for testimony concerning his recollection he must give it accordingly. Brooks v. Byam, 1 Story, 296.

20 Victor G. Bloede Co. v. Carter, 148 Fed. 127.

21 Burpee v. First Nat. Bank, 5 Biss. 405. In extraordinary cases, answers as to the defendants' remembrance have been allowed, even when there was no request for the remembrance upon the subject. Hall v. Bodily, 1 Vernon, 470; Carey v. Jones, 8 Ga. 516; Hall v. Wood, 1 Paige (N. Y.), 404; Story's Eq. Pl., § 855. But see Talbot v. Sebree's Heirs, 31 Ky. 56.

22 Burpee v. First Nat. Bank, 5 Biss. 405; Kittredge v. Claremont Bank, 1 W. & M. 244.

23 Kittredge v. Claremont Bank, 1 W. & M. 244.

or to state want of knowledge clearly and truly as a reason for not doing it."[24] Where one or all of the officers of the corporation could not answer without self-incrimination, it was held that it was the duty of the coorporation to select or provide an officer who would not be incriminated.[25] It is insufficient to deny any "recollection or belief" as to a transaction in which the defendant is said to have been personally engaged.[26] "The defendant in his answer must state the facts as they then are."[27] But where a bill charged that the defendant would in future infringe a patent as he was charged to have done before, it was held insufficient for him to deny merely that he had done so since the trial of an action at law which established the complainant's rights.[28] He should also answer as to his future intentions.[29] The Equity Rules of 1912 merely provide that the defendant shall answer concerning his knowledge, and that when he is without knowledge he shall so state, such statement operating as a denial.[30] A denial of two allegations conjunctively is not a denial of each.[31] An admission in the disjunctive is binding.[32] The statement that the respondent believes an allegation to be true is equivalent to an admission;[33] but the statement that he has no knowledge upon the subject seems to be equivalent to a denial,[34] although, if full discovery be required, it is subject to exception for insufficiency.[35] The denial[36] and

24 Wheeler, J., in Hale v. Continental L. Ins. Co., 16 Fed. 718, 719.

25 Simon v. Am. Tobacco Co., 192 Fed. 662.

26 Taylor v. Luther, 2 Sumner, 228.

27 Sir Thomas Plumer, V. C., in Knight v. Matthews, 1 Madd. 566.

28 Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 185; s. c., 2 Fish. 74.

29 Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 185; s. c., 2 Fish. 74.

30 Eq. Rule 30.

31 Pierson v. Ryerson, 5 N. J. Eq. 196.

32 Adams Exp. Co. v. Adams, C. C. A., 159 Fed. 62.

33 There the plaintiff alleged that the defendant was a corporation organized under the laws of the State of New York, and the defendant, in its petition for removal and answer, alleged that it was "a corporation or joint stock company organized and existing under and by virtue of the laws of New York."

34 Brown v. Pierce, 7 Wall. 205, 212, 19 L. ed. 134, 136; Brooks v. Byam, 1 Story, 296.

35 Kittredge v. Claremont Bank, 1 W. & M. 244.

36 Union M. Ins. Co. v. Commercial M. M. Ins. Co., 2 Curt. 524; s. c. on appeal, as Commercial M. M. Ins. Co. v. Union M. Ins. Co., 19 How. 318, 319, 15 L. ed. 636, 637. Thus, when the bill alleged that the defendant executed and delivered a

the averment[37] of a conclusion of law, have no effect. A few of the earlier cases hold that a general traverse of the allegations concerning the citizenship and residence of the respective parties, do not raise an issue.[38] An averment that land which is the subject of the suit was at the time of its commencement unoccupied is not denied by an affirmative allegation in the answer that defendants "are now in the quiet and peaceable possession" of the same.[39] In a suit in equity, submitted on bill and answer, the complainant's title to real estate was deemed to be admitted by an answer in which the defendant pleaded an adverse claim of title, deraigned from a void judicial decree in a proceeding against the complainant to foreclose a lien for taxes, notwithstanding a denial of the complainant's title in the same answer.[40] In drawing such an answer, it is usual and

deed, a denial by the defendant of its delivery, accompanied by an admission that he made the deed and placed it upon record, is equivalent to an admission of its delivery. Adams v. Adams, 21 Wall. 185, 22 L. ed. 504. An admission that a deed bears a certain date does not estop the respondent from showing that it was fraudulently antedated. Holbrook v. Worcester Bank, 2 Curt. 244.

37 Klank v. Byrne, 143 Fed. 1008, 1011.

38 Hill v. Walker, C. C. A., 167 Fed. 241; Bettes v. Brower, 184 Fed. 342. See *supra*, § 40, *infra*, § 454.

39 Klenk v. Byrne, 143 Fed. 1008. Where the holder of a tax title sued out a writ of possession from a state court, and, in a suit to set aside his deed as a cloud on title, filed a cross-bill praying possession, held that he thereby confessed that the possession was in complainant. Collier v. Goessling, C. C. A., 160 Fed. 604. Complainant in a suit to quiet title alleged the recovery of judgment in ejectment against defendant, and that plaintiff had been put in possession by the marshal on execution of a writ of possession. Defendant answered, denying that the marshall had executed the writ, and filed a cross-bill alleging possession since 1899, as also of a 20-acre tract south and adjoining the land in controversy; that the marshal, in executing the writ of possession, removed defendant from such south 20-acre tract, and placed plaintiff's agent in possession thereof afterwards filing a return that he had executed the writ by placing plaintiff's agent in possession of the land in controversy; but the cross-bill did not allege that the marshal did not in fact place plaintiff in possession of the land in controversy, nor was there any averment that defendant had paid taxes on such land. Held, that the cross-bill was demurrable for failure to show that the writ of possession was not executed according to its return. Center v. Cady, C. C. A., 184 Fed. 605.

40 Klenk v. Byrne, 143 Fed. 1008.

often advantageous to interweave the discovery with a narrative of the transactions from the defendant's point of view in a continuous statement, so that it will be hard for the plaintiff to read as evidence the defendant's admissions without also reading the latter's own explanation and account of the controversy.[41]

§ 175. Pleading defenses in answer. Inconsistent defenses may now be pleaded.[1] Matters in abatement, such as *lis pendens* and objections to the jurisdiction of the court, can now be set up by answer.[2] Formerly, matters in abatement which did not affect the jurisdiction and objections to the character of the parties and matters of form, could not be so pleaded.[3] Facts that have occurred since the filing of the bill may be so pleaded by the defendant.[4] The defenses must be pleaded with sufficient certainty, although it seems that the same degree of certainty is not required in an answer as in a bill[5] nor as

41 It has been *held* that where the original answer intermingles objectionable and irrelevant matter with allegations that are good, so that the result of striking out what is objectionable would be to leave the remaining parts disjointed and not in good form, an entirely new answer must be filed. Dr. Miles Medical Co. v. Snellenburg, 152 Fed. 661.

§ 175. 1 Eq. Rule 30. This practice was first authorized by the New York Code of Procedure, written by David Dudley Field. Lord Chancellor Loreburn (Harv. Law Rev., XXVI., p. 101): "A litigant may state in his defense what facts he relies upon, and at the same time may state that he contends that even if the facts be as alleged by the plaintiff, yet they furnish no cause of action. That is in effect a demurrer. There is no doubt that this practice is beneficial. It may be convenient that the question of law decided by the demurrer should be decided first, and if decided in favor of the defendant it will end the case, unless the plaintiff is allowed to amend and raise a fresh contention. It may be, and generally is, convenient first, to ascertain all the facts at a trial, and then to apply the law or equity, as the case may be. Which course is to be taken is usually agreed to by the parties, but, if not agreed, the judge can direct what is to be done. We find it very useful to have as much elasticity as possible in these things, and I am sure no one doubts that all relevant contentions both of fact and law ought to be stated in the pleadings. An answer to a bill in equity may plead a former judgment in bar in connection with matters of defense to the merits. Mound City Co. v. Castleman, 171 Fed. 520.

2 Eq. Rule 29.

3 Eq. Rule 39, of 1842; Pierce v. Feagans, 39 Fed. 587.

4 Earl of Leicester v. Perry, 1 Brown Ch. C. 305; Turner v. Robinson, 1 Sim. & S. 3.

5 Daniell's Ch. Pr. (5th Am. ed.) 714.

formerly, in a plea.[6] The general rule is that no affirmative defense can be proved unless it has been set up in the answer,[7] but the failure of the opposite party to make this a ground of objection to the introduction of evidence in support of such omitted defense waives the defect.[8] Estoppel is such an affirmative defense.[9] But it has been held: that when the fact appears, that the complainant has come into court with unclean hands because of fraudulent misrepresentations to the public concerning the subject-matter of the suit, his bill will be dismissed, although the defense is not pleaded.[10] It has been said: that, if a defendant states in his answer certain facts as evidence of a particular case, which he represents to be the consequence of those facts, and upon which he rests his defense, he is not permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which by his answer he has drawn the plaintiff's attention.[11] Thus it has been said that where fraud is set up in the answer "the party making the charge, if it is denied in a proper pleading, will be confined to that issue."[12]

§ 176. Defenses in answer. In general. The defenses which were formerly usually or always included in pleas may now be set up by answer. Pleas have been abolished, and with them a vast amount of learning has been rendered obsolete.[1]

[6] Maury v. Mason, 8 Porter (Ala.) 213, 228.

[7] Stanley v. Robinson, 1 Russ. & M. 527; Cummings v. Coleman, 7 Rich. (S. C.) Eq. 509, 520, 62 Am. Dec. 402; Burnham v. Dalling, 3 C. E. Green (18 N. J. Eq.) 132; Daniell's Ch. Pr. (5th Am. ed.) 712; Black v. Thorne, 10 Blatchf. 66, 84; Sperry v. Erie Ry. Co., 6 Blatchf. 425.

[8] Lusk v. Bush, C. C. A., 199 Fed. 369.

[9] Pennsylvania Co. v. Cole, 132 Fed. 668. But see Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45; cited *infra*, § 145.

[10] Memphis Keeley Institute v. Leslie E. Keeley Co., C. C. A., 16 L.R.A.(N.S.) 921, 155 Fed. 964.

[11] Langdell's Eq. Pl., § 79; Bennett v. Neale, Wightwick, 324.

[12] French v. Shoemaker, 14 Wall. 314, 335, 20 L. ed. 852, 857. See § 70.

§ 176. [1] A plea was a pleading which set up some reason not apparent upon the face of the bill why the defendant should not be obliged to answer the whole or a part thereof. Lord Redesdale defines a plea as "a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required." Roche v. Morgell, 2 Sch. & Lef. 721, 725. A

Defenses, which formerly might be set up by plea and can now be included in an answer, are either defenses in abatement or

plea might be to the whole or to a part of the bill. Usually but a single ground of defense could be presented by a plea, which, though it might state more than one fact, must bring the matters in issue to a single point. Whitbread v. Brockhurst, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves. & Bea. 154, note; Watkins v. Stone, 2 Sim. 49; Rhode Island v. Massachusetts, 14 Pet. 210, 259, 10 L. ed. 423, 446; Storys Eq. Pl., § 654. See Rhino v. Emery, 79 Fed. 483. Otherwise, it was opened to the charge of duplicity and multifariousness, and would be overruled. Rhode Island v. Massachusetts, 14 Pet. 210, 259, 10 L. ed. 423, 446. Gaines v. Mausseaux, 1 Woods, 118; Whitbread v. Brockhurst, 1 Brown, Ch. C. 404, 416, note 9; s. c., 2 Ves & Bea. 154, note; London v. Liverpool, 3 Anst. 738; Watkins v. Stone, 2 Simons, 49; Saltus v. Tobias, 7 J. Ch. (N. Y.) 214; Giant Powder Co. v. Safety N. P. Co., 19 Fed. 509; M'Closkey v. Barr, 38 Fed. 165; Story's Eq. Pl., §§ 653–655. But see Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann & A. Pat. Cas. 148; MacVeagh v. Denver C. W. W. Co., 85 Fed. 74; Societe Fabriques v. Lueders, 105 Fed. 632; Hazard v. Durant, 25 Fed. 26; Fayerweather v. Hamilton College, 103 Fed. 546. If a bill contained different prayers for relief based upon different grounds, the defendant might file a plea to each part of the relief. Emmott v. Mitchell, 14 Sim. 432. And in other cases, where great inconvenience could thus be saved, the court might upon motion, after notice to the complainant's solicitor, give special leave to file a double plea. Gibson v. Whitehead, 4 Madd. 241; Kay v. Marshall, 1 Keen, 190, 192. But see Reissner v. Anness, 12 Off. Gaz. 842; s. c., 3 Bann. & A. Pat. Cas. 148; or rather, according to Professor Langdell, two separate pleas, each containing a single defense, Langdell's Eq. Pl., § 98. Pleas were either pure, negative, or anomalous. A pure plea sets up new matter as a defense which was not apparent upon the face of the bill, McCloskey v. Barr, 38 Fed. 165. A negative plea, which was sometimes also termed an anomalous plea, merely denied certain allegations contained in the bill. Story's Eq. Pl., § 651; Rhino v. Emery, 79 Fed. 483. An anomalous plea sets up a fact in avoidance of the bill, but one which the bill had anticipated and without confessing replied to, Langdell's Eq. Pl., § 102; Story's Eq. Pl., § 651; McDonald v. Salem C. F. M. Co., 31 Fed. 577; McCloskey v. Barr, 38 Fed. 165; Hilton v. Guyott, 42 Fed. 249. But see Milligan v. Milledge, 3 Cranch, 220, 2 L. ed. 417. The main object of filing a plea was to avoid discovery, and in their drafting and defense much learning and subtlety was employed. Those interested in stating their history and refinement are referred to Beames on Pleas, Wigram on Discovery, and Langdell on Equity Pleading, where they will find the subject discussed at length with full references to the cases. They were abolished in England by the Judicature Act of 1873, but they endured in the Federal courts until the end of the year 1912 and are still used in the courts of a few of the States. It was as

defenses in bar to the suit. Objections in abatement include among them, objections to the jurisdiction, objections to the person and objections to the bill.[2] Objections to the jurisdiction are: (1) That the subject of the suit is not within the jurisdiction of a court of equity;[3] (2) that some other court of equity has the proper jurisdiction;[4] (3) that the defendant has not been properly served with process.[5] Objections to the person are: (1) That the plaintiff has not the legal capacity to sue; either at all if an alien enemy,[6] or alone if an infant,[7] or without leave from the court if a receiver.[8] (2) That the plaintiff is not the person whom he pretends to be, or does not sustain the character which he assumes; as, for example, that he is not executor,[9] or not assignee,[10] or not a corporation,[11] when suing as such; or that the suit is brought in the name of a fictitious person;[12] or that it is brought in the name of a person who sues for the benefit of another, through collusion or champerty;[13] or, it seems, in a stockholder's suit founded upon a right which may properly be asserted by the corporation, that

true when they were abolished as in the time of Beames, that the subject of pleas in equity is one "concerning which so much still remains to be elucidated, that it may be said of them, *maxima pars eorum quae scimus est minima eorum quae ignoramus*," Beames on Pleas, 61. See Am. Sulphite Pulp Co. v. Bayless Pulp & Paper Co., 163 Fed. 843, 844.

[2] See Beames on Pleas, ch. 2; Story's Eq. Pl., §§ 705–708; Rule 39; Memphis City v. Dean, 8 Wall. 64, 19 L. ed. 326.

[3] Story's Eq. Pl., §§ 710–713.

[4] Story's Eq. Pl., §§ 714–716.

[5] Larned v. Griffin, 12 Fed. 590; Williams v. Empire Tr. Co., 1 N. J. L. 315.

[6] Albrech v. Sussman, 2 V. & B. 323; Story's Eq. Pl., § 724; Mumford v. Mumford, 1 Gall. 366.

[7] Story's Eq. Pl., § 725. But see Dudgeon v. Watson, 23 Fed. 161.

[8] See Newman v. Moody, 19 Fed. 858.

[9] See Rubber Co. v. Goodyear, 9 Wall. 788, 792, 19 L. ed. 566, 567; Ord v. Huddleston, 2 Dick. 510; Story's Eq. Pl., § 727.

[10] Nicholas v. Murray, 5 Saw. 320.

[11] Dental V. Co. v. Wetherbee, 2 Cliff, 555; Blackburn v. Selma, M. & M. R. Co., 2 Flip. 525; Emerson Co. v. Nimocks, 88 Fed. 280. A limited partnership, organized under the laws of Michigan, was allowed, in the Second Circuit, to sue in equity in its copartnership name, where jurisdiction did not depend upon the citizenship. Sanitas Nut Food Co. v. Force Food Co., 124 Fed. 302.

[12] Chapman v. School Dist. No. 1, Deady, 108, 116.

[13] Dinsmore v. Central R. Co., 19 Fed. 153. But see Sperry v. Erie Ry. Co., 6 Blatchf. 425.

the corporation has not refused to sue.[14] It was held that the objection that the plaintiff was a lunatic and could not sue without a next friend could not be taken by plea, and that the proper course for the defendant was to move either to strike the bill off the file on account of the complainant's mental incapacity, or for a stay of the proceedings until a committee or next friend was appointed.[15] (3) That the defendant cannot be sued except upon the happening of some event which has not occurred, as under the former practice, that he was a receiver, and no leave to sue him had been obtained from the court by which he was appointed.[16] (4) That the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear;[17] or that the person named as a defendant is not a corporation when sued as such, in which case the person served with process on its behalf may file the answer in his own name,[18] or was not incorporated under the laws of the State which is named in the bill as its creator;[19] or that the defendant has become a bankrupt or insolvent, and his interest in the subject-matter has passed to his assignee.[20] It is improper to file an answer in the name of a defunct corporation by its successor.[21] It was held: that it was too late to file a plea that the defendant corporation had been dissolved, when, after the alleged dissolution, counsel had argued on its behalf in support of a judgment in its favor, which was subsequently reversed.[22] Objections to the bill are: (1) That there is another suit depending in a domestic court of equity for the same matter. (2) That there is a want of proper parties.

14 Newby v. Oregon Cent. Ry. Co., 1 Saw. 63, 67.

15 Dudgeon v. Watson, 23 Fed. 161.

16 Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Jerome v. McCarter, 94 U. S. 734, 737, 24 L. ed. 136, 137; In re Young, 7 Fed. 855. But see 24 St. at L., ch. 373, § 3; *infra*, § 314.

17 Story's Eq. Pl., §§ 732–734.

18 Kelly v. Mississippi C. R. Co., 1 Fed. 564; s. c., 2 Flip. 581. See also Williams v. Empire Tr. Co., 1 N. J. L. J. 315.

19 Blackburn v. Selma, M. & M. R. Co., 2 Flip. 525.

20 Kittredge v. Claremont Bank, 3 Story, 590; Story's Eq. Pl., § 732. See also Doggett v. Emerson, 1 Woodb. & M. 196.

21 Underwood Typewriter Co. v. Fox Typewriter Co., 158 Fed. 476.

22 L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., C. C. A., 128 Fed. 332.

(3) That the bill will cause an improper multiplicity of suits.
(4) Multifariousness.[23]

§ 177. **The pendency of another suit.** A defense, that another suit in equity is pending for the same cause in the same court is, if true, a sufficient defense to a bill.[1] The pendency of an action at law for the same matter is not, however, in itself a defense.[2] For the very fact that relief cannot be had at law is the usual ground for resorting to equity. So the pendency of an action at law upon a contract was held to be no bar to a subsequent bill in equity by the same plaintiff to reform it so as to obviate a cross-action on the contract by the defendant.[3] If, however, there appeared to be a sufficient reason for the maintenance of both, the court at equity might, after the defendant has answered, put the plaintiff to his election, whether he will proceed at law or in equity; and if he elects the latter, then his proceeding at law will be enjoined; if the former, his bill will be dismissed.[4] The pendency of another suit in a court of another of the United States,[5] or of a foreign country,[6] is not a bar to a suit for the same relief in a District Court of the

[23] Story's Eq. Pl., §§ 735–748.

§ 177. [1] Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 736; Urlin v. Hudson, 1 Vern. 332; Foster v. Vassall, 3 Atk. 587, 590; Crofts v. Wortley, 1 Ch. Ca. 241; Tarleton v. Barnes, 2 Keen, 632, 635; Insurance Co. v. Brune, 96 U. S. 588, 592, 593, 24 L. ed. 737, 739, 740. See also Memphis v. Dean, 8 Wall. 64, 19 L. ed. 326. The pendency of a suit to enjoin the removal of ore from a mining claim, brought in assistance to an action of ejectment to recover possession of a part of such claim, is not a bar to a subsequent suit by the same complainant to remove a cloud on its title to the entire claim, which includes extra-lateral rights not in controversy in the former suit. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., C. C. A., 121 Fed. 973.

[2] Graham v. Meyer, 4 Blatchf. 129; Thorne v. Towanda T. Co., 15 Fed. 289, 292.

[3] Providence S. E. Co. v. Hathaway Mfg. Co., 79 Fed. 512.

[4] Story's Eq. Pl., § 742; Beames' Orders in Ch., 11, 12; Mitford's Pl., ch. 2, § 2, part 2; Royle v. Wynne, 1 C. & Ph. 252; Thorne v. Towanda T. Co., 15 Fed. 289, 292; *infra*, § 368.

[5] Insurance Co. v. Brune, 96 U. S. 588, 592, 593, 24 L. ed. 737, 739, 740; Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; O'Callaghan v. O'Brien 116 Fed. 934; Robinson v. Suburban Brick Co., C. C. A., 127 Fed. 804. But see Dady v. Georgia & A. Ry. Co., 112 Fed. 838.

[6] Lord Dillon v. Alvares, 4 Vesey, 357; Story's Eq. Pl., § 747.

United States, at least when the object is not to obtain the possession of property in the custody of the former court.[7] The pendency of a similar suit in a court, held within the same State and district where the Federal court is held, is under similar circumstances, not a bar to a suit for the same relief in a District Court of the United States;[8] at least where the Federal jurisdiction is founded upon difference of citizenship.[9] But it is usually a ground for a stay of its own proceedings by the Federal court, where the action in the State court was first instituted,[10] provided that the parties to the two suits are the

[7] Briggs v. Stroud, 58 Fed. 717, 720; Mankato v. Barber Asphalt Paving Co., C. C. A., 142 Fed. 329. *Supra*, § 57.

[8] Latham v. Chafee, 7 Fed. 520; White v. Whitman, 1 Curt. 494; Sharon v. Hill, 22 Fed. 28; Washburn & M. Mfg. Co. v. Scutt, 22 Fed. 710; Loring v. Marsh, 2 Cliff. 322; Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. ed. 383, 386; Dwight v. Cent. Vt. R. Co., 9 Fed. 785; Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. 225; North Muskegon v. Clark, C. C. A., 62 Fed. 694; Marshall v. Otto, 59 Fed. 249; Rejall v. Greenhood, 60 Fed. 884; Short v. Hepburn, 75 Fed. 113; Shaw v. Lyman, 79 Fed. 2; Brooks v. Vermont Cent. R. Co., 14 Blatchf. 463, Fed. Cas. No. 1,964; Beekman v. Hudson River West Shore Ry. Co., 35 Fed. 3; Barber Asphalt Paving Co. v. Morris, C. C. A., 67 L.R.A. 761, 132 Fed. 945; Burk v. McCaffrey, 136 Fed. 696; Mankato v. Barber Asphalt Paving Co., C. C. A., 142 Fed. 329; Barnsdall v. Waltemeyer, C. C. A., 142 Fed. 415; New York Cotton Exch. v. Hunt, 144 Fed. 511; Weir v. Winnett, 155 Fed. 824; Borden's Condensed Milk Co. v. Baker, 177 Fed. 906. Chicago, B. & Q. R. Co. v. Weil, 183 Fed. 956; People's Gaslight & Coke Co. v. City of Chicago, 192 Fed. 398; Curlette v. Olds, 110 App. Div. (N. Y.) 596. The fact that a counterclaim was pleaded in the State court was held: to make no difference in this respect. Burk v. McCaffrey, 136 Fed. 696. But see Gamble v. San Diego, 79 Fed. 487, and *supra*, § 9. *Contra*, Radford v. Folsom, 14 Fed. 97; Brooks v. Mills County, 4 Dill. 524; Lawrence v. Remington, 6 Biss. 44; Marks v. Marks, 75 Fed. 321; South Penn Oil Co. v. Miller, C. C. A., 175 Fed. 729. See Am. Confectionery Co. v. North British & Mercantile Ins. Co., 199 Fed. 195.

[9] See D. E. Loewe Co. v. Lawlor, 130 Fed. 633; holding that an action, founded upon an act of Congress, against monopolies of Interstate Commerce was not affected by a previous suit in the State court for similar relief.

[10] Foley v. Hartley, 72 Fed. 570; Zimmerman v. So Relle, C. C. A., 80 Fed. 417; Hughes v. Green, C. C. A., 84 Fed. 833; Green v. Underwood, 86 Fed. 427. See Hughes v. Green, 75 Fed. 693; Benoist v. Smith, 191 Fed. 514. A State court refused to stay foreclosure proceedings pending a prior suit to set aside the mortgage, brought by a mortgagor in the Federal court in the same district, when it appeared

same.[11] The effect of the pendency of another suit for the same cause in another court of the United States has never been expressly decided. In such a case, where the parties are the same, the court, where the first suit was brought, might enjoin the prosecution of the other suit.[13] This might also be done if the prior suit involved an adjudication upon the validity of the right to use a machine affected by the second suit;[14] but not merely because the validity of the plaintiff's patent is attacked in another suit to enjoin the use of a different machine.[15]

A defense that another suit is pending, in which the complainant might obtain by cross-bill the relief now sought by him, is bad.[16] A defense of *lis pendens* should set forth the commencement of the former suit, its general nature, character, and objects, whether it is at law or in equity, the relief prayed and how far it has progressed;[17] It should then aver specifically that the second suit is for the same subject-matter[18] as the first, and seeks the same or similar relief;[19] and further, that the former suit is still pending.[20] It must show that the defendant was served or has appeared in the former suit.[21] "For it is no suit depending till the parties have appeared or been served to appear, but only a piece of parchment thrown into the office, which may lie there forever, and never come to a suit."[22] "It is not necessary to the sufficiency of the plea that

that the mortgagor was an attorney in the State courts, who founded his suit upon a technical non-residence, and there were circumstances which made it probable that the action was brought to hinder and delay the mortgagee. Curlette v. Olds, 110 App. Div. (N. Y.) 596.

[11] Kirkpatrick v. Eastern Milling & Export Co., 135 Fed. 144. See Wheeler v. McCormick, 8 Blatchf. 267; Steiger v. Heidelberger, 4 Fed. 455; s. c., 18 Blatchf. 426; Brooks v. Mills County, 4 Dill. 524, 527.

[13] Electric Vehicle Co. v. Barney, 143 Fed. 551.

[14] Ibid.

[15] Ibid.

[16] Washburn & M. Mfg. Co. v. Seutt, 22 Fed. 710.

[17] Crescent City L. S. Co. v. Butchers' U. L. S. Co., 12 Fed. 225; Green v. Underwood, C. C. A., 86 Fed. 427; Foster v. Vassal, 3 Atk. 589, 590; Story's Eq. Pl., § 737.

[18] Devie v. Lord Brownlow, 2 Dick. 611; Mitford's Pl., ch. 2, § 2, part 2; Story's Eq. Pl., § 737.

[19] Behrens v. Sieveking, 2 Myl. & Cr. 602; Wheeler v. McCormick, 8 Blatchf. 267; Jenkins v. Eldredge, 3 Story, 183; Story's Eq. Pl., § 737.

[20] The Haytian Republic, 57 Fed. 508, 512; Story's Eq. Pl., § 737. See Urlin v. Hudson, 1 Vern. 332; Mitford's Pl., ch. 2, § 2, part 2.

[21] Moor v. Welsh C. Co., 1 Eq. Cas. Abr. 29, pl. 14.

[22] Ibid.

the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold.[23] So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last;[24] for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the court has taken in such case has been to dismiss the first bill, and to direct the defendant in the second cause to answer upon being paid the costs of the plea allowed."[25] Where a former suit had been brought for a part, but not the whole, of the relief sought in the case at bar, the court held its pendency no defense, but said that proceedings in it might be stayed until the determination of the second suit.[26] "Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non,* and brought another bill, the pendency of the former bill is not a good plea.[27] The reason of this determination seems to have been, that, the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man

23 Ibid.

24 Durand v. Hutchinson, Mich. 1771, in Chan.

25 Mitford's Pl., ch. 2, § 2, part 2, citing Crofts v. Wortley, 1 Ch. Cas. 241.

26 Mass. Mut. L. I. Co. v. Chicago & A. R. Co., 13 Fed. 857.

27 Huggins v. York B. Co., 2 Atk. 44.

coming in under a decree is *quasi* a party."[28] The pendency of a taxpayer's bill in the same court was held to be a defense to a bill by other taxpayers for the same relief.[29] The pendency of a suit for the infringement of a patent in one district is no bar to a suit against the same defendant for the infringement of the same patent in another district; but, in the latter suit, the court will only consider and adjudicate upon alleged infringements within its district if the defendant resides or has made a general appearance in the former.[30]

§ 178. Defenses in Bar. Defenses in bar set up some reason founded on the substance of the case, why the plaintiff is not entitled to relief. They rest upon some matter created by either statute, matter of record, or matter *in pais*, which last term signifies a matteh of fact that is not of record, and is not given by statute special effect.

§ 179. Defenses of statutes. In General. Defenses founded upon matter that is made a bar by statute rests upon the statute of limitations, the statute of frauds, or less frequently some other statute. An act of Congress ratifying the construction of an otherwise illegal structure will, if constitutional, abate a suit for an injunction against the further maintenance of the structure, although not set up by plea, answer, or demurrer.[1]

§ 180. Federal statutes of limitations. Congress has enacted statutes of limitations in certain civil and criminal cases.

"In any suit or action brought for the infringement of any patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action."[1] Less than six years' delay will rarely bar a suit to enjoin the infringement of a patent;[2] although it may prevent

[28] Mitford's Pl., ch. 2, § 2, part. 2, citing upon last point, Neve v. Weston, 3 Atk. 557.

[29] Gamble v. San Diego, 79 Fed. 487.

[30] Warren Bros. Co. v. City of Montgomery, 172 Fed. 414.

§ 179. [1] The Clinton Bridge, 10 Wall. 454, 19 L. ed. 969. But see Griffing v. Gibb, 2 Black, 519, 17 L. ed. 353; Liverpool, N. Y. & P. S. S. Co. v. Comrs of Emigration, 113 U. S. 33, 38, 28 L. ed. 899, 900.

§ 180. [1] 29 St. at L. 694.

[2] Ide v. Trorlicht, D. & N. Carpet Co., C. C. A., 115 Fed. 137, 147.

interlocutory relief.[3] The fact that the owner of a patent permitted a suit for its infringement to be dismissed before trial without prejudice is not such laches as to bar a second suit against the same defendant when the statutory period has not expired,[4] but a delay before suit by the owner of a patent, of nine years after knowledge of an infringement was held to be such laches as to defeat his case, although he claimed that his partner in the ownership of the patent had prevented the previous institution of the litigation.[5] It has been held: that the Federal statute of limitations need not be pleaded to bar the collection of profits or damages for infringement of patents more than six years before the suit.[6]

"Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patent hereafter isued shall only be brought within six years after the date of the issuance of such patents."[7] It has been held: that this statute does not apply to suits brought on behalf of Indian tribes to cancel patents issued for lands within a reservation by mistake,[8] nor to suits by the United States to cancel so-called trust patents for Indian allotments;[9] that the statutory period is not extended by a fraud which is concealed until after the lapse of six years,[10] and that service of process in such a suit against an individual stops the running of the statute against a corporation which he has secretly formed, of which all the capital stock is owned by him, and the existence of which was unknown to the officers of the Government.[11]

3 *Infra*, § 294.

4 Welsbach Light Co. v. Cohn, 181 Fed. 123.

5 Hall v. Frank, 195 Fed. 946. In Layton Pure Food Co. v. Church & Dwight Co., C. C. A., 32 L.R.A. (N.S.) 274, 182 Fed. 35, it was held that similarly a delay for the same period in a trademark case did not deprive the complainant of the right to an injunction, although the accounting must be limited to the time subsequent to the commencement of the suit.

6 Peters v. Hanger, C. C. A., 127 Fed. 820; Johnson v. Roe, 1 Fed. 692; Etting v. Marx's Ex'r, 4 Fed. 673. But see Pratt v. Northam, 5 Mason, 95.

7 Act of March 3, 1891, c. 559, 26 St. at L. 1093.

8 Northern Pac. Ry. Co. v. U. S., C. C. A., 191 Fed. 947.

9 U. S. v. La Roque, C. C. A., 198 Fed. 645.

10 U. S. v. Exploration Co., 190 Fed. 405.

11 Linn & Lane Timber Co. v. U. S., C. C. A., 196 Fed. 593.

"All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." [12] It has been held that this requires a bill in equity to compel the issue of a patent, to be filed within one year after the refusal thereof.[13]

The Revised Statutes provide: "No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen." [14] Whether this section is still in force has not been decided. The Copyright Act of March 4, 1909, provides: "That no criminal proceedings shall be maintained under the provisions of this Act unless the same commenced within three years after the cause of action arose." [15] "No suit on a marshal's bond shall be maintained unless it is commenced within six years after the right of action accrues, saving, nevertheless, the rights of infants, married women, and insane persons, so that they sue within three years after their disabilities are removed." [16]

"Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: Provided, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted,

[12] U. S. R. S., § 4894, as amended 29 St. at L. 692, § 4, 5 Fed. St. Ann. 488, Comp. St. 3384, Pierce Fed. Code, § 8760.

[13] Westinghouse El. & Mfg. Co. v. Ohio Brass Co., 186 Fed. 518.

[14] U. S. R. S., § 4968, 2 Fed. St. Ann. 271, Pierce Fed. Code, § 8861.

[15] 36 St. at L. 1075, § 39, Pierce Fed. Code Supp., § 1589.

[16] U. S. R. S., § 786, Pierce's Fed. Code, § 7428, 4 Fed. St. Ann. 85.

as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." [17] A similar statute regulates suits against the United States in the District Courts.[18]

Actions by laborers and materialmen upon bonds given to the United States by contractors for the construction or repair of public buildings and public works "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." [19] The preceding language of this statute forbids the commencement of such a suit by a laborer or materialman until six months after "the completition and final settlement of the contract." [20] During that period, the United States alone can sue, although the creditors have the right to intervene in a suit brought by the United States.[21] The work must not only be completed, but there must be a final settlement of the contract. So long as the matter is under consideration by the department and the final payment has not been made, the contract has not been finally settled.[22] The reservation by the Government, in accordance with the contract, of a specified sum for one year after the completion and acceptance of the work, does not, it has been held, extend the time of final settlement.[23] It has been held that this statute of limitations is a condition

[17] U. S. R. S., § 1069, Pierce's Fed. Code, § 7798, 2 Fed. St. Ann. 65. See chapter on Court of Claims, *infra*.

[18] Jud. Code, § 24, subd. 20, 36 St. at L. 1087. Statutes creating claims against the United States usually also prescribe periods of limitation for suits thereunder. E. G. The Indian Depredations Act of March 3, 1891, 26 St. at L. 851, § 2, 2 Fed. St. Ann. 91, Comp. St. 758, Pierce's Fed. Code, § 7845; The French Spoliations Act of January 20, 1885, 23 St. at L. 283, § 6, 2 Fed. St. Ann. 88, Pierce's Fed. Code, § 7863.

[19] Act of August 13, 1894, ch. 280, 28 St. at L. 278, Comp. St. 1901, p. 2523, as amended by Act of February 24, 1905, ch. 778, 33 St. at L. 811, Comp. St. Supp. 1909, p. 948.

[20] Ibid. Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

[21] U. S. v. Winkler, 162 Fed. 397; Title Guaranty & Trust Co. v. Puget Sound Engine Works, C. C. A., 163 Fed. 168, 89 C. C. A., 618; U. S. v. McGee, 171 Fed. 209; Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

[22] Stitzer v. U. S., C. C. A., 182 Fed. 513, 517.

[23] U. S. v. Illinois Surety Co., 195 Fed. 306.

to the cause of action granted by the statute and consequently need not be pleaded;[24] and that so much of the statute as requires notice to all known creditors and publication of the commencement of the action need not be complied with within this period of time;[25] and that the commencement of an action upon such a bond in a State court, which had no jurisdiction of the same, does not extend the statutory period.[26]

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."[27] It has been held that this applies to an action against a common carrier to recover damages for a discrimination.[28] A previous statute provides: "That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: provided, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation."[29] It was held that this statute was in force in 1907 and aplied to a suit brought under the Customs Administrative Act of June 10, 1890, for the forfeiture of property.[31] Actions for penalties, forfeiture, or damages for the presentation of false claims to the United States, must "be commenced within six years from the commission of the act, and not afterward."[32]

"No person shall be prosecuted, tried, or punished for treason

[24] Stitzer v. U. S., C. C. A., 182 Fed. 513, 516.

[25] U. S. v. United Surety Co., 192 Fed. 992.

[26] U. S. v. Boomer, C. C. A., 183 Fed. 726.

[27] U. S. R. S., § 1047, Comp. St. 1901, p. 727.

[28] Carter v. New Orleans & N. E. R. Co., C. C. A., 143 Fed. 99. *Contra*, Ratican v. Terminal R. Ass'n, 114 Fed. 666. *Cf.* Murray v. Chicago & N. W. Ry. Co., C. C. A., 92 Fed. 868, 35 C. C. A. 62.

[29] Act of June 22, 1874, ch. 391, 18 St. at L. 190, Comp. St. 1901, p. 727.

[30] 26 St. at L. 135, Comp. St. 1901, p. 1895.

[31] U. S. v. Wittemann, C. C. A., 152 Fed. 377.

[32] U. S. R. S., § 3494, Pierce's

or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed."[33] "No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime."[34] "No person shall be prosecuted, tried, or punished for any offense, not capital except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws."[35] The copyright law of 1909 provides: "That no criminal proceeding shall be maintained under the provisions of this Act unless the same is commenced within three years after the cause of action arose."[36] The Revised Statutes previously provided: "No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen."[37]

The Interstate Commerce Act provides concerning claims thereunder against Railroad Companies: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit," now the District "Court within one year from the date of the order and not after: Provided that claims accrued prior to the passage of this act may be presented within one year."[38]

Fed. Code, § 1686, 2 Fed. St. Ann. 31.

[33] U. S. R. S., § 1043, Pierce's Fed. Code, § 7760, 2 Fed. St. Ann. 358.

[34] U. S. R. S., § 1046.

[35] U. S. R. S., § 1044, Pierce's Fed. Code, § 7761, 2 Fed. St. Ann. 358.

[36] Act of March 4, 1909, 35 St. at L. 1075, § 39, Pierce's Fed. Code, § 1589.

[37] U. S. R. S., § 4968, Pierce's Fed. Code, § 8861, 2 Fed. St. Ann. 271.

[38] Act of Feb. 4, 1887, c. 104, § 16, 24 St. at L. 384 (Comp. St. 1901, p. 3165), as amended by Act of June 29, 1906, c. 3591, § 5, 34 St. at L. 590 (Comp. St. Supp. 1909,

It has been held that a cause of action to recover damages for unreasonable charges accrued when the shipment terminated and the complainant became liable for the freight, and not when he paid the same.[39]

§ 181. State statutes of limitations. When there is no Act of Congress upon this subject the courts of the United States in actions at common law are bound by the State statutes of limitations.[1] The effect of a State statute of limitations upon actions at common law, to enforce rights created by Federal statutes, was for a long time the subject of conflicting adjudications.[2] Before the passage of the act of Congress upon the subject, it was, however, held that actions at common law for the infringement of a patent were barred by the period of limitations prescribed by the statutes of the State where the Federal court was held.[3] It has been further held: that the State statutes of limitations apply to actions to enforce the liability of stockholders of national banks,[4] when however, the statute does not begin to run until the Comptroller of the Currency orders an assessment,[5] and that, in the absence of any discrimination against the authorities of the United States, they apply to suits against Federal officers, founded upon their

p. 1159), Pierce's Fed. Code, § 6435; A. J. Phillips Co. v. Grand Trunk Western Ry. Co., C. C. A., 195 Fed. 12.

39 Arkansas Fertilizer Co. v. U. S., (Comm. Ct.) 193 Fed. 667.

§ 181. 1 U. S. R. S., § 721; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. ed. 331; Bauserman v. Blunt, 147 U. S. 647, 37 L. ed. 316; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Clark v. Smith, 13 Pet. 195, 10 L. ed. 123; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596; Brine v. Insurance Co., 96 U. S. 627, 24 L. ed. 858; Mills v. Scott, 99 U. S. 25, 25 L. ed. 294; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Holland v. Challen, 110 U. S. 15, 28 L. ed. 52; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733; Bucher v. Cheshire R. Co., 125 U. S. 555, 31 L. ed. 795. But see Watson v. Tarpley, 18 How. 517, 15 L. ed. 509.

2 See the Second Edition of this Treatise, p. 72.

3 Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280.

4 McClaine v. Rankin, 197 U. S. 154, 49 L. ed. 702.

5 Rankin v. Barton, 199 U. S. 228, 50 L. ed. 163. The statute against an assessment against stockholders under a State statute does not run until the entry of the decree levying the assessment. Irvine v Putnam, 190 Fed. 321.

official acts,[6] and to actions upon judgments of courts of the United States.[7]

Federal courts of equity are not bound by State statutes of limitations,[8] except in cases where their jurisdiction is concurrent with the jurisdiction at common law;[9] but they will usually follow them,[10] unless injustice otherwise would be done,[11]

[6] McCluny v. Silliman, 3 Pet. 270, 277, 7 L. ed. 676, 678; Andreae v. Redfield, 98 U. S. 225, 25 L. ed. 158; Barney v. Oelricks, 138 U. S. 529, 34 L. ed. 1037. See also Beatty's Adm'r v. Burne's Adm'rs, 8 Cranch, 98, 107, 108, 3 L. ed. 500, 503, 504; Campbell v. Haverhill, 155 U. S. 610, 620, 39 L. ed. 280, 283.

[7] Metcalf v. Watertown, 153 U. S. 671, 38 L. ed. 861.

[8] Wagner v. Baird, 7 How. 234, 258, 12 L. ed. 681, 691; Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; Wilson v. Koontz, 7 Cranch, 202, 3 L. ed. 315; Kirby v. L. S. & M. S. R. Co., 120 U. S. 130, 137, 30 L. ed. 569, 572; Richards v. Maryland Ins. Co., 8 Cranch, 84, 3 L. ed. 496; Hanger v. Abbott, 6 Wall. 532, 18 L. ed. 939; Etting v. Marx's Ex'r, 4 Fed. 673; Stevens v. Sharp, 6 Sawy. 993; Continental Nat. Bank v. Heilman, 81 Fed. 36; Redd v. Brun, C. C. A., 157 Fed. 190; Jackson v. Horton, 3 Caines (N. Y.) 19; Ide v. Trorlicht, D. & R. Carpet Co., C. C. A., 115 Fed. 137; Stevens v. Grand Cent. Min. Co., C. C. A., 133 Fed. 28.

[9] Wagner v. Baird, 7 How. 234, 258, 12 L. ed. 681, 691; Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; Meath v. Phillips Co., 108 U. S. 553, 27 L. ed. 819. *Contra*, Rodgers v. Thomas, C. C. A., 193 Fed. 952, 957; Riner, J.: "We think it is the general rule that courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this rather in obedience to the statute of limitations than by analogy, while in many other cases they act upon the analogy of the statute of limitations at law."

[10] Wagner v. Baird, 7 How. 234, 258, 12 L. ed. 681, 691; Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; Meath v. Phillips County, 108 U. S. 553; Kirby v. L. S. & M. S. R. Co., 120 U. S. 130, 30 L. ed. 569; Pratt v. Northam, 5 Mason, 95, 112, per Story, J.; Norris v. Haggin, 136 U. S. 386, 34 L. ed. 424; O'Brien v. Wheelock, 184 U. S. 450, 482, 493, 46 L. ed. 636, 651, 655.

[11] Higgins Oil & Fuel Co. v. Snow, C. C. A., 113 Fed. 433; Patterson v. Safe Deposit & Trust Co., 148 Fed. 787; Redd v. Brun, C. C. A., 157 Fed. 190; Fogg v. St. Louis, H. & K. R. Co., 17 Fed. 871, 873; Cheatham v. Evans, C. C. A., 160 Fed. 802; Wilson v. Plutus Min. Co., C. C. A., 174 Fed. 319; Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199; Newbery v. Wilkinson, 190 Fed. 62; Rodgers v. Thomas, C. C. A., 193 Fed. 952; Updike v. Mace, 194 Fed. 1001; Davis v. Smokeless Fuel Co., C. C. A., 196 Fed. 753; Layton Pure Food Co. v. Church &

especially in foreclosure suits[12] and suits against executors and administrators,[13] unless there is an Act of Congress upon the subject. It has been said that a Federal court of equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought,[14] nor usually in case of a fraud that has been concealed.[15] The Federal courts will usually give such statutes the same construction that is placed upon them by the courts of the respective States where they were enacted;[16] but a court of admiralty refused to follow a decision of a State court which did not permit a foreign corporation, subject to service of process within the State, to plead the statute.[17] A State statute of limitation cannot bar the United States;[18] even, it has been said, if specially named therein;[19] but the United States may take advantage of a State statute of limitations.[20] The United States may plead a State statute of limitations which does not name them;[21] and so may officers of the United States in possession of property claimed by the government.[22] The rule that a State is not affected by laches or a statute of limi-

Dwight Co., C. C. A., 32 L.R.A. (N.S.) 274, 182 Fed. 35; L. Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Pulliam v. Pulliam, 10 Fed. 53; Fogg v. St. Louis, H. & K. R. Co., 17 Fed. 871, 873; Story's Eq. Jur., § 1521. *Cf.* Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 237, 47 L. ed. 147, 158.

12 Cleveland Ins. Co. v. Reed, 1 Biss. 180; Reeves v. Vinacke, 1 McCrary, 213, 217, per Nelson and Dillon, JJ.

13 Pulliam v. Pulliam, 10 Fed. 53; Broderick's Will, 21 Wall. 503, 22 L. ed. 599; Newbery v. Wilkinson, 190 Fed. 62.

14 Fogg v. St. Louis, H. & K. R. Co., 17 Fed. 871, 873; Story's Eq. Jur., § 1521. *Cf.* Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059; Security Tr. Co. v. Black River Nat. Bank, 187 U. S. 211, 237, 47 L. ed. 147, 158.

15 McIntire v. Pryor, 173 U. S. 38, 43 L. ed. 606; Saxlehner v. Eisner & M. Co., 179 U. S. 19, 45 L. ed. 60; Newberry v. Wilkinson, C. C. A., 199 Fed. 673; Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co., C. C. A., 182 Fed. 607.

16 Cheatham v. Evans, C. C. A., 160 Fed. 802; Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199.

17 Davis v. Smokeless Fuel Co., C. C. A., 196 Fed. 753.

18 Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; U. S. v. Thompson, 98 U. S. 486, 25 L. ed. 194. See *infra*, § —.

19 U. S. v. Thompson, 98 U. S. 486, 490, 25 L. ed. 194, 195.

20 Stanley v. Schwalby, 147 U. S. 508, 517, 37 L. ed. 259, 263.

21 Stanley v. Schwalby, 147 U. S. 508, 517, 37 L. ed. 259, 263.

22 Stanley v. Schwalby, 147 U. S. 508, 518, 37 L. ed. 259, 263.

tation cannot aid a creditor of a State when suing one of its debtors.[23] An individual seeking to enforce by subrogation the rights of a State may be estopped by laches of the State which would not have affected the State itself.[24] Municipal corporations and counties may be estopped by laches.[25] Laches or the statute of limitations may be pleaded to a bill to remove a cloud on title filed by one out of possession.[26] The filing of a bill in equity stops the running of the statute of limitations, although the subpœnas are not issued until subsequent to its expiration.[27]

§ 182. Equitable laches. Moreover, the lapse of time for a shorter period than the statute of limitations, and in cases to which that statute does not apply, will often be held such laches as to bar the complainant[1] but very rarely, unless other circumstances than the mere lapse of time make it inequitable to permit the complainant to sue.[2] The United States are not bound by laches,[3] unless equities have arisen through the lapse of time;[4] or where a suit is brought in the name of the United States to enforce the rights of a private person.[5] It is not laches for a complainant to delay asserting his rights until the determination in another suit, brought by himself or another in a similar position, of a doubtful question of law materially affecting their validity,[6] nor is delay because of the inability

23 Cressy v. Meyer, 138 U. S. 525, 34 L. ed. 1018.

24 Ibid.

25 Boone County v. Burlington M. R. R. Co., 139 U. S. 684, 35 L. ed. 319.

26 Sage v. Winona & St. P. R. Co., 58 Fed. 297.

27 Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199.

§ 182. 1 Brown v. County of Buena Vista, 95 U. S. 157, 161, 24 L. ed. 422, 423.

2 Stuart v. Holland, 179 Fed. 969; Central R. Co. of New Jersey v. Jersey City, 199 Fed. 237; Newberry v. Wilkinson, C. C. A., 199 Fed. 673.

3 U. S. v. Beebe, 127 U. S. 338, 32 L. ed. 121; U. S. v. Insley, 130 U. S. 263, 32 L. ed. 968; U. S. v. Dalles M. L. Co., 140 U. S. 599, 55 L. ed. 560; U. S. v. Fitts, 197 Fed. 1007, an action to collect the legacy tax.

4 U. S. v. Stinson, 197 U. S. 200, 49 L. ed. 724.

5 U. S. v. Chicago, M. & St. P. Ry. Co., C. C. A., 116 Fed. 969. *Cf.* U. S. v. Beebe, 127 U. S. 338, 32 L. ed. 121.

6 Buxton v. James, 5 De Gex & Sm. 80, 84; Rumford Chem. Works v. Vice, 14 Blatchf. 179, 180; Green v. Barney, 19 Fed. 420; Hurd v. James Goold Co., 197 Fed. 756; Central R. Co. of New Jersey v. Jersey City, 199 Fed. 237; Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed.

of the owner to bear the expense of the litigation,[7] nor, in Porto Rico, a delay warranted by the previous jurisprudence and caused by lack of knowledge of the principles of chancery.[8]

§ 183. Pleading statute of limitation. It is the safer practice for the defendant to plead the statute of limitations in every case where he relies upon it;[1] although, when laches appear upon the face of the bill, it might perhaps be dismissed upon motion before answer;[2] and under the former practice, the defense of laches, although not pleaded, might be raised at the hearing.[3] Where the bill shows that a reissued patent was void because of delay in the patent office, that defense need not be pleaded.[4] In certain cases, it has been held that Federal statutes of limitations need not be pleaded.[5] Laches may be pleaded.[6] Laches in prosecuting a suit after it is brought may also be taken into consideration.[7] That the delay has been prejudicial to the defendant need not be affirmatively shown, but may be presumed, and it was so presumed when a bill was filed eighteen months after the complainant admitted to have dis-

113; People v. Cooper, 22 Hun (29 N. Y. S. C. R.), 515, 517. See Illinois G. T. Ry. Co. v. Wade, 140 U. S. 65, 35 L. ed. 342.

[7] Davis v. A. H. Reid Creamery & Dairy Supply Co., 187 Fed. 157.

[8] Noble v. Gallardo y Seary, 223 U. S. 65, 56 L. ed. 353.

§ 183. [1] Fichtel v. Barthel, 173 Fed. 489, a patent case; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629. The limitation upon the time to bring actions to claim filiation in the Civil Code of Porto Rico of 1889, art. 137, and of § 199 of the Porto Rico Act of March 1, 1902, must be pleaded. Burnet v. Desmornes Y Alvarez, 226 U. S. 145, 57 L. ed. —. A defendant in a foreclosure suit, who claimed an interest in the property, but who was not alleged to be in possession nor to owe the amount of the debt, was not allowed by a demurrer to avail himself of the statute of limitations. Blair v. Silver Peak Mines, 84 Fed. 737.

[2] Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wisner v. Barnet, 4 Wash. 631; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629.

[3] Nat. Cash Register Co. v. Union Comp. Mach. Co., 143 Fed. 342.

[4] Wollensak v. Reiher, 115 U. S. 96, 101, 29 L. ed. 350, 351; Lockhart v. Leeds, 195 U. S. 427, 49 L. ed. 263; Thurmond v. Ches. & O. Ry. Co., C. C. A., 140 Fed. 697.

[5] *Supra*, § 180.

[6] Edison El. Light Co. v. Equitable Life Assur. Soc. of U. S., 55 Fed. 478; Sullivan v. P. & K. R. Co., 94 U. S. 806, 811, 24 L. ed. 324; Doe v. Hyde, 114 U. S. 247, 29 L. ed. 142; Phillippi v. Phillippe, 115 U. S. 151, 29 L. ed. 336.

[7] See Underfeed Stoker Co. v. Am. Stoker Co., 169 Fed. 891, *infra*, § 294.

covered the existence of a decree of divorce which he claimed to be fraudulent and the defendant had married since the decree.[8] When a suit is brought after the statutory time, the burden is on the complainant to show in his bill and by his proof that it would be inequitable to apply the statute to his case.[9]

The defense of the statute of limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential.[10] The same strictness of pleading the statute is not required at equity as at law; and it was held to be a sufficient averment of the statute of limitations, as well as of laches, when the answer alleged that if there had been any claim against the defendant's intestate in his lifetime, by reason of the transactions alleged in the bill, which was denied, said claim was barred by the lapse of time and the neglect of plaintiff to have a settlement of the same in the lifetime of the decedent; and that the defendant, therefore, believes that any such claim is barred, as plaintiff allowed the claim to sleep only after the death of deceased.[11] When the answer pleaded a limitation of six years, whereas the three years' statute applied; it was held to be sufficient.[12] If the bill charge fraud or other matters, which, if true, would prevent the statute from depriving the complainant of relief, the plea must deny them.[13]

§ 184. Defense of statute of frauds. The State statute of frauds will be followed by the Federal courts.[1] Under

[8] McNeil v. McNeil, C. C. A., 170 Fed. 289. In Newberry v. Wilkinson, C. C. A., 199 Fed. 673, a bill was dismissed for laches when filed against the sureties of a guardian between three and four years after the complainant became of age, and he had had notice sufficiently to put him upon inquiry two years before his infancy terminated, but made no search of the records until three months before the suit was brought.

[9] Godden v. Kimmel, 99 U. S. 201, 25 L. ed. 431; National Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wilson v. Plutus Min. Co., C. C. A., 174 Fed. 317; Wisner v. Barnet, 4 Wash. 631. But see Sullivan v. P. & K. R. Co., 94 U. S. 806, 811, 24 L. ed. 324, 326; Doe v. Hyde, 114 U. S. 247, 29 L. ed. 242; Phillippi v. Phillippe, 115 U. S. 151, 29 L. ed. 336.

[10] Harpending v. Reformed Prot. Ch., 16 Pet. 455, 10 L. ed. 1029; West Portland H. Ass'n v. Lownsdale, 17 Fed. 205; Story's Eq. Pl., § 752.

[11] Huntington Nat. Bank v. Huntington Distilling Co., 152 Fed. 240.

[12] Ramsden v. Gately, 142 Fed. 912.

[13] Stearns v. Page, 1 Story, 204.

§ 184. [1] Randall v. Howard, 2 Black, 585, 589, 17 L. ed. 269, 271.

the old practice, if the bill showed that the complainan's case is repugnant to the statute of frauds, it was demurrable.[2] This, however, is rarely the case, and the statute was usually referred to by plea or answer.[3] The rule is thus stated by Lord Chancellor Cranworth: "It was argued that the statute of frauds was not open to the defendant, by reason of his not having insisted upon the statute as a defense; but this is a mistake. Where a defendant admits the agreement, if he intends to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement the burden of proof is altogether upon the plaintiff, who must then prove a valid agreement capable of being enforced."[4] The facts which show that the statute applies must be stated specifically.[5] Otherwise the defense is bad.[6]

§ 185. Defenses of matter in pais. Defenses founded upon matter *in pais* state some other reason, why the plaintiff should not have relief,[1] for example, a release or an account stated, or a purchase without notice for a valuable consideration. A plea of purchase without notice for a valuable consideration should deny notice positively, and should state the amount of the consideration.[2] It is insufficient to plead that the defendant paid a "good and valuable consideration, to-wit, a certain sum of money."[3] Notice to an individual is notice to a corporation subsequently formed by him, in which he retained the control.[4] It seems that a purchaser without notice pending a suit is confined to asserting his rights in the pending cause.[5]

2 Randall v. Howard, 2 Black. 585, 589, 17 L. ed. 269, 271. But see Chapman v. School Dist., 1 Deady, 108.

3 For an illustration of the plea, see Jackson v. Oglander, 2 H. & M. 465.

4 Ridgway v. Wharton, 3 De G., M. & G. 677, 689. But see Heys v. Astley, 9 Law Times (N. S.), 356.

5 Bailey v. Wright, 2 Bond. 181; McCloskey v. Barr, 38 Fed. 165, 169.

6 Ibid.

§ 185. 1 Story's Eq. Pl., §§ 795–815.

2 Wood v. Mann, 1 Sumn. 506.

3 Secombe v. Campbell, 18 Blatchf. 108.

4 Rickey Land & Cattle Co. v. Miller, 218 U. S. 258, 263, 54 L. ed. 1032, 1038. See Linn & Lane Timber Co. v. U. S., C. C. A., 196 Fed. 593.

5 Rickey Land & Cattle Co. v. Mil-

§ 186. Defenses of matter of record or res adjudicata. A plea founded upon matter of record sets up the judgment or decree of a court of record upon the same matter and between the same parties, or those in privity with them, in a cause of which it had jurisdiction.[1] Pleas of matter of record are in some of the books distinguished from pleas of matter as of record. This distinction was due to the fact that, in England, the Court of Chancery in its equitable jurisdiction, the Court of Admiralty and ecclesiastical courts were deemed courts not of record, although their decrees had the same effect as the judgments of the courts of record.[2] Where there is neither valid service of process, nor voluntary appearance, a judgment *in personam* is not an estoppel;[3] but a State statute providing that a special appearance for the sole purpose of questioning the jurisdiction is equivalent to a general appearance, will make a judgment thereupon binding when attacked collaterally;[4] and, so it has been held, will a rule of law, established by the courts of a State, that an appeal from an order denying a motion to set aside the service of a summons is equivalent to a general appearance.[5] It has even been held that in the case of a foreign corporation, where the validity of the service has been contested and decided against the defendant, such decision is binding collaterally.[6] The judgment of the same court,[7] or

ler, 218 U. S. 258, 263, 54 L. ed. 1032, 1038; citing Whiteside v. Haselton, 110 U. S. 296, 301, 28 L. ed. 152, 154. See Atlas Ry. Supply Co. v. Lake & River Ry. Co., 134 Fed. 503; Barstow v. Becket, 110 Fed. 826. See *infra*, § 477.

§ 186. [1] Ulpian, liber 42, tit. 20 et leg. 1: "*Res judicata dicitur, quae finem controversariarum pronunciatione judicis accipit: quod vel condemnatione, vel absolutione contingit.*"

[2] Story's Eq. Pl., § 778. A decree of distribution amongst the heirs of a decedent, made by a Probate Court of Alaska, was held not to be a conclusive adjudication that a partnership did not exist between decedent and another, to whom the property belonged, as against a creditor of the alleged partner who sought to recover the property from the distributees, since the Probate Court had no jurisdiction to bring in the proper parties and adjudicate that question. Bartleson v. Feidler, 149 Fed. 299.

[3] Simon v. Southern Ry. Co., C. C. A., 195 Fed. 56; *supra*, § 164.

[4] York v. Texas, 137 U. S. 15, 34 L. ed. 604.

[5] Chinn v. Foster-Milburn Co., 195 Fed. 158, 162.

[6] Chinn v. Foster-Milburn Co., 195 Fed. 158, 163. But see Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; *supra*, § 164.

[7] Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429.

of another court of the United States,[8] or of a court of one of the United States,[9] with jurisdiction of the subject-matter and of the parties, in which the defendant was duly served or voluntarily appeared, is, with the exceptions hereinafter noted, and in the absence of fraud, conclusive between the parties and their privies as to all matter pleaded and which might have been tried in the case. The same rule applies to the judgment of a court of an Indian nation in the Indian Territory[10] and to the judgment of an alien court in a country, such as England and Canada, the laws of which give like effect to a judgment of a court in the United States.[11] A domestic or foreign judgment *in rem* adjudicating the title to land or to a ship or to other movable property within the custody of the court, is in the absence of extraordinary circumstances,[12] conclusive, and will not be re-examined.[13] An adjudication in bankruptcy against persons who were charged as partners is, for the purpose of the administration of the property, good against all the world; but it is not *res adjudicata,* as to the existence of the partnership, against parties who were not heard, although they appeared therein.[14] An adjudication of residence upon an application for probate is not binding upon the courts of another State in a proceeding to collect an inheritance tax.[15] A foreign judgment determining the status of persons subject to the jurisdiction, such as a decree confirming a marriage or granting a divorce, is followed unless contrary to the policy of the law of this country.[16] A foreign judgment under which

[8] Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

[9] Clay v. Deskins, C. C. A., 63 Fed. 330; Hennessy v. Tacoma Smelting & Refining Co., C. C. A., 129 Fed. 240.

[10] Standley v. Roberts, 59 Fed. 836.

[11] Ritchie v. McMullen, 159 U. S. 235, 40 L. ed. 133; Giae v. Westervelt, 116 Fed. 1017.

[12] See Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

[13] Williams v. Armroyd, 7 Cranch, 423, 432, 3 L. ed. 392, 395; Hudson v. Guestier, 4 Cranch, 293, 2 L. ed. 625; Hilton v. Guyot, 159 U. S. 113, 167, 40 L. ed. 95, 109.

[14] Manson v. Williams, 213 U. S. 453, 53 L. ed. 869.

[15] Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95.

[16] Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298; Hilton v. Guyot, 159 U. S. 113, 167, 40 L. ed. 95, 109. It has been held that the decree of a foreign court concerning the awarding the custody of a child is not conclusive, but is a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it. People ex

a person has been compelled to pay money is said to be so far conclusive that the justice of the payment cannot be impeached in another country, and that the defendant cannot be compelled to pay it again.[17] So, it has been held, are foreign judgments discharging obligations between citizens or residents of the foreign country and therein contracted.[18] But it was held by a majority of the Supreme Court: that, otherwise, the judgment *in personam* of a court in a foreign country where a similar judgment of a court of this country would be considered as only *prima facie* evidence of the facts therein adjudicated, when one of the parties is an American citizen and the other a citizen of that foreign country; is only *prima facie*

rel. Allen v. Allen, 105 N. Y. 628; Morrell v. Morrell, 83 Conn. 479, 77 Atl. 1; Woodworth v. Spring, 4 Allen (Mass.) 321; Hanrahan v. Sears, 72 N. H. 71; in all of which the decree was followed; *Ex parte* Stewart, 137 N. Y. 202, in which the decree was not followed. A decree of divorce, obtained upon service by publication, must be respected when it was made by a court of the State of the matrimonial domicile. Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794; Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —. The State in which the parties were married and where they resided after their marriage and the party who brings the suit still resided when the suit was brought is the matrimonial domicile. Ibid. Notice, by personal service or by publication, must be given to the defendant. Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —. The judgment is valid although the order for service by publication was granted by an affidavit that the defendant was a non-resident, made upon information and belief, when she was in fact a resident of the State; provided that the law of the State permits orders to be granted upon affidavits so made. Thompson v. Thompson, 226 U. S. 551, 57 L. ed. —. Irregularities in such affidavit, in the manner of stating material facts, do not invalidate the judgment, provided that the facts are actually stated therein, although the judgment might be voidable because of those defects by a suit brought for that purpose. Ibid. Otherwise, when no personal service within the jurisdiction is made upon the defendant and such defendant is a nonresident, the decree of divorce is invalid unless the defendant appears. Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 5 Ann. Cas. 1.

[17] Hilton v. Guyot, 159 U. S. 113, 168, 40 L. ed. 95, 110, per Gray, J., citing Gold v. Canham, 2 Swanst. 325; s. c., 1 Cases in Ch. 316; Tarleton v. Tarleton, 4 M. & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

[18] Burrows v. Jamereaux or Jamineau, Mosely, 1; s. c., 2 Stra. 733; s. c., 2 Eq. Cas. Abr. 525, pl. 7; s. c., 12 Vin. Abr. 87, pl. 9; s. c., Sel. Cas. in Ch. 69; s. c., 1 Dick. 45; May v. Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; Hilton v. Guyot, 159 U. S. 113, 168, 40 L. ed. 95, 110.

evidence and not conclusive.[19] A judgment at common law is a bar to a bill in equity, based upon the facts there pleaded or offered in evidence; unless a claim or defense is pleaded in equity, or which the former court could not have taken cognizance.[20] A decree or judgment of a State court between the same parties in a suit duly commenced before that in a Federal court is *res adjudicata* in the latter,[21] although the question was one of general commercial law and jurisprudence and the case was decided upon a demurrer;[22] but not, it has been held, an order, judgment or decree of a State court in a suit instituted subsequent to the beginning of that in a court of the United States.[23] Where a suit was first instituted the decree therein is conclusive although not entered until after the pendency of that in which it is pleaded or offered in evidence.[24] The judgment of a State court has no greater weight as *res adjudicata*, than would be given to the same by a State tribunal.[25] A nonsuit, although involuntary,[26] or even when taken after the highest court of the State has decided that the plaintiff has no cause of action, is not conclusive in a subse-

19 Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95; Kilham v. Wilson, C. C. A., 112 Fed. 565; Eastern Bldg. & L. Ass'n v. Welling, 116 Fed. 100. But see Cruz v. O'Boyle, 197 Fed. 824.

20 Commercial Union Assur. Co., L'd, v. N. J. Rubber Co., 64 N. J. Eq. 338, 51 Atl. 451. A judgment for nominal damages, in an action at law for a breach of contract, was held to be not a bar to a suit for specific performance. Slaughter v. La Compagnie Francaise, 113 Fed. 21.

21 Clay v. Deskins, C. C. A., 63 Fed. 330; Hennessy v. Tacoma Smelting & Refining Co., C. C. A., 129 Fed. 240; Susquehanna Coal Co. v. Mayor, etc., of South Amburg, 184 Fed. 941; Chinn v. Foster-Milburn Co., 195 Fed. 158; Converse v Stewart, C. C. A., 197 Fed. 152.

22 Fuller v. Hamilton County, 53 Fed. 411.

23 Blydenstein v. N. Y. S. & Tr. Co., 59 Fed. 12; Sharon v. Terry, 1 L.R.A. 572, 36 Fed. 337, *supra*, §§ 9, 10. But see Insurance Co. v. Harris, 97 U. S. 331, 24 L. ed. 959.

24 David Bradley Mfg. Co. v. Eagle Mfg. Co., C. C. A., 57 Fed. 980; s. c., 58 Fed. 721.

25 Union & Planters' Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963; Glencoe Granite Co. v. City Tr., S. D. & S. Co., C. C. A., 118 Fed. 386; John D. Park & Sons Co. v. Bruen, 139 Fed. 698; Harrison v. Remington Paper Co., C. C. A., 3 L.R.A.(N.S.) 954, 140 Fed. 385, 5 Ann. Cas. 314.

26 Homer v. Brown, 16 How. 354, 14 L. ed. 970; Woodward v. Davidson, 150 Fed. 840.

quent action upon the same facts,[27] and the rulings in such a case, even if made by the appellate tribunal are not binding in a second suit, brought in another jurisdiction.[28] A decree of a court of equity will not be a bar if it resulted in the dismissal of a bill without prejudice;[29] or for want of prosecution,[30] or for multifariousness,[31] or for a slip in practice,[32] such as a dismissal upon a verified answer when an oath by the respondent had not been waived;[33] or because the court had no power to grant the relief,[34] or by consent before a hearing,[35] even, it has been held, when it provides that each party shall pay his own costs;[36] or by the former English practice, if it had not been signed and enrolled, although it could then be insisted on by answer as a good defense.[37] Nor does a judgment against the plaintiff upon his default have that effect.[38] But a decree upon a bill taken as confessed concludes the defendant in another suit,[39] and the failure of a party to offer evidence

27 Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107. But see Williford v. Kansas City, M. & B. R. Co., 154 Fed. 514.

28 Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. ed. 1107; Gilbert v. Am. Surety Co., C. C. A., 122 Fed. 499; Harrison v. Remington Paper Co., C. C. A., 3 L.R.A. (N.S.) 954, 140 Fed. 385, 5 Ann. Cas. 314; Illinois Cent. R. R. Co. v. Benz, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763.

29 Durant v. Essex Co., 7 Wall. 107, 19 L. ed. 154; House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839; Northern Pac. Ry. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. 536; *infra*, § 377.

30 American D. R. B. Co. v. Sheldon, 17 Blatchf. 208; s. c., 4 Bann. & A. 551; Keller v. Stolzenbach, 20 Fed. 47; Conn v. Penn, 5 Wheat. 424, 427, 5 L. ed. 125; Badger v. Badger, 1 Cliff. 241; Welsbach Light Co. v. Cohn, 181 Fed. 122.

31 Young v. U. S., 176 Fed. 612.

32 Durant v. Essex Co., 7 Wall. 107, 109, 19 L. ed. 154, 156; House v. Mullen, 22 Wall. 42, 46, 22 L. ed. 838, 839; Walden v. Bodley, 14 Pet. 158, 10 L. ed. 399; Gist v. Davis, 2 Hill Ch. (S. C.) 335; Grubb v. Clayton, 2 Hayw. (N. C.) 378; Hughes v. U. S., 4 Wall. 232, 18 L. ed. 303. See, however, Starr v. Stark, 1 Saw. 270; Anon., 3 Atk. 809; Story's Eq. Pl., § 790.

33 Speckart v. Schmidt, 190 Fed. 499.

34 Murray v. City of Pocotello, 226 U. S. 318, 57 L. ed. —.

35 Marshall v. Otto, 59 Fed. 249.

36 Rincon Water & Power Co. v. Anaheim Union Water Co., 115 Fed. 543.

37 Anon., 3 Atk. 809; Story's Eq. Pl., § 790.

38 Gabrielson v. Waydell, 67 Fed. 342.

39 Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 39 L. ed. 859; Reedy v. Western El. Co., C. C. A., 83 Fed. 709; Thompson v. Wooster, 114 U. S. 104, 111, 112, 29 L. ed. 105, 107, 108; Ogilvie v.

upon an issue does not make the adjudication less conclusive against him.[40] The fact a writ of error was dismissed by the appellate court without a decision there upon the merits does not make the decision below the less conclusive.[41] And where a bill was dismissed for want of equity as well as for technical objections to the same, the decree was *res adjudicata* to a subsequent suit in another court where such objections were not recognized.[42] Where a decree of dismissal does not disclose the ground, the presumption is that the dismissal was upon the merits; but this is not conclusive; and when the decree is pleaded in bar of a subsequent suit, the plaintiff may plead facts showing that it was not.[43] A judgment dismissing an action upon plaintiff's refusal to amend is a judgment upon the merits.[44] A decree sustaining a demurrer to a bill is a bar to a subsequent bill between the same parties involving the same subject-matter unless the bill is dismissed without prejudice;[45] and a final decree overruling a demurrer operates as an estoppel upon the defendant.[46] In the absence of statutory authority,

Herne, 13 Ves. 563. Where, in an action on contract, defendant pleaded a counterclaim, to which plaintiff replied by plea in abatement, alleging another suit pending between the same parties in the federal court on the counterclaim, which plea was clearly invalid, and on the trial defendant failed to appear, whereupon evidence was introduced by plaintiff to rebut the merits of the counterclaim, but no evidence was given to sustain the plea in abatement; held, that a judgment dismissing the counterclaim would not be presumed to have been based on the plea of abatement, but was on the merits, and therefore was *res adjudicata*. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., C. C. A., 126 Fed. 552.

40 Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Delaware, L. & W. R. Co. v. Troxell, C. C. A., 200 Fed. 44.

41 Johnson v. Herold, 161 Fed. 593.

42 Venner v. Chicago City Ry. Co., 195 Fed. 788. Where the court had no power to grant relief, the judgment was not *res adjudicata* because, in its opinion, it expressed its views against the complainant upon the merits.

43 Stratton v. Essex County Park Commission, 164 Fed. 901.

44 Lindsley v. Union Silver Star Min. Co., C. C. A., 115 Fed. 46.

45 Northern Pac. Ry. Co. v. Slaght, 205 U. S. 122, 51 L. ed. 738; Messinger v. New Eng. M. L. I. Co., 59 Fed. 416; Bradford Belting Co. v. Kisinger-Ison Co., C. C. A., 113 Fed. 811. *Cf.* Lindsley v. Union Silver Star Min. Co., C. C. A., 115 Fed. 46; Ohio River R. Co. v. Fisher, C. C. A., 115 Fed. 929; Sperry & Hutchinson Co. v. City of Tacoma, 199 Fed. 853.

46 Fuller v. Hamilton Co., 53 Fed. 411.

a decree of a State court of equity is void which declares to be invalid a conveyance of land beyond its jurisdiction, but does not direct a reconveyance; and such a decree does not bind a court within the jurisdiction of which such land is situated.[47] So, it has been held, is a decree foreclosing a mortgage upon and selling property beyond the territorial jurisdiction, unless it compels the mortgagor or the trustee of the mortgage to execute a conveyance to the purchaser.[48] No judgment or decree rendered after a proceeding not *in rem*, in which the defendant therein was not served with process within the jurisdiction;[49] or in which the unsuccessful party was denied a hearing;[50] or some such other gross injustice was perpetrated as to render the so-called judicial proceeding not due process of law,—is of any effect. Judgments or decrees obtained by fraud are not conclusive when properly impeached,[51] but it has been held that they cannot be attacked collaterally.[52] A judgment of a court of the United States cannot be attacked collaterally because the record does not show the necessary difference of citizenship of the parties or that a Federal question was involved.[53] In general, a decree which is interlocutory, such as

47 Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640. But see Eq. Rule 8.

48 Lynde v. Columbus, C. & K. Ry. Co., 57 Fed. 993; Farmers' L. & Tr. Co. v. Postal Tel. Co., 55 Conn. 334, 3 Am. St. Rep. 53, s. c., 11 Atl. 184; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337. But see Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; *supra*, § 61, *infra*, § 399.

49 Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Life Ins. Co. v. Bangs, 103 U. S. 780, 26 L. ed. 608; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222; Klenk v. Byrne, 143 Fed. 1008. See Clark v. Roller, 199 U. S. 541, 50 L. ed. 300. Where the defendant had appeared specially to challenge the jurisdiction, and the jurisdiction had been sustained; it was held, that the decision could not be collaterally disputed. Phelps v. Mutual Reserve Fund Life Ass'n., C. C. A., 61 L.R.A. 717, 112 Fed. 453. As to decrees *in rem*, see The James G. Swan, 106 Fed. 94.

50 Bischoff v. Wethered, 9 Wall. 812, 19 L. ed. 829; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Bradstreet v. Neptune Ins. Co., 3 Sum. 601. See Hilton v. Guyot, 159 U. S. 113, 204, 205, 40 L. ed. 95, 122, 123.

51 Pac. R. Co. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 28 L. ed. 498.

52 Peninsular Iron Co. v. Eels, 68 Fed. 24, 35, 36; Christmas v. Russell, 5 Wall. 290, 305, 18 L. ed. 475, 479; Mawell v. Stewart, 22 Wall. 77, 22 L. ed. 564.

53 Kempe's Lessee v. Kennedy, 5 Cranch, 173, 185, 3 L. ed. 70, 73; Skillern's Ex'rs v. May's Ex'rs, 6 Cranch 267, 3 L. ed. 220; Cameron

a decree for an injunction and an accounting because of the infringement of a patent,[54] is not a bar, for, until the final decree in the cause, it is subject to revision by the court which entered it.[55] When no formal judgment has been entered upon a verdict or findings, there is no adjudication.[56] In certain cases orders which finally determine the rights of parties, such as an order of interpleader, are conclusive in subsequent litigation.[57] It has been held: that a judgment appointing a receiver, with power to sue in any court of any State or of the United States, estops a party duly served with process therein from subsequently disputing the right of such receiver to sue in any of such other courts;[58] that an order fixing an attorney's fees, upon a motion for his substitution, is not an adjudication which will support an action at law, brought in another Federal

v. McRoberts, 3 Wheat. 591, 4 L. ed. 467; Des Moines Nav. Co. v. Iowa H. Co., 123 U. S. 552, 557, 559, 31 L. ed. 202, 204, 205; Dowell v. Applegate, 152 U. S. 327, 337–341, 38 L. ed. 463, 467, 467, 468. Pullman's P. C. Co. v. Washburn, 66 Fed. 790. *Cf.* Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 L. ed. 779.

54 Australian Knitting Co. v. Gormly, 138 Fed. 92; Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 Fed. 480.

55 David Bradley Mfg. Co. v. Eagle Mfg. Co., 58 Fed. 721; *infra*, § 318; Reinecke Coal Min. Co. v. Wood, 112 Fed. 477; Dady v. Georgia & A. Ry., 112 Fed. 838; *infra*, § 443. In Mitchell v. Porter, C. C. A., 194 Fed. 49, held that an order before trial denying a motion to discharge the defendant from custody under civil process was not *res judicata* upon a motion to strike from the judgment upon an amended complaint a provision directing his arrest.

56 Oklahoma City v. McMaster, 196 U. S. 529, 49 L. ed. 587. It has been held: that the following entries in the docket, although indefinite, sufficiently indicated that the action proceeded to final judgment: After the title of the case and notations of adjournments: "Trial commenced January 18, 1887, and concluded January 27, 1887, and decided in favor of the defendant. Costs assessed against plaintiff, $1,389.15. Rents and money, $1,340. Total amount, $2,729.15. Appeal to the Supreme Court granted." In the Supreme Court: "Court met pursuant to adjournment. The bench all present. The evidence in the case was then concluded, and, after some arguments by counsel on both sides, the case was submitted to the court for their decision. The court, after some deliberation, decided that the will is good, and hereby confirms the decision of the lower court." Holford v. James, 136 Fed. 553.

57 Insurance Co. v. Harris, 97 U. S. 331, 24 L. ed. 959.

58 Burr v. Smith, 113 Fed. 858; *supra*, §§ 35, 93.

district;[59] that a decree for alimony and costs will not support an action in another State in respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court that rendered it;[60] that a decree was not final, which confirmed and adopted a commissioners' report in partition, recommending a conveyance of part of the land, a sale of the rest, and a distribution of the proceeds, as thereafter ordered upon the confirmation of the sale.[61] Where several suits ancillary to each other were brought in different districts, it was said that the validity of a decree in one district could not be questioned by the same parties in the ancillary suit in another district.[62] A judgment of acquittal upon an indictment is a bar to a suit by the United States to recover a penalty for the same offense,[63] but not to a civil suit to recover damages;[64] or an injunction upon a charge of the same facts.[65] A decree of deportation, rendered by a United States Commissioner, was held to be an adjudication *in rem*, binding in a criminal prosecution against a stranger to the proceeding.[66] Where the parties and the property in dispute are the same and the plaintiff claims the same right as in the former suit, the prior adjudication is conclusive both as to all questions which were actually decided and as to all which might have been considered.[67] But where there is a different

[59] Du Bois v. Seymour, C. C. A., 152 Fed. 600; reversing 145 Fed. 1003.

[60] Israel v. Israel, C. C. A., 9 L.R.A.(N.S.) 1168, 8 Ann. Cas. 697, 148 Fed. 576; Valiquet v. Valiquet, 177 Fed. 994.

[61] Clark v. Roller, 199 U. S. 541, 50 L. ed. 300.

[62] Compton v. Jesups, 68 Fed. 263, 282, per Taft, J. But see s. c., 167 U. S. 1, 42 L. ed. 55.

[63] Coffey v. U. S., 116 U. S. 442, 29 L. ed. 686. *Cf.* U. S. v. Oregon C. Co., 103 Fed. 549.

[64] Stone v. U. S., 167 U. S. 178, 42 L. ed. 127. As to the rule concerning judgments of the courts of the Philippines, see Chantangeo v. Ababoa, 218 U. S. 476, 54 L. ed. 1116.

[65] U. S. v. Donaldson-Schultz Co., C. C. A., 148 Fed. 581; reversing, 142 Fed. 300.

[66] U. S. v. Hills, 124 Fed. 831.

[67] M'Aleer v. Lewis, 75 Fed. 734; Nesbitt v. Riverside Ind. Dist., 144 U. S. 610, 36 L. ed. 562; Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195; Jaros H. U. W. Co. v. Fleece H. U. W. Co., 65 Fed. 424; Bissell v. Spring Valley Tp., 124 U. S. 225, 31 L. ed. 411; U. S. Tr. Co. v. New Mexico, 183 U. S. 535, 540, 46 L. ed. 315, 319; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817; Virginia-

Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179; *Re* Coffin, 146 Fed. 181; Wood v. Browning, C. C. A., 176 Fed. 273. It has been held: that, where, in a suit upon coupons, they and the bonds from which they were cut were adjudged to be invalid, the adjudication bound the plaintiff in a subsequent suit upon coupons from the same bonds which fell due later. Bissell v. Spring Valley Tp., 124 U. S. 225, 31 L. ed. 411; Fitch v. Stanton Tp., C. C. A., 190 Fed. 310; Hickman v. Town of Fletcher, C. C. A., 195 Fed. 907. That in a similar action a judgment that the bondholder had not paid the same in good faith, was binding in a suit upon coupons subsequently maturing Fitch v. Stanton Tp., C. C. A., 190 Fed. 310. That a decision, that a tax for one year was void because the property taxed was exempt, was conclusive as to the exemption of the property when taxed for another year. New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202; Gunter v. Atlantic Coast Line, 200 U. S. 273, 291, 50 L. ed. 477, 486; Goodenow v. Litchfield, 59 Iowa, 226. But see Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 315, 38 L. ed. 450, 456; Davenport v. Chicago, R. & P. R. Co., 38 Iowa, 633; Memphis City Bank v. Tennessee, 161 U. S. 186, 40 L. ed. 664. *Cf.* Baldwin v. Maryland, 179 U. S. 220, 45 L. ed. 160. It was held otherwise, where it was the settled rule of the State courts that such an adjudication was not an estoppel between the parties, as to taxes for any other year. Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963. That where a controversy has arisen between the lessor and the lessee of certain cars, as to the right of ownership and possession thereof upon the termination of a sublease, and a suit to which the lessor, lessee and sublessee were parties has been brought to determine their rights, in which it was adjudged that the lessor owned and had the right of possession of the cars, and compensation for storage of them after the end of his lease was awarded to the sublessee; the decree was *res adjudicata* as to the lessee's right to recover damages from the sublessee for the detention of the cars after the end of the sublease. O'Hara v. Mobile & O. R. Co., 75 Fed. 130. But see Chicago, R. I. & P. Ry. Co. v. St. Joseph Depot Co., 92 Fed. 22. That where, on the reversal of a foreclosure decree after a sale thereunder, the court below, in its action upon the mandate, although it reversed the decree in part, confirmed the sale; the failure of the mortgagor to appeal from such confirmation rendered it *res adjudicata* so that another suit to set it aside could not be maintained. Grape Creek C. Co. v. Farmers' L. & Tr. Co., C. C. A., 80 Fed. 200. That a judgment dismissing a bill to enforce an alleged mechanics' lien, upon the ground that there was no lien, was a bar to a subsequent suit by the alleged lienor, to redeem property sold in a foreclosure sale. Nat. Foundry & Pipe Works v. O'Conta City Water-Supply, C. C. A., 113 Fed. 793. That where, upon a decree establishing the right to a trademark, it was stipulated that neither the defendant, nor its customers, should be held liable for past infringements, the complainant could not subsequently bring a suit for contributory infringement against one who had previously furnished the former defendant cartoons containing the in-

matter in dispute, the former judgment is only conclusive of the matters which were actually decided.[68] "In general, a

fringing trademark. Hillside Chemical Co. v. Munson & Co., 146 Fed. 198. That a decree in a suit for an infringement of a patent does not prevent a subsequent suit for infringement of the same patent by the same defendant through a new device, although the cause in action therein set forth might have been pleaded by a supplemental bill. T. B. Wood's Sons Co. v. Valley Iron Works, 198 Fed. 869. That the judgment of a Circuit Court of the United States, in an action for the recovery of excessive duties, brought by importers against a collector, was *res adjudicata* against the importers in subsequent proceedings before the Board of General Appraisers. U. S. v. J. G. Johnson & Co., 145 Fed. 1018; East Tennessee Tel. Co. v. Board of Councilmen, 190 Fed. 346. As to internal revenue cases, see Johnson v. Herold, 161 Fed. 563. Questions decided upon the issue of a mandamus to compel the payment of judgments were held to be *res adjudicata* upon an application to enforce a later judgment so far as concerned the balances of the former judgments therein included, but not as to the other claims on the same. Police Jury of Jefferson County v. U. S. ex rel. Fisk, 60 Fed. 249. For a case where a prior decree was held to conclusively establish the sufficiency of maps filed by a railway company, see So. Pac. R. Co. v. U. S., 168 U. S. 1, 42 L. ed. 355. For a case where a decree declaring stock to be invalid was said to substantially establish the invalidity of the claim to pay which the stock was issued, see Townsend v. St. L. & S. C. & Min. Co., 159 U. S. 21, 40 L. ed. 61. Where a director was one of the defendants to a stockholder's suit, in which the complainant succeeded, and the decree directed that the costs and expenses of litigation be paid out of the fund that was there recovered; it was held that such decree was conclusive against her right to recover in a subsequent suit against such director the proportion thereof which represented her stockholding interest. Singer-Bigger v. Young, C. C. A., 166 Fed. 852. A deficiency judgment taken by a trustee in a foreclosure suit does not prevent the bondholders from suing at law upon their bonds. Mackay v. Randolph Macon Coal Co., C. C. A., 178 Fed. 881.

[68] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 39 L. ed. 859; Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195; So. Pac. R. R. Co. v. U. S., 183 U. S. 519, 533, 46 L. ed. 307, 314. It has been held: that a decree of a court of equity dismissing a bill to remove a cloud on title is not so far *res adjudicata* as to prevent the plaintiff from succeeding in a subsequent action of ejectment against the same defendant, although the court of equity in its opinion stated that the title of plaintiff was bad. Phelps v. Harris, 101 U. S. 370, 25 L. ed. 855. But see State v. Buller, 47 Fed. 415. That a judgment in favor of defendants for costs in a replevin suit, where one of the defenses was that plaintiff owned only on undivided interest in the property, was no bar to a subsequent action by plaintiff

judgment is a bar to a second attempt to reach the same result by different *medium concludendi.*"[69] A decree for a perpetual injunction is not conclusive upon the right to commit the act enjoined under subsequent legislation.[70] The fact that

against one of these defendants for the conversion of the same property. Benjamin Schwarz & Sons v. Kennedy, 142 Fed. 1027. That a judgment adjudicating that certain parties had no property rights in a railroad switch on the land of another, but that they were entitled to car service thereupon during the continuance of a contract between the land owner and the railroad, was *res adjudicata* in a subsequent suit between the parties, or their privies, on the question of their property rights in the switch; but did not affect the question as to whether the right to use the switch had been lost by the abrogation of the contract between the land owner and the railroad company. Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441. That a decree denying the prayer of a petition of intervention, which sought to establish and enforce a landlord's lien for the rent of terminal facilities, did not preclude the intervenor from filing a second petition asking for the payment of rent, which accrued within six months prior to the receivorship, out of the earnings of the road while in the hands of the receivers. Manhattan Trust Co. v. Sioux City & N. R. Co., 102 Fed. 710. That an order made by a referee on a motion directing a trustee to return to the purchaser of certain casks of whisky sold by the trustee a part of the purchase money on account of a shortage in the quantity, where the amount involved was small, the shortage very large and no defense was made, does not constitute an adjudication of the terms of the contract of sale which will bind the trustee when a much larger claim is filed involving other packages. In re Drumgoole, 140 Fed. 208. That a judgment in favor of a defendants in a suit brough against him and others, as partners, is not a bar to a subsequent action on the same contract against him individually, when no statute authorized the affording of such relief in the former action. Millie Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42. That in the courts of the United States a judgment for the damages caused by a nuisance such as the excessive use of a street by a railroad company does not bar a subsequent action for a continuance of the same nuisance. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 34 L. ed. 784. But where a street has been permanently occupied by a railroad company without compensation to the owners, all the damage thereby caused must be recovered in a single action. Shepherd v. Baltimore & O. R. Co., 130 U. S. 426, 32 L. ed. 970.

[69] U. S. v. Dalcour, 203 U. S. 408, 433, 51 L. ed. 248, 251. See U. S. v. California & Oregon Land Co., 192 U. S. 355, 48 L. ed. 476.

[70] Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 L. ed. 1155. As to the effect of a decree which prescribes the language of a certain statement when enjoining

the first judgment or decree in the matter in dispute was too small to permit its review by an appellate court does not prevent it from being a bar to a subsequent suit which can be brought up by appeal or error.[71] If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence;[72] but, where, on the face of the record, it appeared that the judgment might have proceeded upon one of several grounds, evidence was admitted to show *aliunde* upon which of these grounds it did proceed, so as to make it effectual as an estoppel.[73] In determining what was decided, the pleadings may be examined.[74] It seems also that the opinion may be considered.[75] The opinion of the court upon a question not within the issues is not binding in subsequent litigation.[76] Questions concluded by a decree in equity, which has been appealed, are determined by the opinion of the appellate court; and the parties are not concluded as to questions left open by such opinion, although they were passed upon by the court below.[77]

A judgment or decree is binding upon both parties and those in privity with them. Privies are all who have acquired the property in dispute after the judgment or decree,[78] or pending the suit,[79] provided, in the latter case at least, that com-

the violation of a trademark, see G. & C. Merriam Co. v. Saalfield, C. C. A., 190 Fed. 927.

71 Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429. As to the effect of an appeal, see Eastern B. & L. Ass'n v. Welling, 103 Fed. 352.

72 Russell v. Place, 94 U. S. 606, 610, 24 L. ed. 214, 215; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 120, 40 L. ed. 358, 362.

73 Benjamin Schwarz & Sons v. Kennedy, 142 Fed. 1027.

74 National Foundry & Pipe Works v. Oconto Water-Supply Co., 183 U. S. 216, 46 L. ed. 157; U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., 114 Fed. 682, 686.

75 National Foundry & Pipe Works v. Oconto Water-Supply Co., 183 U. S. 216, 46 L. ed. 157. Mack v. Levy, 60 Fed. 751; U. S. ex rel. Coffman v. Norfolk & W. Ry. Co., 114 Fed. 682; Millie Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42.

76 Millie Iron Min. Co. v. McKinney, C. C. A., 172 Fed. 42.

77 Russell v. Russell, 129 Fed. 434.

78 Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 39; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817.

79 Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 39. Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914. G. & C. Merriam Co. v. Saalfield, C. C. A., 190 Fed. 927, where those who succeeded to the business of a publisher pending a suit against him were

pliance was made with the necessary statutory requirements.[80] Ordinarily, the beneficiary of a trust is bound by a judgment against his trustee.[81] An ancillary administrator in one State is not in privity with an ancillary administrator in another, and a judgment against the one is not a bar to a suit by the other.[82] The same rule applies between executors of a will and administrators with the will annexed appointed in another jurisdiction.[83] A judgment upon the merits against a widow, in an action for the benefit of herself and children, is not a bar to a second suit, brought by her as administratrix, for the same cause of action under the Employers' Liability Act[83a] when the recovery would be for the benefit of the same persons and the defendant is the same.[83b] A judgment against the husband concerning the title to property claimed to be held in community was held to estop him and his wife in a subsequent suit.[83c] A mortgage is bound by judgments against the mortgagor entered before the mortgage or in suits pending

held to be bound by the decree subsequently therein entered. But see Reinecke Coal Min. Co. v. Wood, 112 Fed. 477. The estoppel can be used by a purchaser of the subject-matter pending the suit and before adjudication. Carroll v. Goldschmidt, C. C. A., 83 Fed. 508, 27 C. C. A. 566; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914, 919. But see Ingersoll v. Jewitt, 16 Blatchf. 378, Fed. Cas. No. 7039.

80 Jones v. Smith, 40 Fed. 314; *infra*, § 375.

81 Kent v. Lake Superior S. C. Co., 144 U. S. 75, 36 L. ed. 352; Rejall v. Greenhood, 92 Fed. 945. For the exceptions, see Goff v. Kelly, 74 Fed. 327; Handlan v. Walker, C. C. A., 200 Fed. 566, in bankruptcy, *supra*, § 113.

82 Brown v. Fletcher's Estate, 210 U. S. 82; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, reversing C. C. C., 148 Fed. 169, and affirming 132 Fed. 168, 136 Fed. 689.

83 Brown v. Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966; Wilson v. Hartford Fire Ins. Co., C. C. A., 164 Fed. 817. A Federal court followed a California statute and the construction of the same by the State courts, so far as to hold that a foreclosure decree of a State court against an administrator of the mortgagor was binding upon the latter's heirs, without determining whether, if the foreclosure had been instituted in the Federal court, the heirs would have been necessary parties. *Cf.* Norton v. House of Mercy, C. C. A., 101 Fed. 382; Hearfield v. Bridges, C. C. A., 75 Fed. 47.

83a 35 St. at L. 65, Comp. St. Supp. 1911, p. 1322.

83b Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, reversing 200 Fed. 44.

83c Lichty v. Lewis, 63 Fed. 535.

when the mortgage was made,[84] but not by judgments in subsequent suits to which he was not a party.[85] The holders of mortgage bonds, previously issued, are not bound by a judgment against the mortgagor concerning the liability of its property to taxation.[86] But a decree against the trustee of a mortgage does not affect the same person when claiming as trustee of another mortgage without proof that the bondholders are the same.[87] A judgment against a trust company, sued individually, is no estoppel against a suit by it as trustee.[88] A State is not bound by a judgment against one of its officers for the possession of lands, which he claims to hold in its behalf.[89] A homesteader is not bound by a decree against the United States in a suit brought by the Government to cancel a land patent to a railway company.[90] A judgment against a municipal officer binds his successor in office, the municipality, and the other officers, so far as their official obligations are concerned,[91] and also the citizens and taxpayers.[92] The same effect is given to an order for a mandamus,[93] or for a writ of prohibition.[94] The denial of a writ of prohibition is not an adjudication that the court sought to be prohibited has jurisdiction of the proceeding which it was sought to stop.[94a] A muni-

[84] Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 314, 38 L. ed. 450, 456.

[85] Dull v. Blackman, 169 U. S. 243, 42 L. ed. 733; Keokuk & Western R. Co. v. Missouri, 152 U. S. 301, 314, 38 L. ed. 450, 456; Campbell v. Hall, 16 N. Y. 575; Southern B & Tr. Co. v. Folsom, C. C. A., 75 Fed. 929; Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 Fed. 152.

[86] Wicomico County Com'rs v. Bancroft, C. C. A., 135 Fed. 977; Laighton v. City of Carthage, Mo., 175 Fed. 145.

[87] Compton v. Jesup, C. C. A., 68 Fed. 47. *Cf.* Carey v. Roosevelt, C. C. A., 102 Fed. 569.

[88] Bancroft v. Wicomico County Com'rs, 121 Fed. 874.

[89] Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137. See *supra*, § 105.

[90] Brandon v. Ard, 211 U. S. 11, 53 L. ed. 68.

[91] New Orleans v. Citizens' Bank, 167 U. S. 371, 389, 42 L. ed. 202, 208; Scotland County v. Hill, 112 U. S. 183, 28 L. ed. 692. Harshman v. Knox Co., 122 U. S. 306, 30 L. ed. 1152; State v. Rainey, 74 Mo. 229; Harmon v. Auditor, 123 Ill. 122, 5 Am. St. Rep. 502.

[92] McIntosh v. Pittsburg, 112 Fed. 705, 707.

[93] Police Jury v. U. S., 60 Fed. 249; Ransom v. Pierre, C. C. A., 101 Fed. 665; McEvoy v. New York, 56 App. Div. 222.

[94] Bank of Ky. v. Stone, C. C. A., 88 Fed. 383, 395, 398.

[94a] Consolidated Rubber Tire Co. v. Ferguson, C. C. A., 183 Fed. 756. See § 456, *infra*.

cipal corporation is not necessarily bound by a decree in a suit against another municipality, to which officers of the State were parties.[95] An injunction in a taxpayer's suit, which retains a municipal corporation from paying bonds, does not estop a bondholder, who is not a party to the suit.[96] A corporation is not estopped by a decree in a suit to which one of its stockholders was a party.[97] It might be held otherwise, however, when the corporation was formed by the same persons, who defended the former suit, for the purpose of escaping from the effect of the adjudication.[98] The officers of a corporation are estopped by a decree against their company, when they assisted it in the acts therein enjoined, and exclusively managed and controlled the same.[99] It has been held: that stockholders who are not parties to statutory proceedings for the dissolution of a corporation are so far bound by a decree therein making assessments upon the stock, that they cannot dispute the insolvency of the company and the necessity of the assessment;[100] but that they may defend upon the ground that their shares were fully paid, or as to any other question peculiarly affecting their individual liability.[101] The same rule applies to former stockholders, who are also, it has been said, concluded by a judgment finding that there were claims unpaid existing at the time of their transfer.[102] Where the stockholders were parties to such a suit or proceeding and were duly served, they are bound by all questions therein determined,[103] and a judgment upon the merits in their favor is a bar to subsequent proceedings in another jurisdiction for the same relief.[104] Stockholders are not bound

95 Bank of Kentucky v. Kentucky, 207 U. S. 258, 52 L. ed. 197.

96 Clagett v. Duluth Tp., C. C. A., 143 Fed. 824.

97 Am. Coat Pad Co. v. Phœnix Pad Co., C. C. A., 113 Fed. 629, 632. Nor by a decree against a president and director of the same in his individual capacity. Brinckerhoff v. Holland Tr. Co., 159 Fed. 191.

98 See McCabe & Steam Constr. Co. v. Wilson, 209 U. S. 275, 52 L. ed. 788.

99 Saxlehner v. Eisner, 140 Fed. 938.

100 Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; s. c., 135 U. S. 533, 34 L. ed. 262; Hamilton v. Levison, 198 Fed. 444; Southworth v. Morgan, 205 N. Y. 293.

101 Rood v. Whorton, 67 Fed. 434.

102 Hamilton v. Selig, 195 Fed. 153.

103 Irvine v. Blackburn, 198 Fed. 360.

104 Converse v. Stewart, 192 Fed. 941.

by a judgment against their corporation in a suit which was brought after the proceedings to liquidate its assets had begun.[105] It has been held that a judgment establishing the exemption of a bank from taxation of its property and from liability to pay a tax upon its stockholders, is not an estoppel against the enforcement of a tax directly against the latter.[106] Where a corporation was sued for the torts of its servants, it was held that a judgment in favor of the servants was a bar to an action against it.[107] A person who succeeded to the defendant's rights, previous to the institution of the suit, is not bound by, and cannot claim, the benefit of, the decree therein.[108] In certain cases, persons not parties nor their privies have been held to be bound by[109] and to have the benefit of decrees as estoppels when they defended the suit openly to the knowledge of the adverse party and for the protection of their own interests[110] provided, at least, that they exercised some control over the management of the defense.[111] The secret payment of the expenses of the defense,[112] or the public filing of a brief upon an appeal,[113] in the first suit, is insufficient; but a party who

105 Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 L. ed. 564. *Cf.* Ward v. Joslin, C. C. A., 105 Fed. 224.

106 New Orleans v. Citizens' Bank, 167 U. S. 371, 380, 402, 42 L. ed. 202, 205, 212. See Union & Planters' Bk. v. Memphis, 189 U. S. 71, 47 L. ed. 712.

107 Williford v. Kansas City, M. & B. R. Co., 154 Fed. 514.

108 Calculagraph Co. v. Automatic Time Stamp Co., 154 Fed. 166.

109 Plumb v. Crane, 123 U. S. 560, 31 L. ed. 268; Bank of Ky. v. Stone, 88 Fed. 383, 396; Lane v. Welds, C. C. A., 99 Fed. 286; Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475; Sacks v. Kupferle, 127 Fed. 569.

110 Cramer v. Singer Mfg. Co., 93 Fed. 636; Greenwich Ins. Co. v. N. & M. Friedman Co., C. C. A., 142 Fed. 944; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

111 Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 54 L. ed. 137; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

112 Cramer v. Singer Mfg. Co., 93 Fed. 636; Litchfield v. Goodnow, 123 U. S. 549, 31 L. ed. 199; Hanks Dental Ass'n v. International Tooth Crown Co., C. C. A., 122 Fed. 74; Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & Power Co., 135 Fed. 365; Jefferson Electric Light, Heat & Power Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 139 Fed. 385; Rumford Chemical Works v. Hygienic Chemical Co., 148 Fed. 862, aff'd 215 U. S. 156, 54 L. ed. 137.

113 Stryker v. Goodnow, 123 U. S. 527, 31 L. ed. 194.

intervenes upon an appeal will be estopped by the decree.[114] A decree in a suit brought by one on behalf of those of a class who come in and contribute to the expense of the suit does not bind the rest unless they come in and contribute.[115] It has been said that the rule is otherwise in a tax-payer's suit.[116] Where joint defendants appeared and answered separately by different attorneys and separate judgments were rendered as to each, it was held that, in the absence of cross pleadings, a judgment against or in favor of either created no estoppel between them in a subsequent action for contribution.[117]

§ 187. Form of defense of res judicata. In pleading a judgment or decree, it is not necessary to set it forth, nor the proceedings upon which it was founded, at length,[1] but so much of the decree and pleadings should be averred as will show that the same point was in issue,[2] together with the commencement and service of process in the former suit, its general character and object, the relief therein prayed, and sufficient averments of the facts to show that there is an identity of subject-matter.[3] In case of such a plea, under the former practice, the court might require that the decree be pleaded at length, or, if the plea set up matter of record in the same court, that the record be shown before the plaintiff is required to take action upon the plea.[4] Where a decree in a former suit is introduced in evidence on stipulation without the objection that it has not been properly pleaded, it will be given full effect as a bar.[5]

A prior decree can usually be put in evidence without hav-

114 Martin v. Peoples' Bank, 115 Fed. 226.

115 Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 58, 52 L. ed. 379, 388; Compton v. Jesup, C. C. A., 68 Fed. 263, 285, (both these cases relate to the same bondholders' suit); Hart v. Globe Ins. Co., 113 Fed. 309 (a creditors' suit); Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113, 117, (a bill filed by stockholders, which was not expressly filed on behalf of the others.) See *supra*, §§ 114–116.

116 Gamble v. City of San Diego, 79 Fed. 487.

117 City of Owensboro v. Westinghouse, Church, Kerr & Co., C. C. A., 165 Fed. 385.

§ 187. 1 McIntosh v. Pittsburg, 112 Fed. 705.

2 Ricardo v. Garcias, 12 Cl. & F. 368; Story's Eq. Pl., § 783; Mound City Co. v. Castleman, 171 Fed. 520.

3 Mound City Co. v. Castleman, 171 Fed. 520.

4 Emma S. M. Co. v. Emma S. M. Co. of N. Y., 1 Fed. 39.

5 Ibid.

ing been pleaded where the pleading of the party sets up the facts which were adjudicated by the decree; and the decree is then conclusive evidence of such facts.[6] It has been held that where a defendant does not raise the objection in the court of first instance, he waives the defense that two separate actions cannot be brought upon a single demand.[7] It has been said that by pleading a defense against a former decree a party waives his right to claim an estoppel under the same.[8] But offering evidence of such facts while the former decree was merely interlocutory does not waive the right to claim that it is a bar after it has ripened into a final decree.[9] The fact that a decree was interlocutory when the suit was brought does not prevent it from becoming a bar as soon as a final decree to the same effect has been entered.[10] Where an interlocutory decree did not become final until after an interlocutory decree had been entered in a subsequent suit; it was held: that, if presented before the final decree in the latter, it was conclusive upon the merits of that suit.[11] A person is not chargeable with laches in presenting a prior adjudication as a bar, where it was set up, in a petition filed before the final decree, and within a month after the dismissal by the Supreme Court of the United States of a petition for a writ of certiorari to review the same.[12] Where the adjudication, upon which the defendant relies, is made subsequent to the defendant's answer, he should regularly plead the same by a supplemental answer;[13] but it may be considered when raised by an amended answer,[14] or in a petition.[15] A decree based, in whole or in part, upon a plea of *res adjudicata*, will be reversed upon appeal; where, subse-

6 David Bradley Mfg. Co. v. Eagle Mfg. Co., 58 Fed. 721; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 57, 42 L. ed. 355, 379.

7 Southern Pac. Ry. Co. v. U. S., C. C. A., 186 Fed. 737.

8 Mack v. Levy, 60 Fed. 751.

9 David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980; Bredin v. National Metal Weatherstrip Co., 147 Fed. 741; David Bradley Mfg. Co. v. Eagle Mfg. Co., C. C. A., 57 Fed. 980.

10 David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980; Bredin v. National Metal Weatherstrip Co., 147 Fed. 741.

11 Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475.

12 Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475.

13 Warren Featherbone Co. v. De Camp, 154 Fed. 198; *infra*, § 195.

14 See *infra*, §§ 212–214.

15 Penfield v. C. & A. Potts & Co., C. C. A., 126 Fed. 475.

quent to its entry, the judgment held to constitute an estoppel has been reversed; and the appellate court in the second suit will take judicial notice of such reversal;[16] even when it was by a State court;[17] but where the judgment, as first rendered, was in accordance with the law of the State, as declared by its highest court, and the reversal overruled former decisions, a Federal court refused, upon a bill to review, to set aside its decree, founded upon *res adjudicata*,[18] although it is no ground for reversal that, in subsequent litigation, the State court has overruled the doctrine which was the foundation of the decision that is pleaded.[19] It has been held: that a judgment of the Supreme Court of a State is no bar to a subsequent suit in a Circuit Court of the United States, where it has been taken by writ of error to the Supreme Court of the United States and is there pending undetermined.[20]

§ 188. Defenses peculiar to patent cases. The Revised Statutes provide: "In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney, thirty days before, may prove on trial any one or more of the following matters: First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, second, that he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or, third, that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof; or, fourth, that he was not the originator and first inventor or discoverer of any material and substantial part of the thing patented; or, fifth, that it had been in public use or on sale in this country for

16 Ransom v. St. Pierre, C. C. A., 101 Fed. 665; Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co., C. C. A., 121 Fed. 973; Hennessy v. Tacoma Smelting & Refining Co., C. C. A., 129 Fed. 40.

17 Ibid.

18 Board of Councilmen v. Deposit Bank, C. C. A., 124 Fed. 18.

19 Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 54 L. ed. 179.

20 Eastern B'g & Loan Ass'n v. Welling, 103 Fed. 352.

more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect." [1] A denial in the answer in a suit for infringement of a patent that the patentee was the first inventor of the improvement described in the patent named in the bill, specifying it by number, is sufficient to raise the issue of invention, although the title of the patent as stated in the answer may be technically inaccurate.[2] Where a bill alleged past and present infringement, and that defendant then had on hand a large number of infringing machines which it was offering for sale, it was held: that an answer which admitted that defendant had previously sold a machine which had been adjudged an infringement, but alleged that it had ceased selling the same "long prior" to the beginning of the suit and returned the parts on hand to the manufacturer, and since "that time" had sold no machines of that character, was indefinite and evasive and not responsive, and must be treated as admitting the averment that defendant had infringing machines on hand which it was offering for sale.[3] When defendants avoided answering specific interrogatories concerning a charged infringement, but merely denied the use of any machinery "in violation and infringement of any rights of the plaintiff, or that they are using, or have made, or sold, or used any machines not protected or covered by the proviso in the act of Congress;" it was said that they thereby presumptively admitted the infringement

§ 188. [1] U. S. R. S., § 4920. *Cf.* Anderson v. Miller, 129 U. S. 70, 32 L. ed. 635.

[2] Robinson v. American Car & Foundry Co., C. C. A., 135 Fed. 693.

[3] Deere & Webber Co. v. Dowageiac Mfg. Co., C. C. A., 153 Fed. 177.

charged.[4] The notice need not be under oath, and a consent to an order that the answer be considered as amended by the insertion of such defense and notice is a waiver of any further oath.[5] Under this statute it has been held that no evidence can be admitted in support of any of these defenses unless it has been properly pleaded and the requisite notice has been given to the complainant;[6] and the complainant's patent is then *prima facie* evidence of the priority of his invention;[7] but that the respondent, after pleading these defenses or some of them, with the names of such of the persons therein referred to as he knows, may also plead a general allegation "that the same had been previously invented and known and used by many other persons whose names are unknown to the respondent, which, when known, the respondent prays leave to insert and set forth in the answer."[8] Upon the subsequent discovery of any such persons, testimony concerning them may be taken, and leave obtained from the court to insert their names in the answer by amendment *nunc pro tunc*. An order to this effect may be obtained before or after the testimony has been taken.[9] An averment that a patent "was obtained upon false and fraudulent representations by the plaintiff, or some of them, made to the Commissioner of Patents, and is wholly void at law," is too uncertain to be sufficient to constitute a defense.[10] In pleading prior patents, it is sufficient to give their number

[4] Agawam Co. v. Jordan, 7 Wall. 583, 609, 19 L. ed. 177, 184. An admission in an answer that the defendant had made locks of the kind described in the patent sued upon, "is satisfied by assuming that the smallest number of locks were made consistent with the use of that word in the plural, and with the use by the defendants of any part of the patent which is valid." See Miller, J., in Jones v. Morehead, 1 Wall. 155, 165, 17 L. ed. 662, 664. But compare Troy I. & N. Factory v. Corning, 6 Blatchf. 328, 336, 337.

[5] Campbell v. Mayor of N. Y., 45 Fed. 243.

[6] Teese v. Huntington, 23 How. 2, 16 L. ed. 479; Agawam Co. v. Jordan, 7 Wall. 583, 19 L. ed. 177; Blanchard v. Putnam, 8 Wall. 420, 19 L. ed. 433; Bates v. Coe, 98 U. S. 31, 25 L. ed. 68; Pitts v. Edmonds, 2 Fisher, 52, 54; Salamander Co. v. Haven, 3 Dill. 131; Jennings v. Pierce, 15 Blatchf. 42; Williams v. Boston & A. R. Co., 17 Blatchf. 21; Decker v. Grote, 10 Blatchf. 331; Morton v. Llewellyn, C. C. A., 164 Fed. 693.

[7] Fay v. Mason, 120 Fed. 506.

[8] Roemer v. Simon, 95 U. S. 214, 220, 24 L. ed. 384, 386; Brown v. Hall, 6 Blatchf. 405.

[9] Ibid.

[10] Clark v. Scott, 5 Fisher, 245.

and date and the name of the patentee.[11] In pleading prior publications, they must be clearly identified or a copy thereof must be filed.[12] In pleading prior use, the time and place thereof must be set forth with such directness and certainty as will enable complainant to go upon the ground and determine what acts there done may be relied on.[13] The omission of the place of the use makes the notice fatally defective.[14] But a notice is not defective for failure to state the particular place within a specified city at which the defendant proposes to prove the previous use.[15] Evidence stated in a notice to be proposed for one purpose cannot be used for another.[16] The defenses that complainant was not the the original inventor and that the thing patented had been in public use or on sale for more than two years before his application, or had been abandoned, are distinct from each other, and if the defendant relies upon both he must give notice accordingly.[17] It seems that when a previous patent has not been referred to in an answer, such patent may still be proved, as evidence of a prior use of the invention, which has been properly pleaded,[18] to show the state of the art at the date of the complainant's alleged invention,[19] and to aid in the proper construction of the patent in suit.[20] The state of the art can always be pleaded without notice.[21] It has been held that a witness may be asked whether the defendant's machine is similar to a model of the plaintiff's patented machine, although no notice of such testimony has been given.[22] The defense of want of patentability need not be pleaded in the answer.[23] It is unsettled whether the defense of insufficient

11 Corrugated Metal Co. v. Pattison, 197 Fed. 577.

12 Ibid.

13 Ibid.

14 Schenck v. Diamond Match Co., C. C. A., 77 Fed. 208; s. c., 71 Fed. 521.

15 Wise v. Allis, 9 Wall. 737, 19 L. ed. 784.

16 Pennock v. Dialogue, 4 Wash. 538; s. c., 2 Pet. 1, 7 L. ed. 327.

17 Meyers v. Busby, 32 Fed. 670.

18 Atlantic Works v. Brady, 107 U. S. 192, 27 L. ed. 438. But see Parks v. Booth, 102 U. S. 96, 105, 26 L. ed. 54, 57; Kennedy v. Solar Ref. Co., 69 Fed. 715.

19 Am. S. Co. v. Hogg, 1 Holmes, 133; s. c., 6 Fisher, 67; Stevenson v. Magowan, 31 Fed. 824; Morton v. Llewellyn, C. C. A., 164 Fed. 693.

20 Morton v. Llewellyn, C. C. A., 164 Fed. 693.

21 Vance v. Campbell, 1 Black, 427, 17 L. ed. 168; Brown v. Piper, 91 U. S. 37, 23 L. ed. 200.

22 Evans v. Hettick, 7 Wheat. 453, 469, 5 L. ed. 496, 500.

23 May v. Juneau County, 137 U. S. 408, 34 L. ed. 729; Stevenson

description can be set up without alleging an intent to deceive the public.[24] The statute requires notice of the names and residences of the inventors and of those who have the prior knowledge of the thing patented, not the names of the witnesses.[25] Notice of the time when the person named possessed a knowledge or use of the invention is not required.[26] The notice is not a pleading and should be served upon the plaintiff.[27] It is the better practice to file the notice with the plead-

v. Magowan, 31 Fed. 824; Wills v. Scranton Cold Storage & Warehouse Co., C. C. A., 155 Fed. 181. It has been said concerning the defense of want of novelty: "Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant." . . . "Defenses of the kind, if the thing patented is an entirety, incapable of division or separate use, must be addressed to the invention, and not to a part of it, or to one or more claims of the patent, of less than the entire invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent; in which cases the several defenses may be made to each patent in the suit, and to each invention, to which the charge of infringement relates." Mr. Justice Clifford, in Parks v. Booth, 102 U. S. 96, 104, 26 L. ed. 54, 57; citing Bates v. Coe, 98 U. S. 31, 25 L. ed. 68. It has been said that a defense charging that the original patentee "fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement." Clifford, J., in Agawam Co. v. Jordan, 7 Wall. 583, 597, 19 L. ed. 177, 180.

[24] Loom Co. v. Higgins, 105 U. S. 580, 588, 589, 26 L. ed. 1177, 1180, 1181; Grant v. Raymond, 6 Pet. 218, 8 L. ed. 376; Whittemore v. Cutter, 1 Gall. 429; Lowell v. Lewis, 1 Mason, 182; Gray v. James, Pet. C. C. 394.

[25] Woodbury P. Mach. Co. v. Keith, 101 U. S. 479, 25 L. ed. 939; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384.

[26] Phillips v. Page, 24 How. 164, 16 L. ed. 639.

[27] Cottier v. Stimson, 20 Fed. 906. See, also, 10 Saw. 212; Henry v. U. S., 22 Ct. Cl. 75. The defendant may also plead his defense specially if he so desires. Cottier v. Stimson, 20 Fed. 906, 907; Evans v. Eaton, 3 Wheat. 454; Grant v. Raymond, 6 Pet. 218; Phillips v. Combstock, 4 McLean, 525; Day v. N. E. C. S. Co., 3 Blatchf. 179. In such a case it seems that no notice may be

ings after it has been served.[28] The pendency of a previous suit for the infringement of certain claims of a patent, specified by number in the bill, is not a bar to a second suit in the same court, between the same parties, for an infringement of different claims of the same patent, also specified in the latter bill, where the two sets of claims cover distinct and separate devices in the same machine.[29] When, after a bill has been filed to restrain the infringement of a patent and to obtain an account of profits, the defendant continues his infringements, the pendency of the first is no objection to a second bill seeking an injunction, and an account founded upon the subsequent infringements.[30] And notwithstanding a decree for an injunction in the former suit, a decree for an injunction and account was granted in that for the subsequent infringements, the second injunction being useless except to support the equitable jurisdiction.[31] The pendency of a suit for the infringement of a patent in one district is no bar to a suit against the same defendant for the infringement of the same patent in another district; but, in the latter suit, the court will only consider and adjudicate upon alleged infringements within its district if the defendant resides or has made a general appearance in the former.[32] It has been held that defenses impugning the validity of complainant's patent[33] and the defense of non-infringement,[34] are not waived by a further defense of license. It was held at common law that the defendant might plead the general issue, and also a special plea that the combination covered

given. Cottier v. Stimson, 20 Fed. 906, 907; Evans v. Eaton, 3 Wheat. 454; Grant v. Raymond, 6 Pet. 218; Phillips v. Combstock, 4 McLean, 525; Day v. N. E. C. S. Co., 3 Blatchf. 179. A plea stricken out by the court is not a sufficient legal notice. Silsby v. Foote, 1 Blatchf. 445; s. c., 14 How. 18. No demurrer lies to a notice. Henry v. U. S., 22 Ct. Cl. 75. A defect in the notice may be remedied by a second notice without leave of the court. Teese v. Huntingdon, 23 How. 2, 10.

[28] Teese v. Huntington, 23 How. 2, 10, 16 L. ed. 479, 482.

[29] Bates Mach. Co. v. Wm. A. Force & Co., 139 Fed. 746.

[30] Wheeler v. McCormick, 8 Blatchf. 267; Roemer v. Newman, 19 Fed. 98; Higby v. Columbia R. Co., 18 Fed. 601. *Contra*, Gold & Stock Tel. Co. v. Pearce, 19 Fed. 419.

[31] Horton v. N. Y. C. & H. R. R. Co., 63 Fed. 897.

[32] Warren Bros. Co. v. City of Montgomery, 172 Fed. 414.

[33] Nat. Mfg. Co. v. Meyers, 7 Fed. 355.

[34] Niagara Fire Extinguisher Co. v. Hibbard, C. C. A., 179 Fed. 844.

by the patent was not an invention, and a further plea that the invention was not patentable.[35] Ownership or part-ownership by defendant of the patent which is the foundation of the bill,[36] a license,[37] and estoppel,[38] are affirmative defenses which must be pleaded. But where the defendant has pleaded a patent of prior date to that alleged in the bill and the complainant undertakes to carry the date of his invention further back without having so alleged in his pleading, the defendant may, it has been held, meet such proof by the defense of laches or abandonment without pleading the same.[39] It has been held: that the Federal statute of limitations, six years, to the recovery of profits or damages for the infringement of a patent,[40] need not be pleaded in the answer, nor need it be negatived in the bill,[41] but it is a defense as to which the defendant bears the burden of proof;[42] that the plaintiff has the burden of proof as to infringement, even when the defendant pleads a license as well as non-infringement;[43] that where the answer admits that defendant, during the time alleged in the bill, had made and used articles conforming to the claims of the patent, no further proof on the issue of infringement is required from complainant,[44] and that the defendant has the burden of prov-

35 Brickill v. Hartford, 57 Fed. 216. It has been said that "the respondent cannot set up as a defense that if complainant's patent be so construed aas to cover the machine made and sold by him, then the machine embraced in said patent was known and used prior to the invention thereof by the patentee." Graham v. Mason, 4 Cliff. 88.

36 Puetz v. Bransford, 31 Fed. 458.

37 Watson v. Smith, 7 Fed. 350; Puetz v. Bransford, 31 Fed. 458.

38 Pennsylvania Co. v. Cole, 132 Fed. 668; *supra*, § 183.

39 Curtain Supply Co. v. Nat. Lock Washer Co., 174 Fed. 45.

40 29 St. at L. 694; *supra*, § 180.

41 Peters v. Hanger, C. C. A., 134 Fed. 586.

42 Ibid. The fact that the owner of a patent permitted a suit for its infringement to be dismissed without a trial on the merits is not such laches as to bar a second suit against the same defendant, Welsbach Light Co. v. Cohn, 181 Fed. 122.

43 Niagara Fire Extinguisher Co. v. Hibbard, C. C. A., 179 Fed. 844.

44 Fox v. Knickerbocker Engraving Co., C. C. A., 165 Fed. 442. In a suit for infringement against the Hygienic Chemical Company of New York, where it was shown that defendant was a selling company only, while the Hygienic Chemical Company of New Jersey was a manufacturing company only, the testimony of a witness that he purchased an article shown to be an infringement from the "Hygienic

ing the defenses of anticipation and prior use beyond a reasonable doubt.[45] A judgment in an action for royalties is an estoppel against the same defendant in a suit for royalties accruing subsequently, when he pleads a defense different from that set up in the first suit.[46] A decree for a perpetual injunction and for damages and profits in a patent case is an estoppel against a second suit for damages and profits on account of infringements committed during the period covered by the first suit of which no evidence was given nor recovery prayed.[47] But it does not prevent a second perpetual injunction against the same acts to support a decree for an accounting of profits caused by infringements subsequent to the first suit.[48] A decree in a suit to enjoin the infringement of a patent which declared that the same was valid, binds upon this question the same defendant in a second suit to enjoin similar infringements, although the only issue raised by the pleadings in the former suit related to the title.[49] But where apparently there was no such finding in the first decree, and the only question then litigated had been the defendants' claim of a license, it was not estopped from contesting the validity of the patent in a second suit.[50] A decree enjoining the infringement of a patent, upon a bill alleging that the defendant claimed the right to make the articles infringed under the authority of another patent, which, however, was not pleaded in the defendant's answer, did not estop parties in privity with the defendants from setting up the latter patent as a defense to a subsequent suit upon the same patent of the plaintiffs, where the former decree did not expressly adjudicate the validity of the plaintiffs' patent.[51] Where the owner of a patent had sued a manu-

Chemical Company" in New York is sufficient, prima facie, to establish infringement by the defendant. Rumford Chemical Works v. Hygienic Chemical Co., C. C. A., 159 Fed. 436.

45 Beckwith v. Malleable Iron Range Co., 174 Fed. 1001.

46 Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429.

47 Horton v. N. Y. C. & H. R. R. Co., 63 Fed. 897.

48 Ibid.

49 Empire S. N. Co. v. American S. L. B. Co., C. C. A., 74 Fed. 864.

50 Lublin v. Stewart H. & M. Co., 75 Fed. 294.

51 Leonard v. Simplex El. Heating Co., 145 Fed. 946. See a note to Westinghouse El. & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.

facturer for infringement, in which suit the Circuit Court of Appeals of one circuit had adjudicated in favor of the defendant; and he subsequently, in a suit in another circuit against the seller of a similar article, not made by the former defendant, obtained an adjudication in his favor by the Circuit Court of Appeals; it was held: that the defendant in the first suit might enjoin him from bringing similar suits in any part of the United States against any of that defendant's customers; although that defendant had assumed the defense of the second suit.[52] But such an injunction will not lie against an exclusive licensee in another circuit when he acquired his rights before the first decision was rendered.[53] A decree for a permanent injunction in one circuit, which excepted therefrom a prohibition against the defendant selling infringing articles made in another, where the patent had been held to be invalid, was held to be not an adjudication of the defendant's right to sell such articles in the latter circuit, but merely a reservation of the question until it should arise in a proper case.[54] A general verdict of a jury in an action at common law awarding damages for the infringement of a patent establishes the validity thereof as between the parties, but does not disclose the construction placed upon it by the jury, nor what claims in the suit were held to be valid.[55] It does not, consequently, afford a basis upon which a court of equity in a subsequent suit between the same parties can, without further evidence, determine the question of infringement by a different device.[56] Since the owner of a patent cannot split up his cause of action, a judgment for damages in an action at law, although conclusive in his favor on the questions of validity and infringement, is a bar to the right to an accounting in a subsequent suit in equity against the same defendant for other sales made prior to the commencement of the action at law.[57] A person who has assumed and conducted the defense of a patent case is bound by the decree, although not a party to the same.[58] A corporation

[52] Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065. See § 186, *supra*, § 269, *infra*.

[53] Hurd v. James Goold Co., 197 Fed. 756.

[54] Hurd v. Seim, 189 Fed. 591.

[55] Cheatham El. S. D. Co. v. Transit Development Co., 197 Fed. 563.

[56] Ibid.

[57] Panoulais v. Nat. Equipment Co., 198 Fed. 493.

[58] Rumford Chemical Works v. Hygienic Chemical Co., C. C. A., 159 Fed. 436; Confectioners' Mach.

which, pending the suit, acquires the subject-matter of the patent in suit, is estopped by the decree therein;[59] and where his assignee was successful, the decree is an estoppel in his favor against the opposite party or his privies.[60] Purchasers of articles subsequent to a decree in a patent suit are not privies to the decree, nor protected by the same.[61] A decree dismissing a bill in equity upon the merits for an infringement of a patent is a bar to a subsequent action at law[62] or suit in equity for an infringement of the same patent by the same device,[63] notwithstanding the fact that the complainant, by notice, restricted his proofs and contention to certain specified claims, which are not in issue in the subsequent suit.[64] A decree sustaining the validity of a patent awarding a permanent injunction against infringement and directing an accounting, is interlocutory, and is not final, and is not conclusive of the validity of the patent in a subsequent suit between the parties,[65] although it has been affirmed by the Circuit Court of Appeals.[66] A plea to a bill for an injunction to restrain the infringement of a reissued patent, which set up that the claim had been unlawfully expanded so as to embrace subsequent improvements covered by later patents, was held good.[67] A plea to a bill filed under section 4918 of the Revised Statutes against the owner of a patent interfering with that of the complainant, which set up that the invention described in the complainant's patent was described in a previous English patent published in the United States, and filed in the Patent Office here before

& Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Bryant El. Co. v. Marshall, 169 Fed. 426, aff'd. C. C. A., 185 Fed. 499. See *supra*, § 186.

59 Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

60 Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914.

61 Hurd v. Seim, 189 Fed. 591.

62 Robinson v. Am. Car & Foundry Co., C. C. A., 159 Fed. 131.

63 Marshall v. Bryant El. Co., C. C. A., 185 Fed. 499; affirming Bryant El. Co. v. Marshall, 169 Fed. 426.

64 Marshall v. Bryant El. Co., C. C. A., 185 Fed. 499; affirming Bryant El. Co. v. Marshall, 169 Fed. 426.

65 Australian Knitting Co. v. Gormly, 138 Fed. 92; Whittemore Bros. & Co. v. World Polish Mfg. Co., 159 Fed. 480.

66 Australian Knitting Co. v. Gormly, 138 Fed. 92.

67 Hubbell v. De Land, 14 Fed. 471.

the issue of the complainant's patent, was held bad and overruled.[68].

§ 189. Proceedings to compel answer. By the Equity Rules of 1912, if the defendant fails to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna, "the plaintiff may, at his election, take an order as of course that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte.*"[1] "Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person *non compos* and not under guardianship."[2] They contain no other provision for proceedings to compel an answer. By the rules of 1842: "The plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause."[3] The ancient practice upon the subject was substantially the same. If the defendant did not file an answer within due time, he was in contempt and an attachment was issued against him.[4] If the sheriff was unable to attach the defendant and returned accordingly *non est inventus*, a commission of rebellion would issue.[5] If that proved insufficient, it was followed by a writ of sequestration.[6]

§ 190. Frame of answer. An answer should be entitled in the cause, so as to agree with the names of the parties as they appear in the bill at the time the answer is filed.[1] It seems that the defendant may not correct or alter the names of the parties as they appear in the bill, and that if there is a mistake

[68] Pentlarge v. Pentlarge, 19 Fed. 817; s. c., 22 Fed. 412. But see Foster v. Lindsay, 3 Dill. 126, 131.

§ 189. [1] Eq. Rule 16.

[2] Eq. Rule 30.

[3] Eq. Rule 18 of 1842.

[4] Matter of Vanderbilt, 4 J. Ch. (N. Y.) 58. See Daniell's Ch. Pr., (First Am. ed.) 538.

[5] Boudinot v. Symmes, Wall. C. C. 139; Smith's Ch. Pr. (2d ed., 1837), 183, 186.

[6] Smith's Ch. Pr., (Second ed. 1837) 183–188; Daniell's Ch. Pr., (First Am. ed.) 543; Davis v. Hammond, 5 Sim. 9.

§ 190. [1] Daniell's Ch. Pr. (5th Am. ed.) 731.

he must correct it in the part following the title of the cause; thus, "The answer of the defendants, the mayor, aldermen, and commonalty in the bill called the mayor, aldermen, and citizens of the city of New York."[2] The answer should begin substantially thus: "The answer of John Aber, one of the above-named defendants, to the bill of complaint of the above-named plaintiff;" if the bill has been amended after answer, "to the amended bill of complaint."[3] If two or more defendants join in the same answer, it usually begins, "The joint and several answer;"[4] unless they are husband and wife, when it is "The joint answer;"[5] but an answer is not defective if put in by several as a joint answer merely.[6] When discovery is required, all of the defendants who join in an answer must swear to the same.[7] When the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had by two or more defendants separately, costs are not allowed for such separate answers or other proceedings, unless a master, upon reference to him, certifies that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.[8] A female defendant who has married since the filing of the bill, usually begins: "The answer of John Aber and Anna, his wife, lately in the bill called Anna Brown, spinster," or widow, as the case may be.[9] A title, "the several answer of John Peck, Esq., one of the defendants to the bill of complaint of Anna Baines, alias Green, assuming to herself the name of Anna Peck, as pretended wife of John Peck, Esq., deceased, and of Anna Maria Green, assuming to herself the name of Anna Maria Peck, as daughter of the said John Peck, Esq., deceased," was held scandalous.[10] An answer by a person defending by guardian or next friend should state that fact: "James Fifield by Edward Jennings,

2 Atty. Gen. v. Worcester Corp. 1 C. P. Cooper, 18; Daniell's Ch. Pr. (5th Am. ed.) 731.

3 Daniell's Ch. Pr. (5th Am. ed.) 731; Rigby v. Rigby, 9 Beav. 311, 313.

4 Davis v. Davidson, 4 McLean, 136.

5 Daniell's Ch. Pr. (5th Am. ed.) 731.

6 Davis v. Davidson, 4 McLean, 136.

7 Bailey W. M. Co. v. Young, 12 Blatchf. 199.

8 Rule 62.

9 Daniell's Ch. Pr. (5th Am. ed.) 731.

10 Peck v. Peck, Moseley, 45.

his next friend."[11] Next followed formerly a clause reserving to the defendant any and all advantages that might be taken by exception to the bill.[12] This was always useless[13] and is forbidden by the Equity Rules of 1912.[14] Then comes the substantive part of the answer, setting up the matters of affirmative defense and giving the discovery required.[15] Next should be inserted any counter-claim or set-off upon which the defendant relies.[16] It is the safer practice to specifically describe the matter thus pleaded as a counter-claim or set-off, as the case may be.[17] The answer usually closes with a general traverse inserted out of abundant caution, denying the unlawful combination charged in the bill, and all other matters therein contained.[18] In the answers of infants and other persons under a disability, the reservation and general traverse have always been deemed properly granted.[19] The answer in such cases generally is that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself on the protection of the court.[20] But if such a defendant has any substantive defense, he should plead the same.[21]

§ 191. Signature and seal to answer. The answer must be signed individually by one or more solicitors of record.[1] If the former practice is followed, an answer must be signed by the defendant, making it; even, it seems, when an answer under oath has been waived,[2] unless he answer by guardian, when the

[11] Daniell's Ch. Pr. (5th Am. ed.) 731.

[12] Mitford's Pl., ch. 2, § 2, part 3; Story's Eq. Pl., § 870.

[13] Story's Eq. Pl., § 870; Rules 39, 44.

[13a] Eq. Rule 30.

[14] Mitford's Pl., ch. 2, § 2, part 3.

[14a] See Eq. Rule 30.

[14b] Bates v. Rosekrans, 37 N. Y. 409; Ward v. Conegys, 2 How. Pr. N. S. (N. Y.) 428; Burke v. Thorne, 44 Barb. (N. Y.) 363; Burral v. De Groot, 5 Duer (N. Y.) 379; Equitable Life Ass'n. v. Cuyler, 75 N. Y. 511, affirming 12 Hun, 247. But see Acer v. Hotchkiss, 97 N. Y. 395.

[15] Mitford's Pl., ch. 2, § 2, part 3, Story's Eq. Pl., § 870.

[16] Story's Eq. Pl., § 871.

[17] Chancellor Kent in Mills v. Dennis, 3 J. Ch. (N. Y.) 367, 368.

[18] Holden v. Hearn, 1 Beav. 445, 455; Lane v. Hardwicke, 9 Beav. 148, 149.

§ 191. [1] Eq. Rule 24.

[2] Story's Eq. Pl., § 875; Davis v. Davidson, 4 McLean, 136; Bayley v. De Walkiers, 10 Ves. 441; Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Denison v. Bassford, 7 Paige (N. Y.), 370.

latter should sign it,[3] or unless an order has been obtained dispensing with such signature on account of the defendant's absence, or for some other reason.[4] A person answering in a dual capacity need sign but once.[5] An answer by a corporation must be under its corporate seal.[6] In such a case it is advisable to have the seal attested by one of the corporate officers.[7] When an answer is made without oath, the signature of the defendant should also be attested.[8] This is usually done by his solicitor.[9]

§ 192. Oath to answer. Under the former practice, unless an answer, under oath, was waived in the bill, a defendant, if a natural person, was obliged to swear;[1] or "if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him."[2] No oath was necessary to an answer by a corporation.[3] The present rules are silent upon the question as to whether an answer must be verified.[4] They provide: "Every pleading which is required

[3] Anon., 2 J. & W. 553; Daniell's Ch. Pr. (5th Am. ed.) 733.

[4] Story's Eq. Pl., § 875; —— v. Lake, 6 Ves. 171; —— v. Gwillim, 6 Ves. 285.

[5] Anon., 2 J. & W. 553.

[6] Haight v. Proprietors Morris Aqueduct, 4 Wash. 601, 605; Monarch Vacuum Cleaner Co. v. Cacuum Cleaner Co. 194 Fed. 172.

[7] Daniell's Ch. Pr. (5th Am. ed.) 735, note 2.

[8] Daniell's Ch. Pr. (5th Am. ed.) 738.

[9] Daniell's Ch. Pr. (5th Am. ed.) 738.

§ 192. [1] Fulton Bank v. Beach, 2 Paige (N. Y.) 307; Daniell's Ch. Pr., (5th Am. ed.) 735.

[2] Eq. Rule 91 of 1842, which so far as it applies to cases in which an oath is required, re-enacted in Eq. Rule 78 of 1912. See U. S. R. S., § 5013.

[3] Union Bank of Georgetown v. Geary, 5 Pet. 99, 110, 8 L. ed. 60, 64; Wallace v. Wallace, Halst. (N. J.) Dig. 173; Smith v. St. Louis M. Ins. Co., 2 Tenn. Ch. 599; Burpee v. First Nat. Bank, 5 Biss. 405; Coca Cola Co. v. Gay-Ola Co., C. C. A., 200 Fed. 720, 726. But see Kittredge v. Claremont Bank, 3 Story, 590; s. c., 1 W. & M. 245.

[4] Although the English Judicature Act and orders and rules are silent upon the subject, the English courts do not require an oath to be annexed to the defense in equity, which is the pleading corresponding to our answer. The writer is indebted for this information through the courtesy of Francis A. Stringer, Esq., of the Central Office, Royal Courts of Justice, one of the editors of "Annual Practice." There, however, in certain cases, upon plaintiff's affidavit that in his belief there is no defense to the action, the defendant is not allowed to defend without permission of the court. Order XIV. For verification by a corporation when required, see § 174, *supra*.

to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any State or Territory, or of the District of Columbia, or any clerk of any court of the United States, or of any Territory, or of the District of Columbia, or any notary public."[5] An answer can be verified without the United States before commissioners appointed for that purpose;[6] or probably before any secretary of legation or consular officer at the post, port, place, or within the limits of his legation, consulate, or commercial agency.[7] The following form of oath or affirmation is given by Daniell in his valuable work on Chancery Practice: "You swear, or solemnly affirm, that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true."[8] When sworn to in a foreign country, it seems that it must be "administered in the most solemn form observed by the laws and usages" of that country.[9] Every alteration and interlineation in the answer should be authenticated by the initials of the officer who administers "the oath." When the verification of an answer is in the form of an affidavit, the name of the defendant making it must be subscribed at the foot of the affidavit. When in the form of a certificate of the officer administering the oath, the defendant's name should be subscribed at the foot of the answer.[10]

§ 193. Motions to take answers off the file. When an answer is any respect irregular,[1] or is filed by a person not named as a defendant in the bill,[2] or is filed too late, it may upon the plaintiff's motion be taken off the file.[3] This may also be done when the paper purporting to be an answer is so evasive that

[5] Eq. Rule 36.

[6] Read v. Consequa, 4 Wash. 335.

[7] U. S. R. S., § 1750. But see Read v. Consequa, 4 Wash. 335.

[8] 2 Daniell's Ch. Pr., ch. 15, § 2, p. 270; Story's Eq. Pl., § 872, note 4.

[9] Read v. Consequa, 4 Wash. 335.

[10] Daniell's Ch. Pr., (5th Am. ed.) 743; Hathaway v. Scott, 11 Paige (N. Y.) 173, 176; Pincers v. Robertson, 9 C. E. Green (24 N. J. Eq.) 348.

§ 193. [1] Bailey W. M. Co. v. Young, 12 Blatchf. 199.

[2] Putnam v. New Albany, 4 Biss. 365, 367.

[3] Allen v. Mayor and Board of Ed., 18 Blatchf. 239.

it is in fact no answer.[4] If it is taken off the file for an error in form, the court may allow the same paper to be corrected, and then filed anew.[5] By setting the cause down for a hearing upon bill and answer,[6] or by filing a reply or taking any other step in the cause without raising the objection, such a defect would be waived.[7] A failure to enter an order taking a bill as confessed, does not authorize the filing of an answer after the prescribed time.[8]

§ 194. **Exceptions for insufficiency.** "Exceptions for insufficiency of an answer are abolished."[1] The sufficiency of an affirmative defense may be tested by a motion to strike out the same.[2] In case of insufficiency in admissions or denials, the matters not properly denied are deemed confessed, except as against a person *non compos* and not under guardianship.[3] By the former practice, exceptions to the insufficiency of the discovery could be filed within a limited time,[4] except in the case of an answer by an infant or other person under a disability.[5] Where such an exception was sustained and a further answer put in, which the plaintiff deemed still insufficient, by the former English practice he had three weeks wherein to refer the same to a master upon the old exceptions; otherwise the further answer was deemed sufficient.[6] If the further answer was found insufficient, the defendant was required to put in a third answer; and if that too was found insufficient, he was committed to the Fleet, and examined upon interrogatories.[7] When an order was obtained after answer, allowing the plain-

[4] Tomkin v. Lethbridge, 9 Ves. 178; Smith v. Searle, 14 Ves. 415.

[5] Bailey W. M. Co. v. Young, 12 Blatchf. 199.

[6] Besson & Co. v. Goodman, et al., 147 Fed. 887.

[7] Fulton Bank v. Beach, 2 Paige (N. Y.), 307; Glassington v. Thwaites, 2 Russ. 458, 461.

[8] Allen v. Mayor, 7 Fed. 483.

§ 194. [1] Eq. Rule 33.

[2] Eq. Rule 33; *infra*, § 237.

[3] Eq. Rule 30.

[4] Read v. Consequa, 4 Wash. 335. Uhlmann v. Arnholt & S. B. Co., 41 Fed. 369; Colgate v. Compagnie Francaise, 23 Fed. 82. But see United States v. McLaughlin, 24 Fed. 823; McCormick v. Chamberlin, 11 Paige (N. Y.), 543; Sheppard v. Akers, 1 Tenn. Ch. 326.

[5] Copeland v. Wheeler, 4 Brown, Ch. C. 256; Lucas v. Lucas, 13 Ves. 274; Micklethwaite v. Atkinson, 1 Coll. 173; Daniell's Ch. Pr. (5th Am. ed.) 169.

[6] Smith's Ch. Pr. (2d ed. 1836), 285.

[7] Smith's Ch. Pr. (2d ed. 1836), 285, 286.

tiff to amend his bill, and requiring the defendant to answer the amendments and the exceptions to the answer to the original bill together; upon such answer the plaintiff could only file new exceptions for a failure to fully answer the amendments.[8] The insufficiency of a defense in an answer could not be thus determined.[9]

§ 195. Supplemental answers. A supplemental answer was formerly filed to bring to the attention of the court some fact which was not inserted in the original answer through mistake or ignorance,[1] or which had occurred subsequently to the filing of the same.[2] They could only be filed by leave of the court, which might impose terms upon the applicant.[3] The Equity Rules now provide: "Upon application of either party party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."[4] This provides merely for supplemental answers of the second class. Such supplemental answers have been little considered in the books. Their functions might also be performed by cross-bills. It was too late after answer and decree to object to the regularity of a proceeding in which facts were set up by petition when cross-bill or supplemental answer would have been the proper practice.[5]

§ 196. Disclaimers. A disclaimer by the defendant is a pleading by which he renounces all claim to property which the plaintiff seeks in his bill to obtain.[1] It is said that it is dis-

[8] Partridge v. Haycraft, 11 Ves. 570, 581; Smith's Ch. Pr. (2d ed. 1836), 286.

[9] Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

§ 195. [1] Smith v. Babcock, 3 Sumner, 583; Williams v. Gibbes, 20 How. 535, 15 L. ed. 1013; Caster v. Wood, 1 Baldw. 289; Suydam v. Truesdale, 6 McLean, 459.

[2] Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. ed. 961, 963; Talmadge v. Pell, 9 Paige (N. Y.), 410, 413.

[3] Smith v. Babcock, 3 Sumner, 583; Caster v. Wood, 1 Baldw. 289.

[4] Eq. Rule 34.

[5] Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. ed. 961, 963; Coburn v. Cedar V. L. & C. Co., 138 U. S. 196, 222, 34 L. ed. 876, 886.

§ 196. [1] Mounsey v. Burnham, 1 Hare, 15.

tinct in its substance from an answer, although sometimes confounded with one.[2] By the former practice, it must in most cases be accompanied by an answer, for where a defendant had been made a party by mistake, having had an interest with which he has parted, the plaintiff might require an answer sufficient to ascertain what the facts were, and to whom he had transferred his interest.[3] Moreover, a defendant, although he may disclaim an interest, cannot disclaim a liability.[4] The only cases in which a disclaimer without an answer was deemed to be sufficient seemed to have been those where the bill simply alleged that the defendant claims an interest in the property in question without specifying the claim.[5] Under very special circumstances, a disclaimer may be withdrawn, and an answer filed setting up a claim.[6] Where a disclaimer is made, and it appears that the defendant was made a party without apparent reason, the bill will be dismissed with costs. Otherwise, a decree may be entered without costs against the defendant and all claiming under him since the filing of the bill.[8] If a disclaimer and answer by the same defendant are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.[9] The following is a form of a mere disclaimer: "The disclaimer of Richard Flagg, the defendant, to the bill of complaint of Robert Aber, complainant. This defendant, saving and reserving to himself [here follows the usual general reservation in an answer], saith, that he doth not know that he, this defendant, to his knowledge and belief, ever had, nor did he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates

[2] Story's Eq. Pl., § 838.

[3] Story's Eq. Pl., § 838. See Ellsworth v. Curtis, 10 Paige (N. Y.), 105; Carrington v. Lentz, 40 Fed. 18.

[4] Glassington v. Thwaites, 2 Russ. 458; Graham v. Coape, 9 Sim. 93, 102; s. c., 3 Myl. & Cr. 638. An averment that the defendant, prior to the beginning of the suit, had ceased selling an alleged infringing machine, and that it had no intention of using or selling any machines embodying the features of the patent, was held not to be such a disclaimer as would deprive the complainant of the right to an injunction. Deere & Webber Co. v. Dowagiac Mfg. Co., C. C. A., 153 Fed. 177.

[5] Story's Eq. Pl., § 838. See Graham v. Coape, 9 Sim. 93, 102; s. c., 3 Myl. & Cr. 638.

[6] Story's Eq. Pl., § 842. See Eq. Rule 30.

[7] Story's Eq. Pl., § 842.

[8] Story's Eq. Pl., § 842.

[9] Mitford's Pl., ch. 2, § 2, part 2.

and premises, situate [describing them]; in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to the said estate and premises in [naming their situation], in the said complainant's bill mentioned, and every part thereof." A disclaimer concludes in the same way as an answer.[10]

[10] Story's Eq. Pl., § 844, note 6.

CHAPTER X.

CROSS-BILLS, SET-OFFS AND COUNTER-CLAIMS.

§ 197. Definition and origin of cross-bills. A cross-bill is a bill filed by a defendant in a suit in equity against one or more of the other parties, in order to obtain either discovery of facts in aid of his defense, or complete relief to all parties as to the matters charged in the original bill.[1] It was auxiliary to the original suit and dependent thereon.[2] It was borrowed through the canon from the *reconventio* of the civil law,[3] and from it is derived the counter-claim of code-pleading.[4] It was originally used chiefly for the purposes of set-off and discovery, which modern statutory enactments make it possible to obtain in a simpler way; but, except in a few cases, without one no relief could be obtained by a defendant against the complainant in the same suit,[5] beyond what resulted necessarily from the denial of the prayer of the original bill.[6] The ordinary cases in which a defendant could obtain relief without a cross-bill were: suits for an account,[7] for the specific performance of contracts,[8]

§ 197. [1] Nelson, J., in Ayres v. Carver, 17 How. 591, 595, 15 L. ed. 179, 180; Springfield M. Co. v. Barnard, C. C. A., 81 Fed. 261.

[2] U. S. v. Reese, 166 Fed. 347; Lovell v. Latham & Co., 186 Fed. 602.

[3] Story's Eq. Pl., § 402; Langdell's Eq. Pl., §§ 152, 154.

[4] See Brande v. Gilchrist, 18 Fed. 465.

[5] Carnochan v. Christie, 11 Wheat. 446, 6 L. ed. 516; Ford v. Douglas, 5 How. 143, 12 L. ed. 89; Chapin v. Walker, 6 Fed. 794; Brande v. Gilchrist, 18 Fed. 465; Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co., 17 Fed. 867; Lewis v. Glass, 92 Tenn. 147; s. c., 20 S. W. 571; International Tooth Crown Co. v. Carmichael, 44 Fed. 350; Stanwood v. Des Moines Sav. Bank, C. C. A., 178 Fed. 670; Asbestos Shingle, S. & S. Co. v. H. W. Johns-Manville Co., 189 Fed. 611, 613; Taylor v. Herndon, C. C. A., 194 Fed. 946; Mitchell v. International Tailoring Co., 169 Fed. 145.

[6] Langdell's Eq. Pl., § 123. See Hilton v. Barrow, 1 Vesey Jr. 284.

[7] Clarke v. Tipping, 4 Beav. 588; Toulmin v. Reid, 14 Beav. 499; Jervis v. Berridge, L. R. 8 Ch. 357; Campbell v. Campbell, 4 Halst. Eq. (N. J.) 740; Little v. Merrill, 62 Me. 328.

[8] Fife v. Clayton, 13 Ves. 546; Stapylton v. Scott, 13 Ves. 425;

to compel the issue of patents in interference cases,[9] contribution between co-defendants,[10] and a few instances for incidental and collateral questions between defendants,[11] or when it was impossible to give the plaintiff the relief to which he was entitled when first deciding a question between them.[12] No cross-bill was necessary for such relief as might be allowed a defendant by means of a conditional decree imposing terms upon the complainant in accordance with the maxim that "he who seeks equity must do equity."[13] The subject-matter of the cross-bill must be germane to that of the original bill.[14]

Bradford v. Union Bank of Tenn., 13 How. 57, 14 L. ed. 49; Northern R. Co. v. O. & L. C. R. Co., 18 Fed. 815. But see s. c., 20 Fed. 347. See Newton v. Gage, 155 Fed. 598; Dettering v. Nordstrom (C. C. A.), 148 Fed. 81.

[9] Lockwood v. Cleveland, 6 Fed. 721; Foster v. Lindsay, 3 Dill. 127; Electrical Accum. Co. v. Brush El. Co., 44 Fed. 602; but may be filed if the defendant so chooses. American C. B. Co. v. Ligowski C. P. Co., 31 Fed. 466; Electrical Accum. Co. v. Brush El. Co., 44 Fed. 602, 607. *Contra*, Lockwood v. Cleveland, 6 Fed. 721, 727.

[10] La Touche v. Lord Dunsany, 1 Sch. & Lef. 137, 166, 167; s. c., as Chamley v. Lord Dunsany, 2 Sch. & Lef. 690, 718; Langdell's Eq. Pl., § 125.

[11] Federal M. & S. Co. v. Bunker Hill & Sullivan M. & C. Co., 187 Fed. 474; Hood v. Clapham, 19 Beav. 90. See Elliott v. Pell, 1 Paige (N. Y.), 263.

[12] Langdell's Eq. Pl., § 125.

[13] Farmers' L. & Tr. Co. v. Denver, L & G. R. Co. (C. C. A.), 126 Fed. 46; *supra*, § 153; *infra*, § 400.

[14] Bowker v. U. S., 186 U. S. 135, 46 L. ed. 1090; Great Northern Ry. Co. v. Western Union Tel. Co., C. C. A., 174 Fed. 321; Lovell v. Latham & Co., 186 Fed. 602; U. S. Light & Heating Co. v. J. B. M. El. Co., C. C. A., 194 Fed. 866; Ledbetter v. Mandell, 141 App. Div. (N. Y.) 556, 558, affirmed 205 N. Y. 537; Great Northern Ry. Co. v. Western Union Tel. Co., 174 Fed. 321; Miller v. Uhlman, 178 Fed. 233; Langdell's Eq. Pl., § 124; Daniell's Ch. Pr. (5th Am. ed.) 1550; Field v. Schieffelin, 7 J. Ch. (N. Y.) 250, 11 Am. Dec. 441.

Where the plaintiff's right depended upon an instrument or conveyance which is not void, but merely voidable on account of fraud, or otherwise, the defendant could in most cases only set up the facts showing its invalidity by a cross-bill. Ford v. Douglas, 5 How. 143, 12 L. ed. 89; Langdell's Eq. Pl., § 131; Jacobs v. Richard, 18 Beav. 300; Beddoes v. Pugh, 26 Beav. 407, 416, 417; Holderness v. Rankin, 2 De Gex, F. & J. 258; Eddleston v. Collins, 3 De Gex, M. & G. 1, 16; Chapin v. Walker, 2 McCrary, 175; Manley v. Mickle, 55 N. J. Eq. 563; s. c., 37 Atl. 738. But see Dayton v. Melick, 27 N. J. Eq. (12 C. E. Green), 362; Pitts v. Powledge, 56 Ala. 147; Kennedy v. Green, 3 My. & K. 699, 718; Eyry v. Hughes, 2 Ch. D. 148; Osborne v. Barge, 30 Fed. 805; Green v. Turner, 80 Fed.

41. So where the defendant claimed that a contract upon which the plaintiff relied did not express the true agreement between the parties, he was required, except when the bill prayed specific performance, to file a cross-bill for the reformation of the contract. Commonwealth T. T. & Tr. Co. v. Cummings, 83 Fed. 767; Green v. Stone, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, s. c., 34 Atl. 1099. In a suit to set aside a contract, the defendant could not have the contract enforced unless he filed a cross-bill, Meissner v. Buck, 28 Fed. 161; Carnochan v. Christie, 11 Wheat. 446, 447, 6 L. ed. 516; when in a proper case he could also obtain a decree declaring the contract to be void. La Dow v. E. Bement & Sons, 66 Fed. 198; Duggar v. Dempsey, 43 Pac. 357; s. c., 13 Wash. 396; Bernhard v. Bruner, 65 Ill. App. 641; North British L. & N. Ins. Co. v. Lathrop, C. C. A., 70 Fed. 429.

Where a bill was filed by one tenant in common of a mortgage against the two others, who had bought in separate parcels the mortgaged property, the complainant seeking to recover from them his share of the purchase-money; it was held that a cross-bill could not be filed by one defendant against the other to recover a balance due him "resulting from the price severally paid and to be paid by them, as compared with the respective amounts" of their interests in the mortgage. Weaver v. Alter, 3 Woods, 152. Where a receiver of a bank filed a bill to set aside a transfer of shares of its stock by one defendant to another, and to hold the transferor liable to the creditors of the bank; it was held that the transferee could not file a cross-bill to set aside the transaction as between transferor liable to the creditors of him by the others. Stuart v. Hayden, C. C. A., 72 Fed. 402. In a suit by a depositor against a bank to recover the amount of checks paid on forged indorsements, it was held that defendant could not file a cross-bill against a second bank seeking to recover over in case it was held liable to plaintiff. Pollard v. Wellford, 99 Tenn. 113, 42 S. W. 23.

Where a bill was filed against the stockholders of an insolvent corporation to collect out of their unpaid subscriptions the amount of a judgment against it, a cross-bill filed by one who had paid a larger proportion of his subscription than the rest, praying for an accounting, and that the others be compelled to pay the judgment, was held bad upon demurrer. Putnam v. New Albany, 4 Biss. 365, 373. Where a bill was filed by a remainderman under a will, claiming that certain provisions of the will establishing estates prior to his own were invalid, and praying that the trustees appointed by the will convey the property devised either to him, or to the heirs-at-law, or to the State; a bill filed by the heirs-at-law, not impugning the estate of the equitable tenant for life, but praying that the estates in remainder, some of which were to persons yet unborn, should be declared invalid, was held improper as a cross-bill. Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515. See Neal v. Foster, 34 Fed. 496, 498; Osborne v. Barge, 30 Fed. 805.

Where, on a bill by several persons to restrain the infringement of a patent and for an account, the defenses being invalidity of the patent and a license, the court sustains

the patent and decrees damages; a bill was not sustained as a cross-bill which set up a judgment in another suit against one of the complainants, and prayed that they all set forth and discover what share of the damages is claimed by each, so that the defendant who filed the cross-bill might set off his judgment against the share claimed by his judgment creditor. Rubber Co. v. Goodyear, 9 Wall. 807.

In a suit by an administrator to recover assets it was held that a cross-bill was demurrable which sought an accounting of the administration of the estate of the intestate's father; although that would have resulted in increasing the estate held by the plaintiff and all the necessary parties were before the court. Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; s. c. as Perea v. Harrison, 7 N. H. 666, 41 Pac. 529. Where to a bill for the cancellation of certain certificates of stock because unlawfully issued, the defendants alleged by a cross-bill that defendant corporation had decided to cease the manufacture of goods for a time, and that complainants had directed the concern to continue operations, and asked to have complainants restrained from further interference; it was held that the cross-bill should be stricken out as foreign to the subject-matter of the original bill. Allen v. Fury, 53 N. J. Eq. 35, 30 Atl. 551. On a suit to restrain the enforcement of a judgment, and to establish as a set-off a legal claim, a cross-bill seeking a settleemnt of a partnership alleged to have formerly existed between the parties was stricken out as foreign to the subject-matter of the original bill. O'Neill v. Perryman, 102 Ala. 522, 14 South. 898. Where the plaintiff, claiming the exclusive right under a contract to use the name of defendant in the sale of patent medicines, filed a bill against the latter to enjoin a violation thereof, and the latter filed an alleged cross-bill to enjoin complainant from making use of the name not authorized by the contract it was held that this latter bill was not a true cross-bill, but an original bill. Chattanooga Medicine Co. v. Thedford, 58 Fed. 347. See also Colton v. Scott, 97 Ala. 447. Where a bill was filed to restrain a sale under an execution, the defendant was allowed to file a cross-bill praying a decree, declaring that he had a lien upon the property on which he had levied, appointing a receiver, and directing the sale of such property. Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900. See Remer v. McKay, 38 Fed. 164. Where the mortgagee filed a bill to collect rents from a lessee and a sublessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sublessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed. Jesup v. Illinois Cent. R. Co., 43 Fed. 483. It has been held that a cross-bill might be filed in a suit to foreclose a mechanic's lien, for the cancellation of the record of the lien with damages for a breach of the mechanic's contract (Springfield M. Co. v. Barnard S. Mfg. Co., 81 Fed. 261); in a suit to foreclose a vendor's lien, for the foreclosure of a subsequent vendor's lien after the cross-complainant had secured the payment of the amount due the original

§ 198. Counter-claims. In the New York Code of Procedure, David Dudley Field substituted a counter-claim for a cross-bill. His reform was adopted in the English Judicature Act.[1] The new Equity Rules have followed these precedents and provide: that the answer "may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-

plaintiff (Cox v. Price, 2 Va. Dec. 170, 22 S. E. 512); in a suit for the cancellation of a lease for the return of property delivered thereunder (Pullman's P. C. Co. v. Central Tr. Co., 171 U. S. 138, 43 L. ed. 108); in a suit by a street railway company to enjoin a city from forfeiting a franchise, by a mortgagee for the appointment of a receiver to borrow the funds needed for payment to prevent the forfeiture. Union Street Ry. Co. v. City of Saginaw, 115 Mich. 300, 73 N. W. 243. Where an insurance company had procured an injunction against a suit upon a policy which contained a limitation clause, the court sustained a cross-bill for a recovery of the amount of the policy on the ground that a State court of common law might hold that the injunction did not extend the period for bringing suit. North B. & M. Ins. Co. v. Lathrop, C. C. A., 63 Fed. 508. In a suit to foreclose a mortgage, given to secure a note for the price of property sold; it was held, that an answer setting up fraud in the inducement of the sale as a defense to the note, and a cross-bill for a rescission of the contract, because of the same fraud, were not inconsistent. Richardson v. Lowe, C. C. A., 149 Fed. 625. It has been held that a discharge in bankruptcy pending a suit (Banque Franco-Egyptienne v. Brown, 24 Fed. 106, 107), the right to equitable set-off (Meek v. McCormick (Tenn. Ch.), 42 S. W. 458. See Carlwright v. Clark, 4 Metc. (Mass.) 104; Derby v. Gage, 38 Ill. 27), and the right of sureties to subrogation (Stokes v. Little, 65 Ill. App. 255), and an agreement to settle the litigation, made pending the suit (Snyder v. De Forest Wireless Telegraph Co., 154 Fed. 142), can only be pleaded by a defendant in a cross-bill. In such cases, the cross-bill is in the nature of a supplemental bill. *Infra*, § 231. A decree dismissing a bill to enjoin an action of ejectment cannot determine the title to the land in the absence of a cross-bill. Wood v. Collins, 60 Fed. 139. But it has been held that a defendant who is not in possession of land, when a bill is filed against him to remove a cloud to the title to the same, may, if he can show a better title than that of the complainant, obtain possession of the land by cross-bill. Greenwalt v. Duncan, 16 Fed. 35.

§ 198. [1] 36 Vic. c. 66, § 24, Order XXI.

claims."[2] If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof."[3] These rules impose no penalty for a failure to state a counter-

[2] Eq. Rule, 30.

[3] Eq. Rule 31. Under the former practice in a case where the original bill prayed a confirmation of a title under a deed absolute in form, a cross-bill by one of the defendants, claiming that the deed be declared a trust deed for her sole benefit, was held to be germane to the subject-matter of the suit, and sufficient to support a decree binding the other defendants as well as the plaintiff. Kingsbury v. Buckner, 134 U. S. 650, 677, 33 L. ed. 1047, 1057. See Griffin v. Griffin, 112 Mich. 87, 70 N. W. 423; Feige v. Babcock, 111 Mich. 538, 70 N. W. 7. A defendant to a foreclosure suit may file a cross-bill, to enforce an agreement by a codefendant to convey him part of the mortgaged premises. Peacock, Hunt & West Co. v. Thaggard, 128 Fed. 1005. Upon a bill to set aside deeds, the grantors and grantees of which were defendants, the court allowed a cross-bill by the grantees against their codefendant, the grantor, for the recovery of the purchase money paid by them for the land, and for the cancellation of notes given for deferred payments, in case the deeds should be set aside. Craig v. Door, C. C. A., 145 Fed. 307. In suits to establish and protect water rights against separate appropriators of water from the same stream, cross-bills were allowed between the several defendants to protect their respective rights against each other. Ames Realty Co. v. Big Indian Min. Co., 146 Fed. 166; Miller & Lux v. Rickey Land & Cattle Co., 146 Fed. 574. But it was held that cross-bills by the defendants against the complainant, asserting their rights and seeking for affirmative relief, were demurrable. Miller & Lux v. Rickey Land & Cattle Co., 146 Fed. 574; Van Vibbler v. Hilton, 84 Cal. 585, 24 Pac. 308. In a suit to foreclose a mortgage, it was held that a defendant holding another mortgage on the same and other property might, by cross-bill, obtain affirmative relief against other defendants, judgment creditors of the mortgagor, and thus establish the validity of his mortgage. First Nat. Bank v. Salem Capital Flour Mills Co., 31 Fed. 580. But a cross-bill was not allowed upon a creditor's bill, when the defendant sought thus to have adjusted the indebtedness between themselves. Vannerson v. Leverett, 31 Fed. 376. Where the mortgagee filed a bill to collect rents from a lessee and a sublessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sublessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed. Jesup v. Illinois Cent. R. Co., 43 Fed. 483. It was said that where an original bill sought to enforce an equitable title against several defendants, it was improper for a defendant to file a cross-bill seeking the enforcement of a title paramount against his codefendants. Ayres v. Carver, 17 How. 594, 15 L. ed. 179.

claim arising out of the transaction which is the subject-matter of the suit, but by implication they forbid their assertion in an independent suit, and a judgment against the defendant would undoubtedly be a bar to any subsequent attempt to assert them.[4] In determining when a counter-claim arises out of the transaction which is the subject-matter of the suit, cases under the former practice in equity and those under the code practice may be considered. Where pending a suit by an insurance company to cancel a policy for misrepresentation the insured died and by supplemental bill the beneficiary was restrained from suing at law upon the policy, it was held that he could only assert his claim by a cross-bill.[5] It has been held under the New York Code of Civil Procedure that the following causes of action arise out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or were connected with the subject of the action: In an action brought to recover the purchase price of stock, a claim that the contract of sale was procured by fraudulent representations, with a prayer that it should be rescinded.[6] In an action by an heir to set aside so much of a will as created a trust, a counter-claim by the defendant trustee for the rents of the land collected by the plaintiff since the testator's death.[7] In a foreclosure suit, a counter-claim for usury and to set aside an equity by the mortgage on the title to the premises.[8] In an action to enforce the statutory lien created on an award in condemnation proceedings, a counter-claim for a breach of a contract for the sale of the premises condemned, which was made during the condemnation proceedings.[9] In an action to enjoin a foreclosure action, a counter-claim for rent due from the equitable owner of the mortgage.[10] It has been held, in England, that in an action by the vendor for specific performance, the defendant may, by a counter-claim, pray for the review of a previous decision as

4 Odger's Pleading, 4th ed., pp. 228–230, *supra*, § 186.

5 Royal Union Mut. Life Ins. Co. v. Wynn, 177 Fed. 289.

6 Delano v. Rice, 23 App. Div. (N. Y.) 327.

7 O'Brien v. Garniss, 25 Hun (N. Y.) 446.

8 Myers v. Wheeler, 24 App. Div. (N. Y.) 327, 48 N. Y. Supp. 611; Queen City Bank v. Brown, 75 Hun, (N. Y.) 259, 58 St. Rep. 286, 28 N. Y. Supp. 1016.

9 Cottle v. N. Y., W. S. & B. Ry. Co., 27 App. Div. (N. Y.) 604, 50 N. Y. Supp. 1008.

10 Austin v. Rapelye, 45 St. Rep. 480.

to the title.[11] The following cases, amongst others, under the New York Code have held that counter-claims could not be pleaded. In an action brought to restrain a party from interference with the plaintiff's trade, a counter-claim for damages arising out of the breach of a contract between some of the plaintiffs and the assignor of the defendant.[12] In an action to set aside an assignment and to procure a reassignment of bonds and mortgages, a counter-claim that the agent, acting under a power of attorney from the plaintiff, together with two others, acting under a previous power of attorney, had subsequently assigned to the defendant three other bonds and mortgages which plaintiff refused to deliver.[13] In an action to recover money collected under color of a contract, by fraud, a counter-claim for a balance due for work under the contract.[14] In an action to recover a debt for which a lien had been filed, a counter-claim for the expense of removing the lien and of preparation of the defense of an action anticipates to foreclose the same.[15] The rules furthermore permit any set-off or counter-claim which might be the subject of an independent suit in equity against the plaintiff.[16] This abrogates the former doctrine, that a cross-bill must be germane to the subject-matter of the original bill.[17] The distinction between a set-off and a counter-claim may be one of importance, since in case of bankruptcy or insolvency of the complainant the defendant might be allowed the full amount of his set-offs and be obliged to share proportionately with the other creditors in the dividend upon his counter-claims.[18] "A set-off is a statutory defense to an

[11] Scott v. Alvarez, (1895), 1 Ch. 596.

[12] Sugden v. Magnolia Metal Co., 58 App. Div. (N. Y.) 236.

[13] Bradhurst v. Townsend, 11 Hun (N. Y.) 104.

[14] People v. Dennison, 84 N. Y. 272, affirming 81 N. C. (N. Y.) 129, affirming 59 How. Pr. (N. Y.) 157.

[15] Biershenk v. Stokes, 18 N. Y. Supp. 854, reversing 43 St. Rep. (N. Y.) 788.

[16] Eq. Rule 30.

[17] It has been held that a cross-bill may be filed in a suit to foreclose a mechanic's lien, for the cancellation of the record of the lien, with damages for a breach of the mechanic's contract (Springfield M. Co. v. Barnard S. Mfg. Co., 81 Fed. 261); in a suit to foreclose a vendor's lien, for the foreclosure of a subsequent vendor's lien after the cross-complainant has secured the payment of the amount due the original plaintiff (Cox v. Price, 2 Va. Dec. 170, 22 S. E. 512). See *supra*, note 3 and § 197, note 14.

[18] Odgers Principles of Pleading, 4th ed., p. 228.

action; a counterclaim is a cross-action."[19] In England, it has been said that "set-off is the creature of statute; to be allowed a set-off you must show a statutory right."[20] There a set-off remains precisely what it used to be under the statutes of George II.[21] It must there be a cross-claim for a liquidated amount and it can be pleaded only to a liquidated claim.[22] There may also be some importance in the distinction between a defense and a counter-claim, since a reply is required to the latter, but not without special order to the former.[23] The former cases holding when a cross-bill should be filed and when not may consequently be useful in this respect. If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense and should be so pleaded; but if they only furnish a reason why the court should make a bill depriving the plaintiff of his cause of action, they must be set forth as a counter-claim.[24] It was formerly held that a discharge in bankruptcy pending a suit,[25] and the right of sureties to subrogation,[26] and an agreement to settle the litigation made pending the suit,[27] could only be pleaded by a defendant in a cross-bill. In such cases, the cross-bill was in the nature of a supplemental bill.[28]

In England, a counterclaim must always seek relief against the plaintiff, either alone or along with some third person;[29] but to a joint claim by two plaintiffs, a counter-claim against them jointly, or a separate counter-claim against each of them has

19 Lord Esher, M. R., in Sykes v. Sacerdoti, 15 Q. B. D. 423.

20 Liskeard, etc., Ry. Co. v. Liskeard & Caradon Ry. Co., 18 Times Rep. 1; Ann. Pr. 1913, p. 360.

21 2 Geo. II, Ch. 22; 8 Geo. II, Ch. 24.

22 Rees v. Watts, 11 Ex. 410; Ann. Pr. 1913, p. 360.

23 Eq. Rule 31.

24 See Langdell's Eq. Pl., § 155.

Therefore, when a bill is filed by a mortgagor against a mortgagee for redemption, if the defendant can only show that the plaintiff is not entitled to redeem, he might obtain the benefit of a foreclosure without filing a cross-bill for the purpose; for the dismissal of a bill to redeem upon its merits is itself a foreclosure. Langdell's Eq. Pl., § 123. See Hilton v. Barrow, 1 Ves. Jr. 284.

25 Banque Franco-Egyptienne v. Brown, 24 Fed. 106, 107.

26 Stokes v. Little, 65 Ill. App. 255.

27 Snyder v. De Forest Wireless Telegraph Co., 154 Fed. 142.

28 *Infra*. §§ 231, 234.

29 Furness v. Booth, 4 Ch. D. 586; Harris v. Gamble, 6 Ch. D. 748; Ann. Pr. 1913, p. 363.

been allowed;[30] or the defendant may counter-claim against one plaintiff and deny all liability to the other, and then recover a judgment against one of them.[31] It has been held in England that the plaintiff may plead a counter-claim against a counter-claim interposed by the defendant;[32] provided, at least, that he does not pray for an affirmative judgment upon the same.[33] It has been held that matter described in the answer as an "answer by way of counter-claim," may be treated as a counter-claim;[34] but that where the matter was described as a defense and nothing was shown to indicate that the pleader intended to set up a counterclaim as such, he was precluded from insisting that he set one up.[35] Where the matter was not described as a counter-claim, but the prayer asked that the paper be made a cross-petition against the plaintiff, who replied to the same, it was treated as a counter-claim.[36]

§ 199. New parties to cross-bills and counter-claims. It was said by a judge of great authority that new parties could not be introduced into a case by a cross-bill.[1] It was held, that this could not be done when the result would be to arraign parties of the same citizenship upon different sides of a controversy, that arose before the suit was brought and over which a Federal court could not have original jurisdiction.[2] A junior mortgagee was not allowed to file a cross-bill in a foreclosure suit, so as to procure the foreclosure of his own mortgage, when, on account of his citizenship, the court would have had no juris-

30 M., S. & L. Ry. Co. v. Brooks, 2 Ex. D. 243.

31 Hall v. Fairweather, 18 Times Rep. 58; Ann. Pr. 1913, p. 363.

32 Toke v. Andrews, 8 Q. B. D. 428.

33 Renton Gibbs & Co., L'd. v. Neville & Co., (1900), 2 Q. B. 181.

34 Johnson v. Sherwood, 34 Ind. App. 490, 73 N. E. 180.

35 Lafond v. Lassere, 26 Misc. (N. Y.) 77, 56 N. Y. Supp. 459; State v. Coughran, 19 South Dak. 271, 103 N. W. 31. *Contra*, Mills v. Rosenbaum, 103 Ind. 152, 2 N. E. 313. But see Mason v. Mason, 46 Misc. (N. Y.) 361, 94 N. Y. Supp. 868, 34 Civ. Pro. R. 193.

36 Hutchings v. Dean, 11 Ky. Law Rep. 310.

§ 199. 1 Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 145, 15 L. ed. 158, 162. See Randolph v. Robinson, 2 N. J. L. 171; Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

2 Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350. Similar is Wright v. Frank, 61 Miss. 32.

diction of an original bill for that purpose.[3] It has been said: that a cross-bill cannot be filed to set aside a compromise of the original suit, under which deeds have been made to a person not an original party thereto.[4]

In a suit in equity by the purchaser of coal rights in lands for a specific enforcement of the contract, the terms of which were in dispute between the parties, the defendant cannot by cross-bill bring in as parties defendant the agents who made the contract, on his behalf and with his approval, to have their right to commissions determined, a controversy which has no relevancy to the principal suit, and in which complaint has no interest.[5] It has been said that when the interests of the defendant require the presence of new parties, he should take the objection of non-joinder and compel the plaintiff to amend.[6] It was said later that such an objection could be raised only by the new parties thus sought to be brought in.[7] The rule seems now to be well established that, although new parties cannot be introduced by a cross-bill which seeks discovery only or which is purely defensive, they may when it seeks affirmative relief against the complainants and their presence is necessary to the determination of the controversy as thus enlarged.[8] A citizen of the District of Columbia, who had bought an interest in the property affected pending the litigation, was allowed to file a cross-bill to protect his interest in the property.[9] Upon a bill in equity filed by the lessors of an oil lease against the lessee, for a discovery, an accounting of royalties, and specific performance

[3] Newton v. Gage, 155 Fed. 598. But see Lilienthal v. McCormick, C. C. A., 117 Fed. 89, 96.

[4] Bunel v. O'Day, 125 Fed. 303, 319.

[5] Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

[6] Patton v. Marshall, C. C. A., 26 L.R.A.(N.S.) 127, 173 Fed. 350.

[7] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371. *Contra*, Gregory v. Pike, C. C. A., 67 Fed. 837, holding that the complainant may object to a cross-bill filed by a stranger claiming an interest in the subject of the litigation. See Thurston v. Big Stone Gap Imp. Co., 86 Fed. 484.

[8] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371; Kanawha Lodge v. Swann, 37 W. Va. 176; s. c., 16 S. E. 462; Allen v. Tritch, 5 Colo. 222, 228; Hurd v. Case, 32 Ill. 45, 83 Am. Dec. 249; Jones v. Smith, 14 Ill. 229; Blodgett v. Hobart, 18 Vt. 414; Hildebrand v. Beasley, 41 S. (Tenn.) 121, 123; Sharp v. Pike's Adm'r, 5 B. Mon. (Ky.) 155; Coster's Ex'rs v. Bank of Ga., 24 Ala. 39.

[9] Ulman v. Iaeger's Adm'r, 155 Fed. 1011.

of the contract to deliver oil as royalty, the defendant was allowed to file a cross-bill, bringing in as defendants other claimants of ownership to parts of the land, and praying that their rights be determined by the court.[10] In a suit to restrain the infringement of a patent, a cross-bill was sustained; which brought in as defendant to it a new party, the assignor of the patent to the original complainant; claimed that that assignor had previously assigned the equitable title thereto to the orator of the cross-bill, and that the legal assignee had bought with notice thereof; and prayed a conveyance of the patent and an injunction against further annoyance.[11] Parties brought in as defendants to a cross-bill may, in turn, exhibit cross-bills when the same are necessary or proper to terminate the litigation.[12] A stranger to a suit cannot file a cross-bill without permission from the court.[13] A cross-bill filed by a stranger without such permission may be stricken from the file.[14] Permission will not be granted if his claim is not germane to that set forth in the original bill.[15] Thus, when a trustee in bankruptcy sued to set aside a preferential transfer and to recover the proceeds of the same, a party claiming the lien upon the fund was not permitted to intervene and to enforce the same by cross-bill.[16] It has been said that under the practice of the Federal courts one claiming an interest in the subject of litigation cannot properly be made a party defendant against the objection of complainant, and hence a cross-bill filed by a person thus coming into the cause should be dismissed.[17] In a suit to foreclose a chattel mortgage, a party claiming a prior chattel mortgage, made by one of the original defendants upon part of the property, may be allowed to intervene and file a cross-bill to estab-

[10] Robinson v. Brast, C. C. A., 149 Fed. 149.

[11] Brandon Mfg. Co. v. Prime, 14 Blatchf. 371.

[12] Blair v. Illinois S. Co., 42 N. E. 895; s. c., 159 Ill. 350, 31 L.R.A. 269.

[13] Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Forbes v. Memphis, E. P. & P. R. Co., 2 Woods, 323; Gregory v. Pike, 67 Fed. 837; *infra*, § 258.

[14] Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 294, 303, 17 L. ed. 725, 729; Putnam v. New Albany, 4 Biss. 365, 367.

[15] Lovell v. Latham & Co., 186 Fed. 602.

[16] *Ibid.*

[17] Gregory v. Pike, C. C. A., 67 Fed. 837. See Thruston v. Big Stone G. I. Co., 86 Fed. 484.

lish his rights.[18] It has been held that upon a stockholders' bill to set aside a transfer of property because of the fraud and gross negligence of its president, such president, although not an original party, may be allowed to intervene and file a cross-bill to controvert the charges against him in the bill.[19] Upon a stockholder's bill for an injunction, against the election of directors at the annual meeting of the stockholders of a corporation, other stockholders not original defendants, were allowed to file a cross-bill praying for a modification of a preliminary injunction, granted in accordance with the prayer of the original bill, so as to permit the election of the directors under the supervision of a master in chancery, at a time to be fixed by the court.[20] Whether under the new Equity Rules a new party can be brought in by a counter-claim has not yet been decided.

In England, the defendant may plead a counterclaim against a third person jointly with the plaintiff; provided that the relief thus sought relates to, or is connected with, the subject-matter of the plaintiff's claim;[21] even though such third person could not be a party to the plaintiff's original claim;[22] but the plaintiff must be a party to such a counter-claim;[23] and a third person may be joined with the plaintiff as defendant to the counterclaim, although he would be liable only in one of two inconsistent alternatives;[24] but such third person cannot counter-claim in the action against either plaintiff or defendant.[25] A joint claim against two partners may there be set up as a counter-claim against a separate claim by one of them.[26] In New York it has been held that where the liability was joint and several, a counter-claim or set-off might be interposed;[27] but otherwise a joint demand could not be set up as a counter-

18 Osborne & Co. v. Barge, 30 Fed. 805.

19 Brinckerhoff v. Holland Tr. Co., 159 Fed. 191.

20 Bartlett v. Gates, 118 Fed. 66.

21 Baker v. Gent, 9 Times Rep. 159; *Re* A Debtor, (1907), 23 Times Rep. 169; S. F. Edge, L'd. v. Weigel, (1907), 97 L. T. 447.

22 Turner v. Hednesford Gas Co., 3 Ex. D. 145.

23 Furness v. Booth, 4 Ch. D. 586; Harris v. Gamble, 6 C. D. 748.

24 Child v. Stenning, 5 Ch. D. 695.

25 Street v. Gover, 2 Q. B. D. 498; Alcoy, etc., Co. v. Greenhill, (1896), 1 Ch. 19. "Annual Practice," 1912, I, 361.

26 Eyre v. Moreing, W. N. 1844, 58. See Hodson v. Mochi, 8 Ch. D. 569.

27 American Guild v. Damon, 186 N. Y. 360.

claim when one only of the obligors[28] or obligees[29] was a party to the suit.

§ 200. Time of filing set-offs, counter-claims and cross-bills. The Equity Rules provide for the assertion of set-offs and counter-claims in the answer of the defendant,[1] which must be filed within twenty days after service of the subpœna, unless the time is enlarged.[2] They authorize the subsequent filing of supplemental pleadings by permission of the court.[3] Set-offs and counter-claims could undoubtedly then be filed, provided they arose subsequent to the original answer or the complainant was ignorant of them when such answer was made.[4] Under the former practice, a cross-bill might be filed at any time before the final decree.[5]

§ 201. Proceedings upon cross-bills. It was the better practice for a defendant to apply for leave before filing a cross-bill.[1] Permission might be denied for laches.[2] Ordinarily, a refusal to grant leave would not be reviewed upon an appeal;[3] but it was held that a cross-bill by a party to the suit might be

[28] Baldwin v. Briggs, 53 How. 80; Spofford v. Rowan, 6 N. Y. St. Rep. 250; P. & S. Mfg. Co. v. Noel, 60 N. Y. Superior Ct. 207, affirmed 138 N. Y. 606.

[29] Windecker v. Mutual Life Ins. Co., 12 App. Div. (N. Y.) 73, 77 N. Y. St. Rep. 358, 43 N. Y. Supp. 358; Nat. St. Bank v. Boylan, 2 Abb. N. C. (N. Y.) 216; Bockover v. Harris, 43 N. Y. Superior Ct. 548.

§ 200. [1] Eq. Rule 30.

[2] Eq. Rules 12, 16.

[3] Eq. Rule 34; *infra*, § 231.

[4] Ibid.

[5] Morgan's La. & T. R. & S. Co. v. Texas C. R. Co., 137 U. S. 171, 34 L. ed. 625, a cross-bill for a foreclosure upon a default subsequent to the appointment of a receiver in a bill *quia timet*. See § 201, *infra*.

§ 201. [1] Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895; Brown v. L. C. & M. W. R. Co., 2 Wall. 283, 17 L. ed. 725; International T. C. Co. v. Carmichael, 44 Fed. 350; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 41 Fed. 8; Brush El. Co. v. Brush-Swan El. Co., 43 Fed. 701; Brown v. Bell, 4 Hay. (Tenn.), 287; Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. 579. *Contra*, Neal v. Foster, 34 Fed. 496, 498; Beauchamp v. Putnam, 34 Ill. 378, 381.

[2] Under-Feed Stoker Co. of America v. Am. Stoker Co., 169 Fed. 891.

[3] Indiana & St. L. R. Co. v. Liverpool, L. & G. Ins. Co., 109 U. S. 168, 27 L. ed. 895. *Contra*, Beauchamp v. Putnam, 34 Ill. 378, 381.

filed with the answer without permission of the court.[4] A cross-bill should not be filed before the answer to the original bill.[5] It should regularly be filed with, or immediately after, the defendant's answer;[6] but may be allowed any time before the final decree.[7] In a case where the defendant, after answer, learned of facts tending to show that the plaintiff had before suit parted with all interest in the subject-matter to a citizen of the same State as the defendant, the proceedings were stayed until the complainant answered a cross-bill, charging such a transfer.[8] A cross-bill in a suit by a State may be served upon the Attorney-General when he filed the original bill.[9] It has been held at Circuit that a subpœna to answer a cross-bill may, by express leave of the court, be served by substitution upon the attorney for the complainant to the original bill when his client is beyond the jurisdiction of the court.[10] In one case the court said: "The reason of this rule would seem to limit it in equity cases to cross-bills, either wholly or partly defensive in their character, and to deny its application to cross-bills

4 Christmas Gold Mining Co. v. Milliken, 200 Fed. 316, and cases cited. In Columbus v. Mercantile Tr. Co., 218 U. S. 645, 663, 54 L. ed. 1193, 1199, the complainant sued to enjoin an act alleged to be in violation of a contract and defendant filed a cross-bill seeking a declaration that the contract had been forfeited for nonperformance; it was held that a decree dismissing the original bill upon the merits must contain a clause granting the prayer of the cross-bill.

5 Allen v. Allen, Hempst. 58. A cross-bill filed before the complainant therein has filed his answer to the original bill might be stricken from the files on motion. Ballard v. Kennedy, 16 So. 327; s. c., 34 Fla. 483.

6 Daniell's Ch. Pr. (2d Am. ed.) 1745; White v. Buloid, 2 Paige (N. Y.), 164; Allen v. Allen, Hempst. 58.

7 Morgan's C. & T. R. S. S. Co. v. Texas C. R. Co., 137 U. S. 171, 34 L. ed. 625. The old practice under which a cross-bill must ordinarily be filed before publication has been abrogated. Neal v. Foster, 34 Fed. 496; Rogers v. Reissner, 31 Fed. 592; Pullman's P. C. Co. v. Central Tr. Co., 46 Fed. 261; Huber v. Diebold, 25 N. J. Eq. 170.

8 Young v. Pott, 4 Wash. 521. But see Westinghouse El. & N. Co. v. Mustard, 87 Fed. 336. It has been said that an objection of a defect of parties must precede the filing of a cross-bill. Plum v. Smith (N. J. Ch.), 39 Atl. 1070.

9 Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. 552.

10 Lowenstein v. Glidewell, 5 Dill. 325; Kingsbury v. Buckner, 134 U. S. 650, 676, 33 L. ed. 1047, 1057; Peay v. Schenck & Bliss, Woolw. 175; Johnson R. R. S. S. Co. v. Union

setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject-matter of the original bill, are made the basis for the affirmative relief."[11] Leave to make substituted service was refused in a case where the plaintiffs offered to stipulate that the matter sought to be pleaded by cross-bill might be set up by answer;[12] and where the cross-bill set up new matter not set out in the original bill, germane to the case made by the original bill, and sought to make such new matter the basis of independent affirmative relief.[13] Service by publication of a subpœna upon a cross-bill was held to be improper.[14] It has been held that a cross-bill may be dismissed upon motion before an answer or a hearing when it sets up matter improper for such a pleading, even though it was filed by leave of the court.[15] A demurrer might however, be filed to a cross-bill for want of equity, for multifariousness, for presenting matter improper for a cross-bill, or for objections which would be grounds of demurrer to an original bill.[16] Where a cross-bill in equity asked relief foreign to the litigation, in behalf of parties who had a right of action at law, it was held that it should be dismissed "without prejudice," and not "for want of equity."[17] Upon demurrer, part of a cross-bill was sustained as substantially a plea to the jurisdiction.[18] The testimony taken under the cross-bill may be read for or against the original bill; and the testimony taken under the original bill can be read for or against the cross-bill. In either case a formal order granting leave to do this, "saving all just exceptions," should first be obtained *ex parte*.[19] Both bills were usually heard together

S. & S. Co., 43 Fed. 331. But see Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811, 19 L. ed. 587, 589, 590; § 165 and citations.

11 Caldwell, J., in Lowenstein v. Glidewell, 5 Dill. 325, 328. See Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811, 19 L. ed. 587, 589, 590; and *supra*, § 165.

12 Heath v. Erie Ry. Co., 9 Blatchf. 316.

13 Fidelity T. & S. Y. Co. v. Mobile St. Ry. Co., 53 Fed. 850. See Lowenstein v. Glidewell, 50 Dillon, 325; Ledbetter v. Mandell, 141 App. Div. 556, affirmed 205 N. Y. 537.

14 Webster Loom Co. v. Short, 10 Off. Gaz. 1019.

15 Dickerman v. Northern Trust Co., 80 Fed. 450.

16 Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; American & G. M. & I. Corp. v. Marquam, 62 Fed. 960.

17 Barrett v. Short, 41 Ill. App. 25.

18 Marvin v. Ellis, 9 Fed. 367.

19 Daniell's Ch. Pr. (5th Am. ed.)

both in the first instance[20] and upon appeal.[21] When a decree had been made dismissing a cross-bill before a decree upon the original bill, it was held that an appeal therefrom taken before a decree upon the original bill must be dismissed.[22] A decree upon the original bill would supersede a previous decree upon a cross-bill if the two were inconsistent.[23] Where the cross-bill sought affirmative relief, the voluntary dismissal of the original bill would not dismiss the cross-bill.[24] It is otherwise where the cross-bill merely sought discovery.[25] It was said that a dismissal of the original bill by the court after a hearing operated as a dismissal of a cross-bill between the defendants, even though the cross-bill showed a good case for relief; "but as a cross-bill, it must follow the fate of the original bill."[26] But the later authorities held that where the cross-bill was not purley defensive, but sought original relief and contained in itself sufficient allegations for an original bill, it might not be affected by such a dismissal,[27] and that where there was no

1552, 1553; Lubiere v. Genou, 2 Ves. Sen. 579.

[20] Ayres v. Carver, 17 How. 591, 15 L. ed. 179; Moore v. Huntington, 17 Wall. 417, 422, 21 L. ed. 642, 643; Ex parte Railroad Co., 95 U. S. 221, 24 L. ed. 355; Daniell's Ch. Pr. (2d Am. ed.) 1751. See Blythe v. Hinckley, 84 Fed. 228.

[21] Ayres v. Carver, 17 How. 591, 15 L. ed. 179; Ex parte Railroad Co., 95 U. S. 221, 24 L. ed. 355.

[22] Ayres v. Carver, 17 How. 591, 15 L. ed. 179.

[23] Ex parte Railroad Co., 95 U. S. 221, 225, 24 L. ed. 355, 356; Blythe v. Hinckley, 84 Fed. 228.

[24] Lowenstein v. Glidewell, 5 Dill. 325; Chicago & A. R. Co. v. Union R. M. Co., 109 U. S. 702, 27 L. ed. 1081.

[25] Donohoe v. Marposa L. & M. Co., 1 Pac. Coast L. J. 211, 219.

[26] Mr. Justice Field in Dows v. Chicago, 11 Wall. 108, 112, 20 L. ed. 65, 67; U. S. v. California & Oregon Land Co., 192 U. S. 355, 369, 48 L. ed. 476, 479. See also Cross v. De Valle, 1 Wall. 5, 14, 17 L. ed. 515, 518. But see Wabash, St. L. & P. Ry. Co. v. Central T. Co., 22 Fed. 138, 142; Donohoe v. Mariposa L. & M. Co., 1 Pac. Coast L. J. 211; Jesup v. Illinois Cent. R. Co., 43 Fed. 483, 495. It was held that where the original bill was dismissed "without prejudice," the cross-bill must also be dismissed "without prejudice." Blewitt v. Blewitt (Miss.), 12 So. 249. Where one who filed a cross-bill was held to have no standing in court it was held that other parties who attempted to come in under the cross-bill must abide by the result declared against him who filed it. Stainback v. Junk Bros. L. & Mfg. Co., 98 Tenn. 306, 39 S. W. 530. See also Richman v. Donnell, 53 N. J. Eq. 32.

[27] San Diego Flume Co. v. Souther, 90 Fed. 164, 167; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025; Holgate v. Eaton, 116 U.

jurisdiction in equity of the matter set up by the original bill, the filing of a cross-bill alleging matters of equitable cognizance gave the court jurisdiction of the original bill as well,[28] at least where the cross-bill might have been sustained as an original bill.[29] When an abatement took place after a cross-bill had been filed, it seems that there should have been a bill of revivor filed in both the original and the cross cause.[30] Where a cross-bill assumed the character of an original bill it was dismissed for jurisdiction if the parties to the controversy thereby presented were citizens of the same State and no Federal question was involved.[31] Otherwise, proceedings upon cross-bills were substantially the same as those upon original bills.[32]

S. 33, 29 L. ed. 538; Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 27 L. ed. 1081; Jackson v. Simmons, C. C. A., 98 Fed. 768; Coogan v. McCarron, 50 N. J. Eq. 611, 25 Atl. 330; Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 48 L. ed. 911; Blythe v. Hinckley, 84 Fed. 228, 236, 237; Badger Gold Min. & Mill Co. v. Stockton Gold & Copper Min. Co., 139 Fed. 838. But see U. S. v. California & Oregon Land Co., 192 U. S. 355, 360, 48 L. ed. 476, 479.

28 Sanders v. Riverside, C. C. A., 118 Fed. 720.

29 Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 145, 48 L. ed. 911, 912.

30 Story's Eq. Pl., § 363.

31 Patton v. Marshall, 173 Fed. 350.

32 See, however, Lautz v. Gordon, 28 Fed. 264; Puetz v. Bransford, 31 Fed. 458. For a case where an answer to a cross-bill was held responsive, see Prentiss Tool & Supply Co. v. Godchaux, 66 Fed. 234. See on the general subject Noel v. King, 2 Madd. 392; Hannah v. Hodgson, 30 Beav. 12; Gray v. Haig, 13 Beav. 65.

CHAPTER XI.

REPLIES.

§ 202. Definition and history of replies. A reply is a pleading by which the plaintiff puts in issue the matters pleaded in a defendant's answer. They were formerly called replications.[1] Replications were formerly of two kinds, general and special.[2] A general replication consists of a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged therein to bar the plaintiff's suit, together with an assertion of the truth and sufficiency of the bill.[3] A special replication sets up new matter in avoidance of a substantive defense contained in the answer or plea.[4] To this the defendant was obliged to file a rejoinder, giving the discovery required in it.[5] This might then be succeeded by a surrejoinder and a rebutter.[6] Special replications and their consequences were, on account of the inconvenience therefrom resulting, almost obsolete by the time of Lord Eldon.[7] A special replication to the answer was forbidden by the Equity Rules of 1842, which provided that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."[8] The body of a general replication was substantially in the following form: "This repliant, saving and reserving to himself all and all manner of advantage of exception, which

§ 202. [1] Mason v. Hartford, P. & F. R. Co., 10 Fed. 334.

[2] Mitford's Pl., ch. 3.

[3] Story's Eq. Pl., § 878.

[4] Story's Eq. Pl., § 878.

[5] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[6] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[7] Mitford's Pl., ch. 3; Story's Eq. Pl., § 878.

[8] Rule 45 of 1842. See Mason v. Hartford, P. & F. R. Co., 10 Fed. 334; Vattier v. Hinde, 7 Pet. 252, 273, 8 L. ed. 675, 683; Duponti v. Mussy, 4 Wash. 128; Wren v. Spencer O. Mfg. Co., 18 Off. Gaz. 857.

may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied unto by his repliant; without that, that any other matter or thing in the said answer contained, material as effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed."[9] The signature of counsel was unnecessary.[10] Replications have now been abolished; and the new Equity Rules, following the New York Code of Procedure and the English orders in chancery, now provide as follows.

§ 203. When a reply should be filed. "Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or effectual in the law to be replied unto, confessed or avoided, plaintiff. If the answer include a setoff or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."[1] Where there are several defendants a replication should be filed within the prescribed time after one of them has filed an answer with a counter-claim, although the others may not have done so,[2] and a separate replication after the other answers have come in if they set up counter-claims. It has been held that the pendency of a motion affecting the answer will excuse the plaintiff from replying until the motion has

9 Story's Eq. Pl., § 878, note 4.

10 Story's Eq. Pl., § 881; Daniell's Ch. Pr. (4th Am. ed.) 830.

§ 203. 1 See Smith's Ch. Pr. (2d Eng. ed.), vol. i, p. 336.

2 Allis v. Stowell, 5 Fed. 203.

been decided.[3] The court exercises great liberality in allowing a reply filed too late to stand.[4] The taking of testimony by the defendant, or any other proceeding taken by him in the cause, might be held a waiver of his right to have a counter-claim taken as confessed for want of a reply.[5] An objection upon this ground cannot be raised for the first time upon appeal.[6] Formerly after a cause had been heard upon bill and answer, the court would rarely allow a replication to be filed;[7] but it was said: that permission to file the replication should be granted when the suit was set down for such hearing in good faith, for the purpose of testing the sufficiency of a defense in the answer.[8] When a complainant is in default for not filing a replication in due time, it is improper to grant him any relief not justified by admissions in the answer.[9] The court may grant leave to withdraw a reply, and amend, or have the cause set down for a hearing upon bill and answer.[10] Where a defense pleaded in an answer is, upon its face, conclusive and raises but a single point, a reply should usually be ordered. In New York, replies have been ordered to defenses setting up the statute of limitations,[11] but not a foreign statute of limitations;[12] the statute of

3 Peirce v. West's Ex'rs, Pet. C. C. 351; Sayles v. Erie Ry. Co., 2 N. J. L. J. 212; Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26; Jones v. Brittan, 1 Woods, 667; Potts v. Alexander, 118 Fed. 885, 886; approving text, U. S. v. Barber Lumber Co., 169 Fed. 184.

4 Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26.

5 Jones v. Brittan, 1 Woods, 667; Fischer v. Hayes, 6 Fed. 76; s. c., 19 Blatchf. 26; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. ed. 733.

6 Clements v. Moore, 6 Wall. 299, 18 L. ed. 786; Fretz v. Stover, 22 Wall. 198, 22 L. ed. 769.

7 Bullinger v. Mackey, 14 Blatchf. 355; Peirce v. West's Ex'rs, Pet. C. C. 351.

8 Besson & Co. v. Goodman, 147 Fed. 887.

9 Harrington v. Union Oil Co., 144 Fed. 236.

10 Rogers v. Goore, 17 Ves. 130; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425; Daniell's Ch. Pr. (2d Am. ed.) 479; Ibid. (3d Am. ed.) 830.

11 Hubbell v. Fowler, 1 Abb. N. S. 1.

12 Olsen v. Singer Mfg. Co., 138 App. Div. 467; 122 N. Y. Supp. 822; Cavanagh v. Oceanic S. S. Co., 30 St. Rep. 532; 9 N. Y. Supp. 198. But see Perls v. Metropolitan Life Ins. Co., 15 Daly, 517; 29 St. Rep. 409, 8 N. Y. Supp. 532; New York, L. E. & W. R. R. Co. v. Robinson, 25 Abb. N. C. 116; 12 N. Y. Supp. 208.

frauds;[13] a discharge in bankruptcy;[14] marriage;[15] divorce;[16] special partnership;[17] ratification;[18] settlement of previous litigation;[19] a judgment in another suit;[20] a previous assignment of the claim in suit;[21] non-payment of insurance premiums and false statements in an application for a policy;[22] foreclosure.[23]

In New York, a reply will not be directed to the matter alleged in an answer which does not constitute a defense,[24] nor to defenses which have been negatived in the plaintiff's pleading,[25] nor where the matter had been thrashed out upon a previous application for a receiver,[26] nor to evidentiary facts in an answer,[27] nor to a defense which is supported by lengthy statements of facts or documents;[28] nor where the complaint alleged compliance by plaintiff with all the conditions of the contract upon

[13] Guinzburg v. Joseph, 141 App. Div. 472; 126 N. Y. Supp. 324.

[14] Poillon v. Lawrence, 43 N. Y. Superior Ct. 385. See Poillon v. Lawrence, 77 N. Y. 207.

[15] Link v. Sprague, cited by counsel in Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207.

[16] Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207.

[17] Williams v. Kilpatrick, 21 Abb. N. C. 61; Hartford Nat. Bank v. Beinecke, 15 App. Div. 474; 44 N. Y. Supp. 486; 26 N. Y. Civ. Pro. R. 226.

[18] Steinway v. Steinway, 26 N. Y. Supp. 657; 52 St. Rep. 660; Richards v. Greason, 128 App. Div. 320, 112 N. Y. Supp. 675.

[19] Seaton v. Garrison, 116 App. Div. 301. See Twamley v. McKennell, 137 App. Div. 574, 122 N. Y. Supp. 237.

[20] Timble v. Russell, 41 Misc. 577; 85 N. Y. Supp. 109. Held otherwise when the judgment was in another State, Columbus, H. V. & T. R. R. Co. v. Ellis, 25 Abb. N. C. 150; 11 N. Y. Supp. 768, 19 Civ. Pro. R. 66.

[21] Toplitz v. Levering, 71 App. Div. 37; 75 N. Y. Supp. 678.

[22] Schwan v. Mutual Trust F. L. Ass'n., 9 Civ. Pro. R. 82.

[23] Timble v. Russell, 41 Misc. (N. Y.) 577, 85 N. Y. Supp. 109.

[24] Voisin v. Mitchell, 96 N. Y. Supp. 386; N. Y., L. E. & W. R. R. Co. v. Robinson, 25 Abb. N. C. (N. Y.) 116, 12 N. Y. Supp. 208; Columbus, H. V. & T. R. R. Co. v. Ellis, 25 Abb. N. C. (N. Y.) 150, 11 N. Y. Supp. 768; Johnson v. Andrews, 34 Misc. (N. Y.) 89, 68 N. Y. Supp. 764; City Equity Co. v. Bodine, 141 App. Div. (N. Y.) 907, 126 N. Y. Supp. 439.

[25] Avery v. N. Y. C. & H. R. R. R. Co., 6 N. Y. Supp. 547, 24 St. Rep. 918 affirmed 117 N. Y. 660; Shaff v. United Surety Co., 142 App. Div. 465, 127 N. Y. Supp. 8.

[26] Hallenborg v. Greene, 87 App. Div. 259; 84 N. Y. Supp. 319.

[27] Steinway v. Steinway, 26 N. Y. Supp. 657; 52 St. Rep. 660.

[28] Zeiner v. Mutual Reserve Fund Life Ass'n., 51 App. Div. 607, 64 N. Y. Supp. 63; Columbus, H. V. & T. R. R. Co. v. Ellis, 25 Abb. N. C.

which he sued, and the answer interposed a general denial and specified conditions which it alleged plaintiff had not performed.[29] It was held that the right to compel a reply was waived by a delay until the action was referred and noticed for hearing,[30] but not by service of a cross-notice of trial.[31]

The Equity Rules are silent as to whether, when the plaintiff wishes to meet a defense by confession and avoidance, he can be permittted to reply against the opposition of the defendant. In England, the rules expressly give the plaintiff the right to reply to any defense in an answer by leave of the Circuit Court.[32] Under the New York Code of Civil Procedure, a defense in an answer may be met by confession and avoidance without any reply.[33]

§ 204. Effect of reply. According to the former practice, the complainant by filing a general replication admitted the sufficiency as regards discovery,[1] and as regards the form of pleading,[2] but not the sufficiency as a defense,[3] of the plea or answer to which it was filed, and denied every allegation in the plea or answer which was not directly responsive to the bill.[4]

§ 205. Frame of a reply. The full title of the cause, as it stands at the time the reply is filed, must be set forth in its heading of the reply, but only the names of such of the defendants as have appeared should be inserted or inferred to in its bodoy. If a defendant's name has been misspelled by the plaintiff, and such defendant has corrected the same by his answer,

150; 11 N. Y. Supp. 768; 19 Civ. Proc. R. 66.

29 Burr v. Union Surety & Guaranty Co., 86 App. Div. (N. Y.) 545, 83 N. Y. Supp. 756.

30 Sterling v. Mut. Life Ins. Co., 6 State Rep. (N. Y.) 96.

31 Cavanagh v. Oceanic S. S. Co., 30 State Rep. (N. Y.) 532, 9 N. Y. Supp. 198.

32 Order XIII. Ann. Cas. 1913, p. 395.

33 Met. L. I. Co. v. Meeker, 85 N. Y. 614.

§ 204. 1 Story's Eq. Pl., § 877; Hughes v. Blake, 6 Wheat. 453, 5 L. ed. 303.

2 McKim v. White Hall Co., 2 Md. Ch. 510.

3 Equity Rule 33; Everts v. Agnes, 4 Wis. 343; Rule 33; Matthews v. Lalance & G. Mfg. Co., 2 Fed. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & C. H. T. Co., 5 Bann. & A. 584.

4 Humes v. Scruggs, 94 U. S. 22, 24 L. ed. 51. It was held that the general replication put in issue the validity of a deed set up in the answer although not questioned by the bill. Boyd v. Hawkins, 2 Dev. (N. C.) Eq. 195. But see McClane's Adm'x v. Shepherd's Ex'x, 21 N. J. Eq. 76; Cowart v. Perrine, 21 N. J. Eq. 101.

but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the reply. In the body of the reply, however, the correct name only should be inserted. When any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants their names need not be repeated in the body; it is sufficient in such case to designate them as "all the defendants;" but if he does not join issue with all, the names of the defendants must be set out in the body.[1] A reply should be signed individually by one or more of the solicitors for the complainant.[2] Unless the complainant appears in person in the case, it would probably be sufficient for the defendant to sign the same individually.[3] It is the safer practice to have his individual signature acknowledged. It has been held, in England, that a reply must not set up new claims.[4]

§ 205. [1] Daniell's Ch. Pr. (4th Am. ed.) 830, 831.

[2] Eq. Rule 24.

[3] U. S. R. S., § 747.

[4] Williamson v. L. & W. Ry. Co., 12 Ch. D. 787.

CHAPTER XI.

AMENDMENTS OF WRITS, PROCESS AND PLEADINGS, AT LAW AND IN EQUITY.

§ 206. **Amendments. In general.** "In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side."[1] The Revised Statutes provide: "No summons, writ, declaration, return process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion, and by its rules, prescribe."[2]

§ 206. [1] Harlan, J., in Hardin v. Boyd, 113 U. S. 756, 761, 28 L. ed. 1141, 1142. See Nellis v. Pennock Mfg. Co., 38 Fed. 379.

[2] U. S. R. S., § 954. See Parks v. Turner, 12 How. 39, 46, 13 L. ed. 883, 887; Roach v. Hulings, 16 Pet. 319, 10 L. ed. 979; Tilton v. Cofield, 93 U. S. 163, 167, 23 L. ed. 858, 859; Jacob v. U. S., Brock. 520,

States,[3] charities[4] infants,[5] idiots, and lunatics, are allowed to amend in cases where courts might hesitate to grant the privilege to others. Amendments are rarely allowed to the plaintiffs in penal actions and actions to enforce forfeitures.[6]

§ 207. Amendments of writs and process. A writ may be amended by adding thereto: a date;[1] or, in a removal case, where the State statute so permits, a seal;[2] or, if it is under seal, by adding the proper teste[3] or signature[4] to the same; or the return day, when served after the original return day had passed;[5] or by directing it to a defendant in his official instead of his individual capacity;[6] or when endorsed by an attorney not admitted to practice in the Federal court, but qualified for such admission, by substituting another attorney,[7] or by admitting the original attorney to practice as of a date prior to the issue of the writ;[8] but that when issued in the Federal court without a seal or signature, the defect cannot be cured by amendment.[9] Petitions and bonds on removal are process within the statute and may be amended in a proper case.[10] It has been held that an omission in the papers upon which an attachment has been granted may be supplied by amendment in a case where the State practice does not permit such a cure.[11]

525; Rosenbach v. Dreyfuss, 1 Fed. 391; U. S. v. Batchelder, 9 Int. Rev. Rec. 98; Warren v. Moody, 9 Fed. 673; Thomas v. U. S., 15 Ct. Cl. 242; Russell v. U. S., 15 Ct. Cl. 168; Gulf, C. & S. F. Ry. Co. v. James, 48 Fed. 148, 150; Am. Alkali Co. v. Campbell, 113 Fed. 398; Great Northern Ry. Co. v. Herron, C. C. A., 136 Fed. 49; U. S. R. S., §§ 636, 948, 914, 5595, 5596.

[3] Rhode Island v. Massachusetts, 13 Pet. 23, 10 L. ed. 41.

[4] President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

[5] Serle v. St. Eloy, 2 P. Wms. 386; Pritchard v. Quinchant, Amb. 147; Story's Eq. Pl., §§ 59, 892.

[6] U. S. v. Batchelder, 9 Int. Rev. Rec. 98, Fed. Cas. No. 14,451.

§ 207. [1] Gilbert v. South Carolina I. & W. I. Exposition Co., 113 Fed. 523.

[2] Wolf v. Cook, 40 Fed. 432.

[3] U. S. v. Turner, 50 Fed. 734.

[4] Bryan v. Ker, 222 U. S. 107, 56 L. ed. 114.

[5] Speare v. Stone, C. C. A., 193 Fed. 375.

[6] Hastings v. Herold, 184 Fed. 759.

[7] Jewett v. Garrett, 47 Fed. 625.

[8] Ibid.

[9] Dwight v. Merritt, 4 Fed. 614; Peaslee v. Haberstro, 15 Blatchf. 472. *Contra*, Chamberlain v. Mensing, 47 Fed. 435.

[10] Kinney v. Columbia Sav. & L. Ass'n, 191 U. S. 78, 48 L. ed. 103. See *infra*. §§ 546, 547.

[11] Bowden v. Burnham, 59 Fed.

§ 208. Amendment of pleadings at common law. It has been held that the time and manner of the amendment of pleadings at common law is determined by the practice of the State where the court is held;[1] but, in matters of form, they may be amended in cases where the State statute gives no such permission.[2] The court has power upon the trial to increase the amount of damages demanded in the complaint.[3] Where the State practice is silent, amendments at common law will usually be allowed in cases in which they would be allowed in equity, and they have the same effect.

§ 209. When bills in equity can be amended. The equity rules regulate the amendments of bills as follows: "The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.[1] After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge." "The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it."[2] "The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[3] Under

752, 754; Erstein v. Rothschild, 22 Fed. 61, 64; Booth v. Denike, 65 Fed. 43; *infra*, Section on Attachment.

§ 208. [1] Rosenbach v. Dreyfuss, 1 Fed. 391. See U. S. R. S., § 914. *Contra* as to amendments upon the trial, Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983. See U. S. R. S., § 954; Erstein v. Rothschild. 22 Fed. 61.

[2] U. S. R. S., § 954; Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983.

[3] Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983.

§ 209. [1] Eq. Rule 28. See Gubbins v. Laughtenschlager, 75 Fed. 615; Beavers v. C. A. Richardson & Co., 118 Fed. 320; National Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816.

[2] Eq. Rule 30.

[3] Eq. Rule 19.

the former practice, where objections to the jurisdiction had been sustained without any general appearance, or any pleading by the defendant, the bill might always be amended.[4] For the purposes of the rule as to amendments, an answer which has been held or admitted to be insufficient, was, considered as no answer.[5] In New York, it was held that, after an insufficient answer, the complainant could not amend by leaving out the defendant's name, thus discontinuing the suit without costs.[6] An amendment of a bill without payment of costs or service of a copy on the defendant might be withdrawn and did not then extend the defendant's time to plead.[7] Under the old chancery practice, it was not usual to give leave to amend when a general demurrer was sustained, but in the discretion of the court that might be done.[8] Under the rules of 1842, if upon a hearing any demurrer or plea was allowed, the court might, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it deemed reasonable.[9] If the defect in the bill was clearly one that went to the whole equity of the plaintiff's case, leave to amend would not be granted.[10] Leave to amend might also be refused when the case of the defendant was a hard one and he was free from wrongdoing while the plaintiff had had an opportunity to plead the new matter when his bill was first drawn.[11] When a demurrer had been sustained, an amendment which did not cure the defect would not be allowed.[12] After a case has been set down for a hearing upon the facts, and especially after such a hearing, an amendment which substantially changes the case made by the bill will rarely be granted,[13] but the

[4] Insurance Co. of N. A. v. Svendsen, 74 Fed. 346.

[5] Daniell's Ch. Pr. (2d Am. ed.) 473. See Chase v. Dunham, 1 Paige (N. Y.), 572.

[6] Chase v. Dunham, 1 Paige (N. Y.), 572.

[7] Sheffield F. Co. v. Witherow, 149 U. S. 574, 576, 37 L. ed. 853, 855.

[8] Wellesley v. Wellesley, 4 Myl. & Cr. 554, 558.

[9] Eq. Rule 35, of 1842.

[10] Langdell's Eq. Pl., § 96; Tyler v. Bell, 2 Myl. & Cr. 89; Lowe v. Farlie, 2 Madd. 101; Walker v. Powers, 104 U. S. 245, 26 L. ed. 729; McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961.

[11] Dowell v. Applegate, 8 Fed. 698; s. c., 7 Saw. 232.

[12] McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961, 965.

[13] The Tremolo Patent, 23 Wall. 518, 527, 23 L. ed. 97, 98; Gubbins v. Laughtenschlager, 75 Fed. 615; Bass, R. & G. v. Feigenspau, 82 Fed. 260; Old Dominion Copper Mining

courts usually grant applications for leave to amend so as to correct clerical errors[14] and to make the pleadings conform to evidence that has been taken without objection,[15] and they often permit the necessary jurisdiction averments then to be added.[16] An amendment may be allowed by the court at any time; even after a final decree[17] or a judgment at law and after a decision upon an appeal.[18] In the latter case ordinarily leave from the appellate court to apply for the amendment must be obtained; but where a decree upon the pleading has been reversed and the cause remanded for further proceedings, the complainant may be allowed by the court of first instance to amend his bill without express leave of the court of review.[19] The power of the court of first instance to allow an amendment pending an appeal,[20] or writ of error,[21] is extremely doubtful.

§ 210. Form and effect of amendment of a bill. "Wherever leave to amend the bill is granted, it is more proper to file an amended bill than to interline the original bill, par-

& Smelting Co. v. Lewisohn, 176 Fed. 745; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Healey Ice Machine Co. v. Green, 184 Fed. 515.

[14] Mellwood Distilling Co. v. Harper, 167 Fed. 389, an error in the name of the complainant.

[15] Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed. 602; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Lusk v. Bush, C. C. A., 199 Fed. 369; Flint & P. M. R. Co. v. McPherson, C. C. A., 105 Fed. 210, 44 C. C. A., 449; Freund v. S. H. Greene & Sons Corporation, 139 Fed. 703.

[16] Baglin v. Title Guaranty & Surety Co., 166 Fed. 356; McEldowney v. Card, 193 Fed. 475; Atchison, T. & S. F. Ry. Co. v. Gilliland, C. C. A., 193 Fed. 608; Crosby v. Cuba R. Co., 158 Fed. 144.

[17] The Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; McEldowney v. Card, 193 Fed. 475; Maddox v. Thorn, 60 Fed. 217. See Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272; Fitchburg R. Co. v. Nichols, C. C. A., 85 Fed. 869.

[18] Post v. Beacon, V. P. & El. Co., C. C. A., 89 Fed. 1, 6; Fitchburg R. Co. v. Nichols, C. C. A., 85 Fed. 869; Newcomb v. Burbank, C. C. A., 181 Fed. 334.

[19] Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192, where the mandate authorized the court below "to grant leave to both sides to adduce further evidence;" Am. Bell Tel. Co. v. U. S., 68 Fed. 542, 570.

[20] *Re* Sanford Fork & Tool Co., 160 U. S. 247, 40 L. ed. 414; Berliner Gramophone Co. v. Seaman, C. C. A., 113 Fed. 750.

[21] St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689, 693.

ticularly if some of the defendants had before answered that bill."[1] "The rule is that the amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible, the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out and separating the old from the new matter, at the peril of having their answer excepted to if any mistake should happen, and all the matter of the amended bill should not be answered."[2] Accordingly, an amended bill which was obnoxious to this rule was held impertinent.[3] It is the better practice for the solicitor to sign the amendment.[4] An amendment speaks as of the date of the original bill;[5] and an amendment alleging the requisite difference of citizenship in the present tense will be presumed to refer to the date of the original bill and will sustain the jurisdiction.[6] Where the original bill stated that the infringements charged were since a specified date, it was held that the general allegations in an amendment as to infringement at divers times since the issue of the patents did not authorize proof thereof prior to the time alleged in the original pleading.[7] Where an amended bill recited the sub-

§ 210. [1] Peirce v. West's Ex'rs, 3 Wash. 354, 355.

[2] Ibid. In Alabama, where the amendment was inconsistent with the allegations in the original bill, which it did not correct or withdraw, the bill as amended was dismissed upon demurrer. Friedman v. Fennell, 94 Ala. 570, 10 S. R. 649. For a case where a paper described as an "amended petition" was treated as an amendment to the petition and as setting forth not a substitute to the original cause of action, but an additional or alternative claim, see Melton v. Pensacola Bank & Trust Co., C. C. A., 190 Fed. 126, 136.

[3] Peirce v. West's Ex'rs, 3 Wash. 354, 355.

[4] Daniell's Ch. Pr. (5th Am. ed.) 313.

[5] Armstrong Cork Co. v. Merchants' Refrigerating Co., C. C. A., 184 Fed. 199.

[6] Birdsall v. Perego, 5 Blatchf. 251; Baltimore & O. R. Co. v. McLaughlin, C. C. A., 73 Fed. 519; Campbell v. Johnson, C. C. A., 167 Fed. 102. *Contra*, Sanbo v. Union Pac. Coal Co., 146 Fed. 80.

[7] Geneva Mfg. Co. v. Nat. Furniture Co., 188 Fed. 662; Empire C. & Tr. Co. v. Empire C. & M. Co., 150 U. S. 159, 37 L. ed. 1037.

stance of the original and made the same a part thereof, it was held that a corporation made a party to the original was a party to the amended bill. The amendment of a bill was usually considered as an admission of the sufficiency of the answer as regards discovery;[8] but an amendment which merely brings in a new defendant did not have this effect;[9] and the court might, to prevent delay, entertain a motion to amend a bill in equity at the time that exceptions to the answer are filed, and then require the defendant to answer the amendments and the exceptions together.[10] A suggestion by a defendant, that an amendment, as to which evidence had been offered, should be allowed *nunc pro tunc,* does not estop him from filing an answer pleading the statute of limitations to the same.[11] An amendment of a bill, at least before answer, will not, it seems, dissolve an injunction previously granted.[12] It is, however, the usual and the safer practice to have a clause inserted in the order stating that the amendment may be made without prejudice to the injunction.[13] Unless otherwise provided in the order, it seems that an amendment of a bill will discharge all contempt proceedings previously instituted.[14] But it was held that an amendment of a bill may be allowed upon the hearing of an application for a preliminary injunction, whereupon it takes effect at once, and the hearing may proceed without an adjournment until after the issue of the new subpœna which the amendment necessitates.[15] The action of the court in submitting a case to a jury on a certain theory inconsistent with the plaintiff's pleading when no exception on that ground was made, may be treated as an amendment to

[8] Smith's Ch. Pr. (2d Eng. ed.) 307.

[9] Taylor v. Wrench, 3 Ves. 715.

[10] Kittredge v. Claremont Bank, 3 Story, 590.

[11] U. S. v. Dalcour, 203 U. S. 408, 51 L. ed. 248.

[12] Read v. Consequa, 4 Wash. 174, 180; Smith's Ch. Pr. (2d Eng. ed.), 306; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

[13] Read v. Consequa, 4 Wash. 174; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

[14] Smith's Ch. Pr. (2d Eng. ed.) 305; Gray v. Campbell, 1 R. & M. 323; Symonds v. Duchess of Cumberland, 2 Cox, 411.

[15] American S. W. Co. v. Wire D. & D. W. Unions, 90 Fed. 598.

his pleading, although no formal amendment is entered on the record.[16]

§ 211. What amendments may be made to bills in equity and declarations at common law. By the former practice an amendment in a bill in equity was required and usually allowed whenever the plaintiff wished to avoid and not merely deny a defense in the answer which had not been anticipated in the original bill.[1] An amendment should rarely if ever be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."[2] It is unsettled whether a bill for

[16] Schiffer v. Anderson, C. C. A., 146 Fed. 457, 459; Erie R. Co. v. Kennedy, C. C. A., 191 Fed. 332.

§ 211. [1] Wilson v. Stolley, 4 McLean, 275; Lant v. Manley, C. C. A., 75 Fed. 627, 634; Piatt v. Vattier, 9 Peters, 405, 9 L. ed. 173. See *supra*, §§ 136, 195. This rule did not require that the amendment set forth evidence, such as a judgment or decree, to establish any fact put in issue by the pleading, Southern Pac. R. Co. v. U. S., 168 U. S. 1, 42 L. ed. 355.

[2] Harlan, J., in Hardin v. Boyd, 113 U. S. 756, 761, 28 L. ed. 1141, 1142. Thus, where a bill for the enforcement of a judgment lien upon certain property was filed against certain specified defendants, an amendment was refused after a hearing, when it was sought to seek discovery and relief against all purchasers of both the property referred to in the original bill and other property of the judgment debtor. Sneed v. McCoull, 12 How. 407, 422, 13 L. ed. 1043, 1049. A bill to restrain the infringement of a patent cannot be amended so as to allege that the title to the patent is in a different person from the one who in the original bill is alleged to hold it. Goodyear v. Bourn, 3 Blatchf. 266. See Rylands v. La Touche, 2 Bligh, 586. But see Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. 519; *infra*, § 231. Such a bill may, however, be amended so as to set up a reissue of the original patent, which occurred before the original bill was filed, but was not mentioned herein. The Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Reay v. Raynor, 19 Fed. 308; Reay v. Berlin & J. E. Co., 30 Fed. 448. But see Jones v. Barker, 11 Fed. 597. And so as to include claims for damages and profits due previous owners of the patent, who have assigned them to the complainant. N. Y. Grape S. Co. v. Buffalo Grape S. Co., 20 Fed. 505. The allegation that certain machines alleged to be used in violation of a patent were infringements when made may also be added by amendment. Reay v. Raynor, 19 Fed. 308. It was held that a bill for a new trial of an action for the price of stock alleged to have been sold the defendant could *not* be changed by amendment so as to charge that the defendant held the stock in trust for the complainant. Oglesby v. Attrill, 14 Fed. 214. A bill filed by several creditors praying the sale of their debt-

or's land in one State, and the satisfaction of their claims out of the proceeds of such sale, cannot be changed by amendment so as to pray relief to one against another of the plaintiffs, in respect to the receipt by the latter of the proceeds of the sale of other land of the same debtor situated in another State and sold under a decree in another suit in another court. Smith v. Woolfolk, 115 U. S. 143, 148, 29 L. ed. 357, 359. A bill by the Land Company of New Mexico to enforce an executory contract by the defendant Smoot for the sale of an interest in land of which the defendant Elkins had the legal title, and which it was alleged that Smoot was about to assign to the defendant Butler with Elkins's connivance, was held not amendable "by omitting all the parties but Elkins, and proceeding against him upon the theory that complainant had acquired Smoot's interest by an absolute and unconditional transfer." Land Co. v. Elkins, 120 Fed. 545. It was held that a creditor's bill, filed to obtain the appointment of a receiver of the property of a city, and the application by him of its assets to the satisfaction of its debts, could not be amended so as to seek relief against a receiver and back-tax collector, appointed by a subsequent statute of the State to collect the city's assets. Meriwether v. Garrett, 102 U. S. 472, 502, 26 L. ed. 197, 200. But see Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864. A bill to set aside a sheriff's sale *may* be amended so as to add a tender of the purchase price and a prayer for a redemption of property. Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839. A bill to set aside a contract for the sale of land as obtained by fraud may be amended by the addition of an alternative prayer for the specific performance of the contract. Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, distinguishing Shields v. Barrow, 17 How. 130, 15 L. ed. 158. A bill to enjoin a railroad company from transporting coal owned by a corporation, in which it is a stockholder, may be amended so as to set forth that the latter corporation is not a bona fide mining company, but merely an adjunct or instrumentality of the defendant, which is in effect the legal owner of the coal which it transports, and that by the use of its power as a stockholder the railroad company has practically obliterated all distinction between the two corporations. U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458. A bill to remove a cloud upon the title to land may be amended so as to seek the enforcement of trusts relating to the same property. Partee v. Thomas, 11 Fed. 709. See also Neale v. Neales, 9 Wall. 1, 19 L. ed. 590; Battle v. Mutual Life Ins. Co., 10 Blatchf. 417; Burgess v. Graffam, 10 Fed. 216. But see Savage v. Worsham, 104 Fed. 80. It has been said that where the bill originally sets out one agreement which it seeks to enforce, and the answer admits the execution of another agreement of a similar character, but with provisions different from those alleged in the bill, the plaintiff may amend abandoning the agreement first pleaded by him, and obtain the enforcement of that admitted by the defendant; but that he cannot, while still praying the enforcement of the agreement as set out by him, amend so as to seek, in case he fail in proving that, an

discovery can be amended so as also to pray relief.[3] It was held that a bill filed against persons in their individual capacity cannot be amended so as to sue them as officers of a corporation,[4] but that when two corporations of the same name were organized in different States, a mistake in the designation of the place of incorporation of the complainant[5] or defendant[6] might be corrected by amendment, and that so may be a mistake in the name of a corporation defendant which has appeared and defended.[7] A cross-bill has been amended so as to radically change the ground of the relief sought, when the proofs which make the amendment necessary have been furnished by the complainant in support of the latter's original bill.[8] When the suit was begun in a Federal court, that court may allow an amendment setting forth the facts essential to the Federal jurisdiction,[9] such as the requisite difference of citizenship,[10] or the sufficient value of the matter in dispute.[11] The practice in removed cases is considered in a subsequent section.[12] Allegations in a *remittitur* filed after judgment cannot be considered as amendments to a pleading.[13] Great

enforcement of the one admitted in the answer. Lindsay v. Lynch, 2 Sch. & Lef. 1, 9.

3 See Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125; Butterworth v. Bailey, 15 Ves. 358; Hildyard v. Cressy, 3 Atk. 303; Crow v. Tyrell, 2 Madd. 397; Jackson v. Strong, 1 McClel. 245; Lousada v. Templer, 2 Russ. 565; Daniell's Ch. Pr. (2d Am. ed.) 263–465.

4 Tyler v. Galloway, 13 Fed. 477. But see Womersley v. Merritt, L. R. 4 Eq. 695; Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864; Pendery v. Carleton, 87 Fed. 41.

5 Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co. 163 Fed. 914.

6 Bainum v. Am. Bridge Co. of N. Y., 141 Fed. 179, where one company was designated in its corporate name as "of New York" and the other as "of New Jersey"; Hernan v. Am. Bridge Co., C. C. A., 167 Fed. 930; Clemmens v. Washington Park Steamboat Co., 171 Fed. 168.

7 Clemmens v. Washington Park Steamboat Co., 171 Fed. 168.

8 Chicago M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289, 33 L. ed. 900, 904.

9 Continental Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380, Halsted v. Buster, 119 U. S. 341, 30 L. ed. 462; Denny v. Pironi, 141 U. S. 121, 124, 35 L. ed. 657, 658; Watson v. Bonfils, C. C. A., 116 Fed. 157; Maddox v. Thorn, 60 Fed. 217. See Brock v. Fuller Lumber Co., C. C. A., 153 Fed. 272. *Contra*, Dickinson v. Consol. Tr. Co., 114 Fed. 232.

10 Ibid.

11 Thompson v. Automatic Fire Protection Co., 151 Fed. 945.

12 *Infra*, Chapter XXXII.

13 Denny v. Pironi, 141 U. S. 121, 35 L. ed. 657.

liberality is allowed as to amendments which strike out parties,[14] or bring in new parties,[15] except as to bills for discovery, to which in England no new parties could be added,[16] but an indispensable party whose citizenship would defeat the jurisdiction cannot be brought in by amendment,[17] and after a removal, an amendment to substitute a defendant for the purpose of defeating the jurisdiction has been denied.[18] A bill filed by a married woman can almost always be amended by the addition of the name of a next friend when necessary.[19] A bill filed on behalf of one's self and others may be amended by striking out the invitation to others to join, provided none of them have come in;[20] and a bill in one's own name may be amended by the addition of words sufficient to make it a bill in behalf of a class.[21] Amendments have been allowed so as to change a bill or declaration filed by the plaintiff individually into one filed by him as executor,[22] or administrator,[23] or a bill filed by him as administrator into one filed by him in his individual capacity,[24] and a bill filed against an executor into one charging him as administrator of the same person,[25] although the statute of limitations had expired.[26] It has been said that when the complaint contains any allegation of a

14 Conolly v. Taylor, 2 Pet. 556, 7 L. ed. 518; Dwight v. Humphreys, 3 McLean, 104.

15 Fisher v. Rutherford, Baldwin, 188; Patterson v. Stapler, 7 Fed. 210.

16 Marquis Cholmondeley v. Lord Clinton, 2 Meri. 71.

17 Delaware, L. & W. R. Co. v. Mayer, etc., of Jersey City, 168 Fed. 128.

18 Taylor v. Weir, 162 Fed. 585, where there were circumstances from which an estoppel might arise.

19 Douglas v. Butler, 6 Fed. 228.

20 Yates v. Arden, 5 Cranch C. C. 526; Anthony v. Campbell, C. C. A., 112 Fed. 212.

21 Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864; Good v. Blewitt, 13 Ves. 397, 401; Atty. Gen. v. Newcombe, 14 Ves. 1, 6; Resse R. S. Min. Co. v. Atwell, L. R. 7 Eq. 347.

22 Leahy v. Haworth, C. C. A., 4 L.R.A.(N.S.) 657, 141 Fed. 850.

23 Missouri, K. & T. Ry. Co. v. Wulf, C. C. A., 192 Fed. 919; Reardon v. Balaklala Consol. Copper Co., 193 Fed. 189. An amendment was allowed upon the trial to permit an administratrix to amend by averring that her appointment was by a local court of a different county from that first alleged in her declaration. Chicago Great Western R. Co. v. McCormick, C. C. A., 200 Fed. 375.

24 St. Louis & S. F. R. Co. v. Herr, C. C. A., 193 Fed. 950.

25 Randolph v. Barrett, 16 Pet. 138, 10 L. ed. 914.

26 Reardon v. Balaklala Consol. Copper Co., 193 Fed. 189.

ground of recovery, although merely inferential, the court has discretionary power to permit the defect to be cured by amendment.[27] In an English case, a bill in behalf of a charity was changed by amendment into an information.[28] Before the new equity rules, it was held that in a removed case, a complaint containing a statement of grounds for equitable relief might be amended, so as to turn it into a bill in equity; although the issues have been tried on the common law side of the court.[29] Now, if at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.[30] An amendment to a petition which sets up no new cause of action and makes no new demand, but simply varies or expands the allegations in support of the cause of action, previously pleaded, relates back to the beginning of the action; and, when the suit was begun within the statutory period of limitation, it is not barred by the expiration of that time previous to the amendment;[31] but an amendment, which introduces a new or different cause of action and makes a new or different demand, is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is made.[32] The former rule applies although the two causes of action arise out of the same transaction, when, by the practice of the State, a plaintiff is only required, in his pleading, to state the facts which constitute his cause of action,[33] when the original declaration referred to a State law and the amendment to the Federal Employers' Liability Act, the allegations of fact, except as to the

27 Great Northern Ry. Co. v. Herron, C. C. A., 136 Fed. 49.

28 President of St. Mary M. College v. Sibthorp, 1 Russ. 154.

29 Goodyear Shoe Machinery Co. v. Dancel, C. C. A., 119 Fed. 692; Dancel v. Goodyear Shoe Machinery Co., C. C. A., 144 Fed. 679, in which the author was counsel. The point does not appear in the report, but the permission was contained in the mandate, and objections to the same argued twice in the Circuit Court of Appeals, and again upon the petition for a certiorari which was denied by the Supreme Court; 202 U. S. 619, 50 L. ed. 1174.

30 Eq. Rul. 22.

31 Patillo v. Allen-West Commission Co. 131 Fed. 680.

32 U. S. v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251.

33 Patillo v. Allen-West C. Co. 131 Fed. 680.

capacity in which the plaintiff sued, being in both pleadings the same,[34] and when the complaint stated facts, from which the law raised the legal presumption of a promise to pay the balance of an account stated and demanded judgment for that amount, it and this amendment, added an averment of a promise to pay the balance.[35] But it has been held: that a new cause of action is presented by changing the ground of recovery from a right at common law to one under a Kansas statute,[36] or from a right under a treaty to a right under a statute, which did away with the defense that the negligence of which complaint was made was that of a fellow-servant;[37] and that if the statutory period expired before such an amendment, the claim was barred.[38]

§ 212. Amendment by pleading matters subsequent to the filing of the bill. The general rule is that nothing which has occurred since the filing of a bill can be added to it by amendment.[1] Such matters, when admissible, should ordinarily be introduced by a supplemental bill.[2] It was held incompetent to amend a bill, stating that certain notes and mortgages were executed under a threat by the defendant that he would kill the complainant if they were not executed and paid at their maturity, by adding the allegation, "that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant."[3] Such a murder does not add to the complainant's cause of action, although it might be put in evidence as tending to prove the original duress.[4] A bill may perhaps be amended before answer, demurrer, or plea, by alleging new matter that has occurred since it was first filed.[5] And it has

[34] U. S.

[35] Patillo v. Allen-West C. Co., 131 Fed. 680.

[36] Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983; U. S. v. Dalcour, 203 U. S. 408, 51 L. ed. 248.

[37] Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 298, 39 L. ed. 983, 991; U. S. v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251.

[38] Ibid.

§ 212. [1] Wray v. Hutchinson, 2 Myl. & K. 235; Mason v. Hartford, P. & F. R. Co., 10 Fed. 334; Copen v. Flesher, 1 Bond. 440; Lyster v. Stickney, 12 Fed. 609; Mellor v. Smither, C. C. A., 114 Fed. 116.

[2] See § 231, *infra*.

[3] Lyster v. Stickney, 12 Fed. 609. 610.

[4] Lyster v. Stickney, 12 Fed. 609.

[5] Story's Eq. Pl., § 885; Candler v. Pettit, 1 Paige (N. Y.), 168; Ogden v. Gibbons, Haist. N. J. Dig. 172.

been held that where a plaintiff has, at the time of filing his original bill, an inchoate right, to perfect which a formal act alone is necessary, and such formal act is not performed till afterwards; as where an executor files a bill before probate, and subsequently proves the testament,[6] or the next of kin brings a suit to protect the personal estate of an intestate, subsequently procures her appointment as administratrix,[7] or a foreign administrator files a bill before obtaining ancillary letters of administration, and such letters are subsequently issued to him;[8] the introduction of the fact by amendment will be permitted.[9] It has been said that amendments might be allowed to set forth damages that accrued since the filing of the bill.[10] It has been also held in England that the "defendant, when he puts in his answer, must state the facts as they *then* are; and if circumstances are then introduced in the answer which occurred subsequent to the filing of the bill the plaintiff must be allowed to make amendments to the bill, so as to show that such new circumstances mentioned in the answer are not of the color he represents them, and so as to obtain a complete answer as to such circumstances."[11] Except possibly in a few cases of the assignment of patents,[12] where the plaintiff has no cause of action at the time the suit is

[6] Belloat v. Morst, 2 Hayw. (N. C.) 157; Daniell's Ch. Pr. (2d Am. ed.) 460.

[7] Humphreys v. Humphreys, 3 P. Wms. 348; Bradford v. Felder, 2 M'Cord (S. C.), Ch. 170. See Person v. Fidelity & Casualty Co., C. C. A., 92 Fed. 965; reversing s. c., 84 Fed. 759; Mo., Kansas & Tex. Ry. Co. v. Wulf, 226 U. S. 570, 57 L. ed. —.

[8] Swatzel v. Arnold, Woolw. 338; Black v. Henry G. Allen Co., 9 L.R.A. 433, 42 Fed. 618, 624; Hodges v. Kimball, C. C. A., 91 Fed. 845; Leahy v. Haworth, C. C. A., 141 Fed. 850; holding that the ancillary letters related back to the date of the filing of the bill, not only for the purpose of qualifying complainant to sue, but also so as to defeat the statute of limitations. Dodge v. Town of North Hudson, 188 Fed. 489, an action under the State statute for negligence, which caused the death of the intestate. *Contra*, Mason v. Hartford, P. & F. R. Co., 10 Fed. 334.

[9] Daniell's Ch. Pr. (2d Am. ed.) 460, 461; Swatzel v. Arnold, Woolw. 383; Black v. Henry G. Allen Co. 9 L.R.A. 433, 42 Fed. 618, 624; Humphreys v. Humphreys, 3 P. Wms. 348.

[10] Mitchell v. Big Six Development Co., 186 Fed. 552.

[11] Sir Thomas Plumer, V. C., in Knight v. Matthews, 1 Madd. 566.

[12] See *infra*, § 231.

brought, he cannot continue the suit by pleading the subsequent accrual of a cause of action to him.[13] Thus, a defective creditor's bill cannot be amended by setting up a judgment obtained after it was filed.[14] Where, prior to the filing of a bill for the infringement of a patent, the defendant had committed no infringement, and had threatened none; it was held: that a subsequent change in the structure, which constituted an infringement, would not warrant the granting of a preliminary injunction in the same suit.[15]

§ 213. Proceedings upon an amended bill. When the amendment merely brings in new parties defendant, they alone need be served with a new subpœna.[1] If, however, a bill is substantially amended by the addition of new charges, according to the English practice a subpœna to answer the amendments had to be sued out and served upon all the defendants.[2] Where, before answer, the bill is amended in a material point, the time to answer is extended to the same time as if the amended were an original bill.[3] If, however, a defendant has answered the original bill, he cannot, without obtaining leave to withdraw his first answer, answer to any more than the new matter, unless the amendments virtually make a new case.[4] Where the amendments seek to introduce new matter which is properly the subject of a supplemental bill, the defendant must raise that objection by answer,[5] or motion to dismiss.[6] Otherwise, the objection will be waived.[7] The equity rules provide that, "In any case where an amendment shall be made after answer

13 Putney v. Whitmire, 66 Fed. 385; Westinghouse Air-Brake Co. v. Christensen Engineering Co., 121 Fed. 558; Am. Bonding & Tr. Co. v. Gibson County, C. C. A., 145 Fed. 871.

14 Putney v. Whitmire, 66 Fed. 385.

15 Westinghouse Air-Brake Co. v. Christensen Engineering Co., 121 Fed. 558.

§ 213. 1 Longworth v. Taylor, 1 McLean, 514; Angerstein v. Clarke, 1 Ves. Jr. 250; Skeffington v. ——, 4 Ves. 66.

2 Cooke v. Davies, T. & R. 309; Bramston v. Carter, 2 Sim. 458. See Kendall v. Beckett, 1 Russ. 152.

3 Nelson v. Eaton, 66 Fed. 376.

4 Keene v. Wheatley, 9 Am. Law Reg. 33, 60; Atkinson v. Hanway, 1 Cox Eq. 360; Ellice v. Goodson, 3 M. & C. 653; Ritchie v. Aylwin 15 Ves. 79; North Chicago St. R. Co. v. Chicago Union Traction Co., 150 Fed. 612. See Ellice v. Goodson, 3 M. & C. 653.

5 Wray v. Hutchinson, 2 M. & K. 235.

6 Brown v. Higden, 1 Atk. 291.

7 Archbishop of York v. Stapleton, 2 Atk. 136.

filed, the defendant shall put in a new answer or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer."[8] An answer to an amended bill is impertinent if it contains any matter which was pleaded in the answer to the bill before amendment.[9] It seems to have been the English rule that an answer to an amended bill might set up an entirely new defense inconsistent with that in his former answer.[10] The court may after amendment refuse leave to file an answer which does not plead a defense to the new matter.[11]

§ 214. Amendment of answers and pleas. The Equity Rules provide concerning the amendment of answers: "The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it."[1] It will be observed that this does not specifically provide for the insertion of a new affirmative defense by amendment, as was permitted by the former practice.[2] The principles upon which the courts proceed in allowing such amendments is thus stated by Judge Story: "In mere matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such applications, they require very cogent circumstances, and such as to repel the notion of any attempt of the party to evade the justice of the cause, or to set up new and ingeniously contrived defenses or subterfuges. When the object is to let in new facts and defenses wholly dependent upon parol evidence, the re-

8 Equity Rule 32; copied in substance from Eq. Rul. 46 of 1842.

9 Gier v. Gregg, 4 McLean, 202.

10 Daniell's Ch. Pr. (2d Am. ed.) 468; citing Bolton v. Bolton, MS. See also Trust & F. Ins. Co. v. Jenkins, 8 Paige (N. Y.) 589.

11 Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank, 134 U. S. 276, 289, 33 L. ed. 900, 905.

§ 214. 1 Eq. Rule 30.

2 See Smith v. Babcock, 3 Sumner, 583.

luctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. But when the new facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the same reason does not apply in its full force, for such papers and documents cannot be made to speak a different language from that which originally belonged to them. The whole matter rests in the sound discretion of the court."[3] "It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put and sworn to. Where the party relies upon new acts which have come to his knowledge since the answer was put in, or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in."[4] Permission may be granted upon terms; for example, that the testimony on the issues raised by the former pleading be allowed to stand and that subsequent proceedings be taken upon short notice.[5] An amendment of an answer,[6] or a cross-bill, changing the character of the defense will rarely be allowed after the court has rendered or caused to be rendered an opinion adverse to the position originally

[3] Smith v. Babcock, 3 Sumn. 583, 586.

[4] Smith v. Babcock, 3 Sumn. 583, 586; N. Y. Filter Co. v. O. H. Jewett F. Co., 62 Fed. 582.

[5] Farmers' Loan & Tr. Co. v. Central Park, N. & E. R. R. Co., 175 Fed. 528.

[6] Calloway v. Dobson, 1 Brock. 119; Gubbins v. Laughtenschlager, 75 Fed. 615; Claflin v. Bennett, 51 Fed. 693, 701. See Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398; Hamilton v. Nevada G. & S. M. Co., 33 Fed. 562, 568.

taken by the defendant.[7] The defendant will rarely be allowed to withdraw an admission which he has made.[8] Leave to amend will be denied when the complainant proves conclusively by affidavit that the new matter sought to be introduced is false.[9] Ordinarily, leave to amend an answer will be denied when the defendant knew of the facts which he wishes to introduce, at the time his original answer was drawn;[10] or might have then discovered them by the exercise of reasonable diligence.[11] An omission due to a mistake of law cannot ordinarily be cured by amendment.[12] The court may refuse to allow an amendment which would introduce an unconscientious defense, such as the statute of limitations,[13] the statute of frauds,[14] or that a contract made by a complainant corporation was not authorized by its charter.[15] When the proposed amendment is trivial the answer may be remove dfrom the file, altered, resworn to, and refiled;[16] but if it is of any length, it is customary to file a supplemental answer setting it forth.[17] Pleas at common law, verified before the wrong officer, may be corrected by amendment and the proper verification added on the trial,[18] and amendments to pleadings will be allowed at common law in all cases authorized by the State statute.[19]

§ 215. Practice in obtaining leave to amend. It has been held that the practice upon an application to amend at common law follows that in the State where the action is pend-

7 Ferguson Contracting Co. v. Manhattan Tr. Co., C. C. A., 118 Fed. 791.

8 Ruggles v. Eddy, 11 Blatchf. 524.

9 Hicks v. Otto, 17 Fed. 539.

10 India R. C. Co. v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. 241; Suydam v. Truesdale, 6 McLean, 459. But see Standard El. I. Co. v. Ramsey, 130 Fed. 151.

11 India R. C. Co. v. Phelps, 8 Blatchf. 85; Webster L. Co. v. Higgins, 13 Blatchf. 349.

12 Webster L. Co. v. Higgins, 13 Blatchf. 349; Cross v. Morgan, 6 Fed. 241.

13 Cock v. Evans, 9 Yerg (Tenn.) 287.

14 Cook v. Bee, 2 Tenn. Ch. 344.

15 Third Av. Sav. Bank v. Dimock, 9 C. E. Green (24 N. J. Eq.) 26.

16 Bailey W. Mach. Co. v. Young, 12 Blatchf. 199.

17 Dolder v. Bank of England, 10 Ves. 284, 285; Daniell's Ch. Pr. (5th Am. ed.) 779, 780.

18 Bank of Edgfield v. Farmers' C. M. Co., 18 L.R.A. 201, 52 Fed. 98.

19 Leman v. Baltimore & O. R. Co., 128 Fed. 191.

ing. In equity the application for leave to amend must be in writing, stating the new matter which the applicant desires to introduce by amendment, and must be supported by an affidavit, stating the reason why this matter was not included in the original pleading.[1] It is the better practice for the complainants to present specific amendments to paragraphs of the original bill[2] and not to present a substituted bill,[3] except under extraordinary circumstances. In one case, detailed proof by affidavit was required concerning matters that it was desired to add by amendment in a general allegation.[4] When a party is entitled to amend as of course, no affidavit is required.[5] Where the former pleading was verified, oath must be made to the truth of the proposed amendment.[6] Where the proposed amendment consists of matters disclosed by documentary evidence, the documents themselves must be produced if possible.[7] Notice of the application for an amendment must always be given when leave of the court is required.[8] An amendment inserting the name of a new party plaintiff should not, ordinarily, be allowed without notice to him.[9] The court may impose costs or other terms as a condition precedent to amendment; for example, a disclosure of the names of the witnesses whom the party expects to call to prove the new matter,[10] or a direction that testimony taken under the former issue shall be allowed to stand and that short notice be taken of subsequent proceedings.[11] The time within which the amend-

§ 215. [1] U. S. R. S., § 914; Rosenbach v. Dreyfuss, 1 Fed. 391; Leman v. Baltimore & O. R. Co., 128 Fed. 191. But see Erstein v. Rothschild, 22 Fed. 61. *Contra*, dicta in Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983; Snead v. M'Coull, 12 How. 407, 422, 13 L. ed. 1043, 1049; Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815; Wells v. Wood, 10 Ves. 401; Nabob of the Carnatic v. East India Co., 1 Ves. Jr. 374, 385; Rodgers v. Rodgers, 1 Paige (N. Y.), 424; Daniell's Ch. Pr. (5th Am. ed.) 781.

[2] Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745.

[3] Ibid.

[4] Postal Tel. Cable Co. v. Livermore & Knight Co., 194 Fed. 180.

[5] Chase Electric Const. Co. v. Columbia Const. Co., 136 Fed. 699.

[6] Rodgers v. Rodgers, 1 Paige (N. Y.), 424.

[7] Churton v. Frewen, L. R. 1 Eq. 238; Daniell's Ch. Pr. (5th Am. ed.) 781.

[8] Riggs v. Brown, 172 Fed. 638.

[9] Frank v. Union Cent. L. I. Co., 130 Fed. 224.

[10] Caster v. Wood, 1 Baldw. 289.

[11] Farmers' Loan & Tr. Co. v. Cen-

ment must be filed may be limited.[12] It has been said that when leave is asked to file a substituted bill of complaint, the court can only permit or reject it as a whole and should not be expected to refuse the same and permit it to be filed when drawn in a different form.[13] When leave to amend by adding the essential jurisdictional averments was granted after verdict for plaintiff, no trial was permitted of any other issue except that which the defendant raised upon the same,[14] and the verdict upon the other issues was allowed to stand.[15] In one case, the parties were directed to take depositions concerning the jurisdictional allegations in support of the application for an amendment.[16] The order allowing the amendment should state the new matter to be inserted.[17] If the amended pleading states new matter not allowed by the order, it may be stricken from the file.[18] An objection that an amended bill contains matter which should have been pleaded in a supplemental bill is waived if not set up by demurrer, plea or answer.[19] It was held, that an order dismissing a bill, when a plea is sustained, is a bar to a subsequent application for leave to amend.[20] The court upon appeal will disregard an amended pleading filed without leave,[21] unless the other party has treated it a sinvalid, when he cannot raise the objection for the first time upon appeal.[22] When both parties have conducted the case as if the pleadings contained certain allegations therein omitted, an amendment inserting such allegations may be allowed at almost any stage of the cause.[23] Where the record on appeal shows that

tral Park, N. & E. R. R. Co., 175 Fed. 528.

12 Klein v. Title Guaranty & Surety Co., 166 Fed. 365, ten days.

13 Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745.

14 Crosby v. Cuba R. Co., 158 Fed. 144, 153; Grand Trunk Western R. Co. v. Reddick, C. C. A., 160 Fed. 898.

15 Ibid.

16 Crosby v. Cuba R. Co., 158 Fed. 144, 153.

17 Daniell's Ch. Pr. (5th Am. ed.) 410.

18 Strange v. Collins, 2 V. & B. 163, 167.

19 Seattle & S. & E. Ry. Co. v. Union Tr. Co., 79 Fed. 179.

20 Raphael v. Trask, 118 Fed. 678.

21 Terry v. McLure, 103 U. S. 442, 26 L. ed. 403.

22 Clements v. Moore, 6 Wall. 299, 18 L. ed. 786.

23 Tremolo Patent, 23 Wall. 518, 23 L. ed. 97; Confectioners' Mach. & Mfg. Co. v. Racine Eng. & Mach. Co., 163 Fed. 914; Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 176 Fed. 745; Pa. Steel Co. v. N. Y. City Ry. Co., 190 Fed.

an amended bill which omitted one of the original parties was filed by leave of the court, it will be presumed that leave to dismiss as to such party was granted when there is nothing in the record to show the contrary.[24] An appellate court may,[25] but rarely[26] will, reverse a decree for an error in refusing permission to make an amendment; never unless the proposed amendment appears upon the record,[27] but a refusal to allow an amendment, after final decree, will rarely, if ever, be reviewed by an appellate court.[28] It has been said that a decree will not be reversed for an error in allowing amendments,[29] A Federal court of review will not allow a pleading to be amended upon writ of error or appeal thereto,[30] except by consent.[31] An appellate court may, however, especially where the question of jurisdiction was not raised below, when reversing a judgment direct that the plaintiff be permitted to amend.[32] In one case it has been held, that upon such a reversal the issues may be narrowed to the question of the jurisdiction of the court.[33] But another held: that a Circuit Court of Appeals had no power, upon the motion of the appellant, to dismiss an appeal and remand the case to the court below, with directions to permit the amendment of a pleading to insert facts inadvertently omitted, when the omission was

602; McEldowney v. Card, 193 Fed. 475.

24 Hicklin v. Marco, C. C. A., 56 Fed. 549.

25 Ridle v. Whitehill, 135 U. S. 621, 627, 640, 34 L. ed. 282, 285, 289; Lant v. Manley, 75 Fed. 634; U. S. v. Lehigh Valley R. R. Co., 220 U. S. 257, 55 L. ed. 458.

26 Mer. Nat. Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816; Hudson v. Randolph, C. C. A., 66 Fed. 216; McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961; Brookfield v. Novelty Glass Mfg. Co., C. C. A., 170 Fed. 960.

27 National Bank v. Carpenter, 101 U. S. 567, 568, 25 L. ed. 815, 816.

28 Brown v. Schleier, 194 U. S. 18, 48 L. ed. 857.

29 Chapman v. Barney, 129 U. S. 677, 681, 32 L. ed. 800, 801.

30 Pacific R. Co. of Mo. v. Ketchum, 95 U. S. 1, 24 L. ed. 347; Yeandle v. Pa. R. Co., C. C. A., 169 Fed. 938. But see Williams v. Molther, C. C. A., 198 Fed. 460.

31 Kennedy v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209.

32 Puget Sound Nav. Co. v. Lavendar, C. C. A., 156 Fed. 361.

33 Grand Trunk Western Ry. Co. v. Reddick, C. C. A., 160 Fed. 898, which is contrary to the usual practice.

not known to the appellant until after the appeal was taken.[34] It was held that a Circuit Court had power to allow an amendment when hearing an appeal from a District Court.[35] A defendant cannot require the complainant to amend his bill.[36]

[34] Strand v. Griffith, C. C. A., 135 Fed. 739.

[35] Warren v. Moody, 9 Fed. 673.

[36] North Chicago St. R. Co. v. Chicago Union Traction Co., 150 Fed. 612.

CHAPTER XIII.

ABATEMENT, REVIVOR AND SUPPLEMENT AT LAW AND IN EQUITY.

§ 216. Abatement. If any event happens after the filing of a bill in equity which makes it necessary to bring in a new party, either plaintiff or defendant, in order to obtain a complete or satisfactory determination of the controversy, the suit will either abate or become defective.[1] The abatement or defect must be remedied by the filing of a bill of revivor, a bill in the nature of a bill of revivor, a supplemental bill, a bill in the nature of a supplemental bill, or a bill of revivor and supplement,[2] or perhaps by motion upon affidavit without such a pleading.[3] An abatement takes place by the death of one of the parties, or, where a married woman is under a disability, by the marriage of a female plaintiff.[4] An action entirely abates by the death of any of the plaintiff:[5] unless his interest therein wholly ceases by his death,[6] or survives to another party to the suit,[7] or he has been previously discharged by a decree in an interpleader[8] suit, or a suit in the nature of an interpleader; when it does not. Formerly a suit abated by the marriage of a female plaintiff;[9] but it may be doubted whether this rule would be followed where a married woman has the same power over her property as if she were single.[10] By the marriage of a female defendant, a suit never abated, though her husband had to be named in

§ 216. [1] Mitford's Pl., ch. 1, § 3.

[2] Mitford's Pl., ch. 1, § 3. See *infra*, § 220, for proceedings at common law.

[3] Eq. Rule 45. But see Eq. Rule 35; *infra*, § 221.

[4] Mitford's Pl., ch. 1, § 3.

[5] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1698; Mitford's Pl., ch. 1, § 3.

[7] Fallowes v. Williamson, 11 Ves. 309; Boddy v. Kent, 1 Mer. 364; Fisher v. Rutherford, Baldw. 188; Daniell's Ch. Pr. (2d Am. ed.) 1699.

[8] Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 134; Daniell's Ch. Pr. (2d Am. ed.) 1765.

[9] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354.

[10] Lorillard v. Standard Oil Co., 2 Fed. 902.

all subsequent proceedings.[11] When the husband of a female plaintiff died, by the former practice she could at her option continue the suit without filing any bill of revivor; but if she did not, it was considered abated and she was not liable for the costs.[12] Before the hearing of a suit,[13] it abates upon the death of a defendant who has appeared so far as proceedings against him or his interest are concerned, and if he were an indispensable party to a decree all proceedings must be suspended till his representatives have been brought in.[14] If, however, his interest wholly ceases by his death, or wholly survives to one of the other parties, no revivor will be necessary.[15] A suit abates by the death of a member of a firm during a suit against it.[16] It has been held that the death of a defendant before appearance does not abate the suit; for, according to the former practice, till his appearance, or a decree taken against him *pro confesso*, there was no cause against him; but a bill to be filed against his representative, which was an original bill as far as respected the defendant, but a supplemental bill with respect to the suit.[17]

The Revised Statutes further provide that if there are two or more plaintiffs or defendants in a suit, where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the suit and action do not thereby abate; but such death must be suggested in the record, and the action thereupon proceed at the suit of the surviving plaintiff against the surviving defendant.[18] This applies to a suit for the infringement of a trade-mark, since that is a

[11] Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 354. A suit does not abate by the marriage of a male defendant, although it affects real estate. Clark v. Hall, 7 Paige (N. Y.), 382. The coming of age of an infant party does not abate the suit or render it defective unless his interest is thereby charged. Campbell v. Bowne, 5 Paige (N. Y.), 34.

[12] Mitford's Pl., ch. 1, § 3.

[13] Childs v. Ferguson, C. C. A., 181 Fed. 795.

[14] Story's Eq. Pl., § 369; Wright v. Phipps, 58 Fed. 552.

[15] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1698, 1699; Story's Eq. Pl., § 357.

[16] Wilson v. Seligman (U. S. C. C. S. D. N. Y. 1880), 10 Rep. 651. But see U. S. R. S., § 956, cited *infra*.

[17] Shadwell, V. C., in Crowfoot v. Mander, 9 Sim. 396. See U. S. v. Fields, 4 Blatchf. 326.

[18] U. S. R. S., § 956. This statute is substantially a copy of the act of 8 & 9 W. III., ch. 1, § 7. See Allen v. Fairbanks, 40 Fed. 188.

tort for which the defendants are jointly and severally liable.[19] It has been held that, where one of several obligees of a negotiable bond dies pending an action to collect the same, the action may be continued in the name of the survivors, who, if they recover, are entitled to the whole sum due under the obligation, and upon its receipt will hold that part of the recovery, to which the decedent would have been entitled had he lived, in trust for the representatives of the latter; that the presence in the action of the personal representatives of such deceased co-obligee after his death is erroneous, but a harmless error; that no formal order of revivor is necessary in such a case, but that a suggestion of the death of one of the plaintiffs, made upon the record by either the plaintiffs or defendants, is sufficient; and that the Circuit Court of Appeals, when reversing a judgment in favor of a surviving plaintiff and the representatives of the other, may direct that, upon the making of the proper suggestion and the striking out of the names of the personal representatives, a new judgment be entered in favor of the remaining plaintiffs, as they then appear of record, for the amount of the principal with interest.[20] This statute applies to writs of error[21] and appeals.[22] These statutes do not apply to real actions.[23] Real actions cannot be revived,[24] unless the State statute so provides.[25] Independently of statute a suit to enjoin an official act abates when the defendant ceases to be a public officer, and cannot ordinarily be revived against his successor.[26] "No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or

[19] Northwestern Consol. Milling Co. v. William Callam & Son, 177 Fed. 786.

[20] Thomas v. Green County, C. C. A., 159 Fed. 339.

[21] McKinney v. Carroll, 12 Pet. 66, 9 L. ed. 1002; Classe v. Rippon, 1 B. & Ald. 586.

[22] Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391.

[23] Macker v. Thomas, 7 Wheat. 530, 5 L. ed. 515; Green v. Watkins, 6 Wheat. 260, 5 L. ed. 256.

[24] Macker v. Thomas, 7 Wheat. 530, 29 L. ed. 391; Green v. Watkins, 6 Wheat. 260, 5 L. ed. 256.

[25] McArthur v. Williamson, 45 Fed. 154.

[26] Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621; State of Florida v. Croom, 226 U. S. 309, 57 L. ed. —.

his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs."[27] If the cause of action be one created by a Federal statute, its survival or abatement is not affected by State statutes or decisions.[28]

The State statute, which requires a claim to be presented to an administrator before revivor does not apply to an action upon a bond given to the United States.[29] A *qui tam* action to recover a penalty under a statute of the United States abates by the death of the defendant, although the statutes of the State where the case is pending authorize the revivor of actions to recover penalties.[30] but an action to recover damages for a violation of the Interstate Commerce law[31] may be revived by the plaintiff's executors[32] and does not abate by a judicial sale of the plaintiff's property.[33] An action to enforce a forfeiture abates unless the acts complained of were divisible and the wrongdoer's estate has derived a benefit therefrom.[34] It has been held that a judgment of conviction which imposes a fine, abates upon the defendant's death and is not enforceable against his personal representatives.[35] An action for the infringement of a patent survives to the representatives of the patentee,[36] and against the representatives of the infringer.[37] It has been held that the death of a sole defendant to a suit for

[27] Act of February 8th, 1899, 30 St. at L. 822.

[28] Schreiber v. Sharpless, 110 U. S. 76, 28 L. ed. 65; Patton v. Brady, 184 U. S. 608, 612, 46 L. ed. 713, 716; Iron Gate Bank v. Brady, 184 U. S. 665, 46 L. ed. 739; May v. Logan County, 30 Fed. 250.

[29] Pond v. U. S., C. C. A., 111 Fed. 989, 49 C. C. A. 582.

[30] Schreiber v. Sharpless, 110 U. S. 76, 28 L. ed. 65.

[31] Act of Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159).

[32] Langdon v. Pennsylvania R. Co., 194 Fed. 486.

[33] Pennsylvania R. Co. v. International Coal Mining Co., C. C. A., 173 Fed. 1.

[34] U. S. v. De Goer, 38 Fed. 80; U. S. v. Riley, 104 Fed. 275.

[35] U. S. v. Pomeroy, 152 Fed. 279.

[36] May v. Logan County, 30 Fed. 250; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154.

[37] Ibid.; Head v. Porter, 70 Fed. 498; Hohorst v. Howard, 37 Fed. 97; Moses v. Wooster, 115 U. S. 285, 29 L. ed. 391.

an injunction against the infringement of a patent and for an accounting, when it occurs before a decree for an account, abates and terminates so much of the suit as seeks an injunction, so that it cannot be revived against his executor, unless it be shown that the latter continues the infringement;[38] but that the suit may be continued against the personal representative for an accounting of profits and for damages.[39] After an interlocutory decree for an accounting, such a suit may be revived against the personal representatives of the deceased defendant.[40]

The survivability of a cause of action, if it be one arising under the statute or, it seems, the common law of the State where the case is pending, depends upon the law of that State;[41] except, perhaps, when it is originally brought in the Federal court and arises under some rule of general law, recognized in the courts of the Union.[42] If the action is transitory in its nature, the survival of the right to sue depends upon the law of the State where the suit is brought; not upon that where the cause of action arose.[43] A State statute which allows an executor or administrator to revive an action for personal injuries will be followed, as the law of the forum, by the Federal courts there held, although there was no such statute where the accident occurred.[44] A State statute was followed which permitted an administrator duly appointed and qualified to be substituted as plaintiff in a suit brought by a person claiming to be the personal representative of the same decedent who had never qualified as such.[45] Unless there be some clause in its

[38] Draper v. Hudson, 1 Holmes, 208; Walker on Patents, § 700.

[39] Kirk v. Du Bois, 28 Fed. 460; Hohorst v. Howard, 37 Fed. 97; Lake Superior I. Co. v. Brown, B. & Co., 44 Fed. 539; Head v. Porter, 70 Fed. 498; Atterbury v. Gill, 13 Off. Gaz. 276; Smith v. Baker, 1 Ban. & A. 117; Childs v. Ferguson, C. C. A., 181 Fed. 795.

[40] Atterbury v. Gill, 13 Off. Gaz. 276.

[41] Warren v. Furstenheim, 35 Fed. 691; Witters v. Foster, 26 Fed. 737; Henshaw v. Miller, 17 How. 212, 15 L. ed. 222; Hatfield v. Bushnell, 1 Blatchf. 393; Trigg v. Conway, Hempst. 711; Martin v. Wabash R. Co., C. C. A., 142 Fed. 650.

[42] Baltimore & O. R. R. Co. v. Joy, 173 U. S. 226, 229, 43 L. ed. 677, 678.

[43] Martin v. Wabash R. Co., C. C. A., 142 Fed. 650. *Contra*, Stratton's Independence, L'd v. Dines, 126 Fed. 968.

[44] Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677.

[45] Person v. Fidelity & Cas. Co., C. C. A., 92 Fed. 965.

charter to the contrary, a suit by or against a corporation ordinarily abates by the dissolution of the corporation;[46] but it has been held that the entrance into liquidation and the closing of a business of a national banking association does not abate a suit brought in its name.[47] A State statute which provided that a suit against a corporation shall not abate upon the dissolution of the defendant was held not to apply to a foreign corporation; and a judgment of the State court in such a case was held by the Federal court to be void.[48] It seems that any step in the cause taken by the surviving party after the death of one or more of his opponents, is a waiver of his right to object that the case has not been revived. Thus, after a decree has been reversed upon appeal, and the cause sent back with a special mandate directing the further proceedings to be taken, or affirmed upon appeal and sent back with a mandate directing its enforcement, it is too late to claim for the first time that the suit has abated by the death of the complainant before he entry of the decree from which the appeal was taken.[49] An order denying a motion to dismiss an action upon the ground that it had abated by the death of the plaintiff is reviewable on a writ of error to the final judgment.[50] The plaintiff cannot describe his action as in tort in order to obtain jurisdiction for the Federal court, and then describe it as in contract in order to prevent its abatement.[51]

[46] National Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; Greeley v. Smith, 3 Story, 658; Mumma v. Potomac Co., 8 Pet. 281, 22 L. ed. 687. But see Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. 539. As to municipal corporations, Hemingway v. Stansell, 106 U. S. 399, 27 L. ed. 245; Grantland v. Memphis, 12 Fed. 287; as to the effect of a consolidation of two corporations, Edison El. L. Co. v. Westinghouse, 34 Fed. 232; as to the effect of a State statute upon foreign corporations, Marion Phosphate Co. v. Perry, C. C. A., 33 L.R.A. 252, 74 Fed. 425.

[47] National Bank v. Insurance Co., 104 U. S. 54, 72, 26 L. ed. 693, 701. The appointment of a receiver does not abate a suit against a national bank. Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 40 L. ed. 595.

[48] Marion Phosphate Co. v. Perry, C. C. A., 33 L.R.A. 252, 74 Fed. 425.

[49] Ex parte Sory, 12 Pet. 339, 342, 9 L. ed. 1108, 1110; Lake Sup. I. Co. v. Brown, B. & Co., 44 Fed. 539; McNeil v. McNeil, C. C. A., 170 Fed. 289, (the argument of an appeal by the administrator).

[50] Henderson v. Henshall, C. C. A., 54 Fed. 320.

[51] Iron Gate Bank v. Brady, 184 U. S. 665, 46 L. ed. 739.

§ 217. Effect of abatement. "An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit when abated, is absolutely dead. But in equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived."[1] Upon the total abatement of a suit the cause is completely suspended while the abatement continues; and, in general, all orders made pending such abatement will be considered nugatory and may be discharged.[2] Applications may, however, be made by parties affected thereby, to discharge process of contempt issued or executed pending the statement.[3] Applications have, moreover, been granted during an abatement for the payment of money out of court, when the right thereto had been previously established;[4] for the preservation of the property in dispute;[5] for the punishment of a party for breach of an injunction;[6] and to set aside irregular proceedings pending the abatement.[7] So, too, a decree previously made could be enrolled;[8] and it has been held in England that depositions might be taken under a commission previously issued.[9] Orders previously made continue in force until discharged.[10] But the time given a party within which to do a certain act is always suspended by an abatement.[11] Where a preliminary injunction has been previously granted, the court may issue an order requiring that

§ 217. [1] Story's Eq. Pl., § 354. See also Hoxie v. Carr, 1 Sumn. 173, 178; Mellus v. Thompson, 1 Cliff. 125, 129.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1714; Griswold v. Hill, 1 Paine, 483.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1715.

[4] Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Roundell v. Currer, 6 Ves. 250; Daniell's Ch. Pr. (2d Am. ed.) 1715. See Wharam v. Broughton, 1 Ves. Sr. 185.

[5] Washington Ins. Co. v. Slee, 2 Paige (N. Y.), 365, 368.

[6] Hawley v. Bennett, 4 Paige (N. Y.), 163.

[7] Quackenbush v. Leonard, 10 Paige (N. Y.), 131.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1715.

[9] Thompson v. Took, 1 Dick. 115; Peters v. Robinson, 1 Dick. 116; Sinclair v. James, 1 Dick. 277.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1716; Lee v. Lee, 1 Hare, 622; Hawley v. Bennett, 4 Paige (N. Y.), 163.

[11] Gregson v. Oswald, 1 Cox, Eq. 343.

the representatives of a deceased plaintiff revive within a certain time, usually a fortnight after notice, or that the injunction be dissolved.[12] No such order will be granted after a decree for a perpetual injunction; for that "would be in effect decreeing a perpetual suit."[13] The power of the court to make an order that the representatives of a deceased plaintiff revive within a certain limited time after notice to them, or that the bill be dismissed, is doubtful.[14] Where the abatement is partial, as where it is caused by the death of a defendant, it prevents those proceedings only by which his interest may be affected.[15] Thus, if there be a decree against trustees and the beneficiary of their trust for a conveyance, and the beneficiary die, the trustees may still be obliged to convey;[16] and, after the death of one defendant, process of contempt may be issued and executed against the others.[17] After its abatement by the death of the owner of the equity of redemption, a foreclosure suit cannot be remanded before its revivor.[18] It has also been held that the death of a defendant after hearing but before a decree does not necessarily prevent judgment.[19] which should then be entered as of the date of the hearing, *nunc pro tunc,* and that, if practicable, a decree made before a defendant's death, for example, a decree for a sale, may be enforced without revivor.[20] But where the defendant died after his demurrer had been sustained and the time of the complainant to amend had expired, it was held that the court could not without revivor

12 Jones v. Massey, Brown v. Warner, Turner v. Cole, all quoted in Chowick v. Dimes, 3 Beav. 290, 292, 293; Chester v. Life Ass'n of America, 4 Fed. 487.

13 Askew v. Townsend, 2 Dick. 471.

14 Compare *dictum* of Judge Story in Hoxie v. Carr, 1 Sumn. 173, 178, and the case of Chowick v. Dimes, 3 Beav. 290, where Lord Langdale, M. R., granted such an order, with that of Lee v. Lee, 1 Hare, 617, where Vice-Chancellor Wigram held that the court had no power to make one.

15 Daniell's Ch. Pr. (2d Am. ed.) 1716; Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2.

16 Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1716.

17 Daniell's Ch. Pr. (2d Am. ed.) 1716.

18 Wright v. Phipps, 58 Fed. 552.

19 Davies v. Davies, 9 Ves. 461; Daniell's Ch. Pr. (2d Am. ed.) 1717.

20 Whiting v. Bank of U. S., 13 Pet. 6, 10 L. ed. 33.

render judgment of dismissal *nunc pro tunc* as of the day following the expiration of the time allowed for amendment.[21]

§ 218. When a suit may be revived and effect of revivor. A suit which has abated may generally be revived when anything further remains to be done therein.[1] But the old practice did not permit a suit to be revived merely for costs which were untaxed, and had not been previously directed to be paid out of a particular estate or fund, nor decreed against an executor out of assets.[2] Nor can a bill of revivor be brought upon a bill filed merely for discovery, after the discovery required thereby has been obtained.[3] The time within which an action to enforce a cause of action at common law not founded upon a statute of the United States may be revived, depends upon the State practice[4] or the State Statute of Limitations;[5] which, however, do not affect the United States.[6] The State Statute of Limitations has been held to be a bar to an application to revive an action by a receiver of a national banking association to collect an assessment from a stockholder.[7] In equity the running of the statute of limitations, State or Federal as the case may be, after the time when a person became entitled to revive is in most cases, except after a decree for an account,[8] a defense and bar to a bill of revivor.[9] A suit cannot be revived

21 McNeil v. McNeil, C. C. A., 170 Fed. 289.

§ 218. 1 Gilbert's Forum Romanum, 181; Johnson v. Peck, 2 Ves. Sen. 465; Fitzpatrick v. Domingo, 14 Fed. 216; Daniell's Ch. Pr. (2d Am. ed.) 1694. See Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621, and *supra*, § 216.

2 Daniell's Ch. Pr. (2d Am. ed.) 1694–1697; Story's Eq. Pl., § 371; Blower v. Morrets, 3 Atk. 772; Kemp v. Mackrell, 3 Atk. 812; Travis v. Waters, 1 J. Ch. (N. Y.) 85.

3 Horsburg v. Baker, 1 Pet. 232, 7 L. ed. 125.

4 Goodyear Dental. Vulcanite Co. v. White, 46 Fed. 278.

5 Browne v. Chavez, 181 U. S. 68, 45 L. ed. 752; Butler v. Poole, 44 Fed. 586; Barker v. Ladd, 3 Sawyer, 44; Price v. Yates, 19 Alb. L. J. 295; Goodyear Dental Co. v. White, 46 Fed. 278; Spaeth v. Sells, 177 Fed. 797, holding that under Ohio R. S. §§ 5150, 5157, the final order of revivor must be made within one year and that the obtaining of the conditional order within that time is insufficient.

6 U. S. v. Houston, 48 Fed. 207.

7 Butler v. Poole, 44 Fed. 586.

8 Hollingshead's Case, 1 P. Wms. 742; Daniell's Ch. Pr. (2d Am. ed.) 1711.

9 Daniell's Ch. Pr. (2d Am. ed.) 1710; Coit v. Campbell, 82 N. Y. 509; Perry v. Jenkins, 1 Myl. & Cr. 122; Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53, 56; Story's Eq. Pl., § 831. A bill of revivor was

seven years after its dismissal for a defect of parties caused by a failure to revive.[10] Where the abatement is by the death or marriage of a plaintiff, an order to revive the suit places it and all proceedings in it in precisely "the same plight, state, and condition that the same were in at the time when the abatement took place."[11] The new plaintiff may then take the same proceedings that the original plaintiff might have done.[12] Thus, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it stood at the abatement; and if a process has been previously issued it will be revived with the revivor of the suit.[13] But where the abatement is caused by the death of a defendant, "the process, being personal, cannot be revived."[14] In general, however, an order to revive against the representatives of a deceased defendant, will place the suit as fully in the same position with regard to such representatives as can be done with reference to the change of the individuals before the court.[15] After revivor testimony previously taken can be used.[16]

§ 219. Who may revive a suit. It is generally necessary, in order to entitle one to revive, that there should be a privity in representation between him and the party whose death caused the abatement. Therefore, upon the death of one suing in a representative capacity the defect can usually be remedied only by a supplemental bill, and not by a bill of revivor.[1] It was held, however, that upon the death of an administrator, the administrator *de bonis non* might file a bill of revivor, "though there is no actual privity between him and the original

stricken from the file when filed twelve years after the delivery of an opinion dismissing the original bill, although no decree upon the opinion was ever entered. Hubbell v. Lankenan, 63 Fed. 881. *Contra*, Miller v. Wattier, 165 Fed. 359. See, also, Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co., 168 Fed. 73, a suit to compel the issue of a patent when the adverse party acquiesced in the bill.

10 Houth v. Owens, 30 Fed. 910.

11 Gregson v. Oswald, 1 Cox Eq. 344.

12 Vattier v. Hinde, 7 Pet. 252, 266; Philips v. Derbie, 1 Dick. 98; Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

13 Hyde v. Forster, 1 Dick. 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

14 Daniell's Ch. Pr. (2d Am. ed.) 1778.

15 Daniell's Ch. Pr. (2d Am. ed.) 1778.

16 Vattier v. Hinde, 7 Pet. 252, 266, 8 L. ed. 675, 680.

§ 219. 1 Daniell's Ch. Pr. (2d Am. ed.) 1697; Story's Eq. Pl., § 340.

plaintiff."[2] But Judge Story suggests that a bill in the nature of a bill of revivor would be more appropriate.[3] It is said by Lord Redesdale that in the case of a bill by creditors on behalf of themselves and other creditors, any creditor may revive;[4] but according to Daniell, in practice the form of a bill in such a case is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor.[5] Before a decree, a suit can only be revived by one or all of the surviving plaintiffs, or the representatives of one that has died.[6] If any of these refuse to join, he must be made a defendant to the bill filed to revive the suit.[7] If the suit concerned solely the real estate of a deceased plaintiff, his heirs alone are entitled to represent him therein;[8] if solely his personal estate, his executor or administrator;[9] if both, separate bills of revivor may be filed by his heirs and personal representatives, and the neglect of one to revive will not prejudice the other.[10] In the case of a suit by a corporation sole, the death of the plaintiff, if he were entitled to the subject-matter for his own benefit, caused an abatement; and the suit could be revived by his personal representative.[11] If, however, he were only entitled to the subject-matter in his corporate capacity, the suit became defective, and could only be continued by his successor by means of an original bill in the nature of a supplemental bill.[12] Where a corporation had, by purchase at a foreclosure sale, succeeded to the rights of one that was defunct, it was held that it could not by a bill of re-

2 Daniell's Ch. Pr. (2d Am ed.) 1697; Mitford's Pl., ch. 1, § 3; Huggins v. York Bldg. Co., 2 Eq. Cas. Abr. 3; Owen v. Curzon, 2 Vern. 237; Newcombe v. Murray, 77 Fed. 492.

3 Story's Eq. Pl., § 382, note 4.

4 Mitford's Pl., ch. 1, § 3.

5 Daniell's Ch. Pr. (2d Am. ed.) 1703.

6 Daniell's Ch. Pr. (2d Am. ed.) 1700; Chester v. Life Ass'n of America, 4 Fed. 487.

7 Daniell's Ch. Pr. (2d Am. ed.) 1700; Fallowes v. Williamson, 11 Ves. 309.

8 Mitford's Eq. Pl., ch. 1, § 3; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4; Mellus v. Thompson, 1 Cliff. 125.

9 Mitford's Pl., ch. 1, § 3; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

10 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., § 367; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

11 Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 1 Kyd on Corporations, 77.

12 Daniell's Ch. Pr. (2d Am. ed.) 28, 1701; 2 Bac. Abr., Corporation, E. 2.

vivor take the benefit of a suit by the stockholders of the defunct corporation, to which the mortgagee had not been a party.[13] After a decree, a suit may be revived by any defendant, or by the representative of any deceased defendant, who has acquired any right thereunder, as well as by any plaintiff.[14]

§ 220. Manner of revivor at common law. "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court."[1] It has been held that this statute is confined to personal actions and not to real actions,[2] nor to proceedings in bankruptcy,[3] which may be revived in a more summary manner than that provided by the statute or by the Equity Rules.[4] The writ to collect a judgment of the Federal court when issued against the representatives of one of the original parties, or against the indorser of a writ, is a continuance of the original action,[5] and an ancillary proceeding which can be maintained irrespective of the citizenship

[13] Keokuk & W. R. Co. v. Scotland County, 152 U. S. 318, 38 L. ed. 457.

[14] Williams v. Cooke, 10 Ves. 406; Devaynes v. Morris, 1 Myl. & Cr. 213, 225.

§ 220. [1] U. S. R. S., § 955. See Allen v. Fairbanks, 40 Fed. 188.

[2] Macker's Heirs v. Thomas, 7 Wheaton, 530, 5 L. ed. 515.

[3] Shute v. Patterson, C. C. A., 147 Fed. 509, 512.

[4] Shute v. Patterson, C. C. A., 147 Fed. 509, 512. Citing General Order in Bankruptcy, 37.

[5] McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Davis v. Davis, C. C. A., 174 Fed. 786.

of the parties or the amount in controversy.[6] As a general rule the practice of the State where the proceedings is taken will be followed in the issue of and proceedings upon writs of *scire facias*,[7] but, it has been held, that a Federal court is not bound to follow the methods prescribed by the State statutes for serving a writ of *scire facias* to revive a judgment against a non-resident defendant; and that it may revive its own judgment by such a writ and prescribe a reasonable method for the service thereof without the district, where the judgment debtor has departed from the same.[8] Whether an action upon the judgment thus revived will, in such a case, be entertained in a court in another State or district, where the debtor resided at the time of the revivor, is, under the authorities, a doubtful question.[9]

It has been held: that in a *scire facias* to review a judgment in an ejectment, the statement that the term recovered is yet unexpired is sufficient; and that there is no need of stating in the writ the term as laid in the declaration, nor the facts which show its continuance;[10] that to a *scire facias* to revive a judgment in ejectment it is not necessary to make the executor or administrator of the deceased defendants parties, but that the judgment must be revived against the heirs of the defendant in ejectment and the terretenants;[11] and that after a conveyance by the lessor of the plaintiff in ejectment to a third person of land for which judgment has been obtained, a *scire facias* or writ of *habere facias* must issue in the name of the original plaintiff in the original judgment.[12] To a *scire facias* to re-

6 Pullman's Palace Car Co. v. Washburn, 66 Fed. 790, *supra*, § 21.

7 McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Walden v. Craig, 14 Pet. 147, 151, 10 L. ed. 393, 395; Kenosha & R. R. Co. v. Sperry, 3 Biss. 309.

8 Collins County Nat. Bank v. Hughes, C. C. A., 155 Fed. 389.

9 Collins County Nat. Bank v. Hughes, C. C. A., 155 Fed. 389, 393, 394. Citing Owens v. Henry, 161 U. S. 642, 40 L. ed. 837; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L.R.A. 782; Weaver v. Boggs, 38 Maryland, 255. Where the non-residence of the defendant in the State where the judgment was revived does not appear in the record, a declaration thereupon in a Federal court in another State is not demurrable. Davis v. Davis, C. C. A., 174 Fed. 786.

10 Lessee of Walden v. Craig's Heirs, 14 Pet. 147, 151, 10 L. ed. 393, 395.

11 Lessee of Walden v. Craig's Heirs, 14 Pet. 147, 10 L. ed. 393.

12 Penn v. Klyne, Pet. C. C 446. Under the practice in Missouri, a

vive a judgment in ejectment, for the term and damages, the defendant cannot plead a conveyance by the lessor of the plaintiff, made subsequent to the judgment.[13] Upon a writ of *scire facias* to revive an action or a judgment against the personal representative of a deceased defendant, such personal representative can only plead what the decedent could have pleaded.[14] unless there be some matter which there was no opportunity to plead in the original action.[15] Upon a *scire facias* to revive a final or interlocutory judgment, the defendant cannot avail himself of matters of defense which occurred previous to the original judgment;[16] nor plead a general denial.[17] A payment which might have been pleaded to the original *scire facias* to revive a judgment cannot be given in evidence on a second *scire facias*.[18] If an heir sells after judgment against the executor upon the plea of *plene administravit* found for him, and before *scire facias* against the heir, the purchaser may, in the name of the heir, plead to the writ assets in the hands of the executor.[19] The writ of *scire facias* was issued to revive and obtain execution against the taxing district of Shelby county, which was the successor of the city of Memphis, on a judgment recovered against the city of Memphis before the repeal of its charter.[20] In that case, the order upon the return of the *scire facias* awarded execution for the amount of the original judgment, and simple interest, "which is, however, to be calculated in the marshal's office on the execution as in all cases."[21]

writ of *scire facias* to revive a judgment which has been assigned is not demurrable because issued in the name of the assignor; but it is sufficient if the writ shows that it was issued on behalf of, and to the use of, the assignee, and permission may be given to amend the writ by striking out the name of the assignor. Wonderly v. Lafayette County, 74 Fed. 702.

13 Penn v. Klyne, Pet. C. C. 446.

14 McKnight v. Craig's Adm'rs, 6 Cranch, 183, 187, 3 L. ed. 193, 194; Morsell v. Hall, 13 How. 212, 14 L. ed. 117; Allen v. Fairbanks, 40 Fed. 188.

15 Hatch v. Eustis, 1 Gall. 160.

16 U. S. v. Thompson, Glip. 614; Morsell v. Hall, 13 How. 212, 14 L. ed. 117; McKnight v. Craig's Adm'rs, 6 Cranch, 183, 3 L. ed. 193; Pennock v. Gilleland, 1 Pittsb. 37.

17 Wonderly v. Lafayette County, 77 Fed. 665.

18 Hatch v. Eustis, 1 Gall. 160; Wilson v. Hurst, Pet. C. C. 441; Wilson v. Watson, Pet. C. C. 269.

19 Hamilton v. Jones, 2 Hayw. 291.

20 Grantland v. Memphis, 12 Fed. 287.

21 Ibid.

§ 221. Manner of revivor in equity in general. When a suit became abated after a decree signed and enrolled, it was anciently the practice to revive the decree by a subpœna in the nature of a *scire facias,* upon the return of which the party to whom it was directed might show cause against the reviving of the decree, by insisting that he was not bound by the decree, or that for some other reason it ought not to be enforced against him, or that the person suing the subpœna was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him, or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter necessary to the proceedings. If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual, as it revived the decree only, and the subsequent proceedings could not be revived but by bill, and the enrollment of decrees being disused, it became the practice to revive in all cases indiscriminately by bill.[1] The regular methods of reviving a suit in equity in the Federal courts have been by a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, a supplemental bill in the nature of a bill of revivor and a bill in the nature of a bill of revivor.[2] The Equity Rules of 1912 provide: "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary."[3] If this rule stood alone, it would authorize the revivor of a suit by motion without a new bill. A previous rule, how-

§ 221. [1] Mitford's Ch. Pr., ch. 1, § 3.

[2] Quoted with approval by McDowell, J., in Dillard's Ad'mr v. Central Va. Iron Co., 125 Fed. 159.

[3] Eq. Rule 45.

ever, expressly recognizes the continuance of bills of revivor.[4] By the former practice, a revivor might be made by motion upon consent;[5] and it was suggested that where one of the surviving parties had sued out a *scire facias,* the personal representative of the decedent might obtain a revivor upon motion.[6] When a board of public officers was abolished by statute and a new board substituted for it, it was held, without determining whether or not a revivor was necessary, that the members of the new board could properly be made parties to the suit by means of a bill of revivor,[7] although a supplemental bill,[8] or bill in the nature of a supplemental bill,[9] would have seemed more appropriate.

§ 222. Definition of bill of revivor and parties to the same. A bill of revivor is a continuance of the original bill, when, by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.[1] "Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor, or administrator; so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained; and therefore the suit may be continued in this case likewise by bill of revivor merely."[2] The persons who may be plaintiffs in a bill of revivor have been specified in a preceding section.[3] If the abatement be caused by the death or marriage of a plaintiff, all previous defendants to the suit must be made parties to the bill of revivor; unless it

[4] Eq. Rule 35; quoted *infra.*

[5] Griswold v. Hill, 1 Paine, 483.

[6] Dillard's Adm'r v. Central Virginia Iron Co., 125 Fed. 157.

[7] Hemingway v. Stansell, 106 U. S. 399, 402, 27 L. ed. 245, 246. See also The Sapphire, 11 Wall. 164, 20 L. ed. 127; Allen v. Mayor, 18 Blatchf. 239; s. c., 7 Fed. 483.

[8] *Infra,* § 231.

[9] *Infra,* § 234.

§ 222. [1] Mitford's Pl., ch. 1, § 3; Fitzpatrick v. Domingo, 14 Fed. 216.

[2] Mitford's Pl., ch. 1, § 3.

[3] § 219.

be filed after a decree, when all whose rights or duties have been fixed and ascertained thereby must be joined.[4] If any of the previous plaintiffs refuse to join in the continuance of the suit, they also must be made defendants to the bill of revivor.[5] If the abatement be caused by the death of a defendant, only his heirs or personal representatives, or both, according as the suit affected his interest in real or personal property, should be made defendants to the bill of revivor;[6] unless the bill be filed after a decree, when all parties interested thereunder should be joined.[7] There is no need of any difference of citizenship among the different parties to such a bill, provided that the court had jurisdiction of the original suit.[8] A suit cannot be revived against foreign executors unless ancillary letters are taken out in the State where the suit is pending.[9] A bill of revivor cannot be filed against the representatives of a defendant not served with process under the original bill.[10] They can only be brought in by a bill in the nature of an original bill.[11]

§ 223. Frame of bill of revivor. A bill of revivor must state the filing of the original bill, and the several proceedings thereon, and the abatement.[1] But the rules provide: "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."[2] "It must show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit be revived accordingly."[3] Where a decree has been made reviving a former decree, a second bill for the same purpose properly seeks to revive the first decree of

4 Daniell's Ch. Pr. (2d Am. ed.) 1703, 1704.

5 Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1700.

6 Bettes v. Dana, 2 Sumn. 383; Daniell's Ch. Pr. (2d Am. ed.) 1704.

7 Daniell's Ch. Pr. 1704.

8 Clark v. Mathewson, 12 Pet 164, 9 L. ed. 1041; s. c., 2 Sumn. 262.

9 Lawrence v. Southern Pac. Co., 177 Fed. 547.

10 U. S. v. Fields, 4 Blatchf. 326.

11 See § 216.

§ 223. 1 Mitford's Pl., ch. 1, § 3.

2 Eq. Rule 35; copied from Eq. Rule 58, of 1842.

3 Mitford's Pl., ch. 1, § 3.

revivor, and so, *ipso facto,* the original decree.[4] If a bill of revivor seeks simply to revive the suit, it prays only for a subpœna to revive and answer.[5] This usually is only required in two classes of cases. Where the bill is filed against an executor or administrator, and requires an admission of assets, the prayer usually is, not only that the suit may be revived, but also that, in case the defendant shall not admit assets to answer the purposes of the suit, an account of the estate of the deceased party may be taken; "and so far the bill is in the nature of an original bill."[6] "If a defendant to an original bill dies before putting in an answer, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered."[7] A bill of revivor should be signed by the solicitor,[8] and in general comply so far as is practicable with the requirements for original bills.[9]

§ 224. Proceedings upon bills of revivor. The Equity Rules provide that: "In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary."[1] This changes the former practice, which required the issue of a subpœna and proceedings in the nature of an original suit.[2] The Revised Statutes provide "when either of the parties, whether plaintiff, pe-

4 Shainwald v. Lewis, 69 Fed. 487.

5 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1707.

6 Mitford's Pl., ch. 1, § 3.

7 Mitford's Pl. ch. 1, § 3.

8 Eq. Rule 24.

9 Daniell's Ch. Pr. (2d Am. ed.) 1707.

§ 224. 1 Eq. Rule 45. See Oliver v. Decatur, 4 Cranch, C. C. 592.

2 Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53; Sharon v. Terry, 36 Fed. 337; Foster's Fed. Pr., (fourth ed.) § 181.

titioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias,* the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance until the next term."[3] The form of the subpœna upon a bill of revivor is the same as that upon an original bill, except that it states the nature of the bill to which the defendant is required to appear, and the time allowed him by the rules in which to do so.[4] The subpœna, if required is also sued out and served in the same manner as one upon an original bill;[5] but substituted service of the subpœna upon the attorney of the defendant to the original bill may be allowed when the original defendant is beyond the reach of process.[6] It has been held that a suit cannot be revived against the foreign executor or administrator of a deceased defendant who has not taken out letters within the jurisdiction of the court, and has no assets there.[7] If the defendant refuses to appear, process of contempt may be issued against him.[8] A defendant who wishes to oppose the revivor should plead to the bill, move to dismiss the same or perhaps show cause by affidavit to the contrary.[9] It might perhaps not be expedient to take in the answer any objection to the revivor. For the English rule was that an objection thus taken would not prevent the order to revive, and the point could then only be determined by bringing the cause regularly to a hearing.[10]

A bill of revivor is defective if it does not show a sufficient

3 U. S. R. S., § 955. See Griswold v. Hill, 1 Paine, 483.

4 Daniell's Ch. Pr. (2d Am. ed.) 1707.

5 Daniell's Ch. Pr. (2d Am. ed.) 1707.

6 Dunn v. Clarke, 8 Pet. 1, 2, 8 L. ed. 845; Norton v. Hepworth, 1 Hall & Tw. 158. See § 96.

7 Mellus v. Thompson, 1 Cliff. 125.

8 Daniell's Ch. Pr. (2d Am. ed.) 1707.

9 Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Rule 58.

10 Daniell's Ch. Pr. (2d Am. ed.) 1709, 1711; Harris v. Pollard, 3 P. Wms. 348; Lewis v. Bridgman, 2 Sim. 465; Codrington v. Houlditch, 5 Sim. 286.

ground for reviving the suit or any part of it, either by or against the person by or against whom it is filed;[11] for want of parties apparent upon its face, though not for the omission of such as had not appeared before, or were not before the court at the time of the abatement;[12] and for any serious defect in form. Upon demurrer to a bill of revivor, the sufficiency of the original bill could not be considered.[13] However, the original bill failed to state facts giving the Federal courts jurisdiction, that objection might be raised by a demurrer to the bill of revivor.[14] If a bill of revivor were brought without sufficient cause to revive, and this were not apparent upon its face, or if the plaintiff was not entitled to revive the suit at all, though a title is stated in the bill so that it was not demurrable, the defendant might set up his objections to it by plea.[15] No plea can be put in against a bill of revivor which has been pleaded to the original bill and overruled, although if a plea has been put in and the suit abated before argument, it may subsequently be pleaded anew to the original bill.[16] When an answer to a bill of revivor is required, it must be confined to such matters as are called for by the bill, or as would be material to the defense with reference to the order made upon it.[17] Allegations which might have been pleaded before abatement to the original bill will be considered as impertinent,[18] and disregarded.[19] It will not, however, be impertinent, if it states matters of defense which have occurred since the answer to the original bill was filed, though these do not affect the title of the plaintiff to revive.[20] Such an answer is impertinent when

[11] Harris v. Pollard, 3 P. Wms. 348; University College v. Foxcroft, 2 Ch. R. 244; Daniell's Ch. Pr. (2d Am. ed.) 1709, 1710; Story's Eq. Pl., §§ 617, 829.

[12] Metcalfe v. Metcalfe, 1 Keen, 74; Crowfoot v. Mander, 9 Sim. 396; Daniell's Ch. Pr. (2d Am. ed.) 1710.

[13] Mason v. Hartford, P. & F. Ry. Co., 19 Fed. 53, 55; Sharon v. Terry, 36 Fed. 337.

[14] Sharon v. Terry, 36 Fed. 337.

[15] Daniell's Ch. Pr. (2d Am. ed.) 1710; Lewis v. Bridgman, 2 Sim. 465.

[16] Daniell's Ch. Pr. (2d Am. ed.) 1711.

[17] Daniell's Ch. Pr. (2d Am. ed.) 1711; Story's Eq. Pl., § 868*a*.

[18] Nanney v. Tottey, 11 Price, 117.

[19] Gunnell v. Bird, 10 Wall. 304, 308, 19 L. ed. 913, 915; Fretz v. Stover, 22 Wall. 198, 204, 22 L. ed. 769, 770.

[20] Langley v. Overton, 10 Sim. 345.

it describes and complains of irregularities in the suit before the abatement.[21] Such an answer should be signed by the solicitor.[22] One replication put in issue both the allegations in that and those in the original answer.[23] In all other respects, the form and the proceedings upon demurrers, pleas, and answers to bills of revivor conformed as nearly as possible to those of and upon similar pleadings to original bills.[24] A bill of revivor need not be set down for a hearing, unless it prays other relief than a mere revivor.[25] Where a bill of revivor sought merely an admission of assets and a revivor, and the defendant admits assets, the cause might proceed upon the order of revivor merely.[26] If, however, any issue were joined upon the answer to it, a hearing was necessary.[27] The sole questions before the court when a bill of revivor is filed are the competency of the parties by and against whom it is filed, and the frame of the bill.[28] A cause is not revived until an order of revivor has been entered.[29]

§ 225. Bills in the nature of bills of revivor in general. A bill in the nature of a bill of revivor is a bill filed "to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill."[1] The ancient practice is thus described. "If the death of a party whose interest is not determined by his death is attended with such a transmission of his interests that the title to it, as well as the person entitled, may be litigated in the court of chancery," as in the case of a devise[2] or conveyance[3] of real estate, "the suit is not permitted to be continued by a bill of revivor. An original bill upon which the title may be litigated must be

21 Wagstaff v. Bryan, 1 R. & M. 28.

22 Daniell's Ch. Pr. (2d Am. ed.) 1712.

23 Catton v. Earl of Carlisle, 5 Madd. 427; Daniell's Ch. Pr. (2d Am. ed.) 1712.

24 Daniell's Ch. Pr. (2d Am. ed.) 1711, 1712.

25 Pruen v. Lunn, 5 Russ. 3; Daniell's Ch. Pr. (2d Am. ed.) 1713.

26 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1713.

27 Daniell's Ch. Pr. (2d Am. ed.) 1713; Mitford's Pl., ch. 1, § 3.

28 Bettes v. Dana, 2 Sumn. 383.

29 Atterbury v. Gill, 13 Off. Gaz. 276.

§ 225. 1 Mitford Pl., ch. 1, § 3. See Slack v. Walcott, 3 Mason, 508, 512; Sharon v. Terry, 36 Fed. 337, 353.

2 Slack v. Walcott, 3 Mason, 508.

3 Sharon v. Terry, 36 Fed. 337.

filed, and this bill will so far have the effect of a bill of revivor that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor."[4] "The bill is said to be original merely for want of that privity between the party to the former and the party to the latter bill, though claiming the same interest, which would have permittted the continuance of the suit by bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of the proceedings in the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the time of the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by original bill, if it could have been continued by bill of revivor merely."[5] So the pleadings filed and any testimony taken in the original cause can be used in the same manner in the second cause after a bill in the nature of a bill of revivor has been filed.[6] Such a bill can only be filed for the purpose of bringing in a person who claims in privity with the party whose death caused the abatement.[7] Thus, if a bill is filed by a devisee under a will, and afterwards a subsequent will is proved, the devisee under the second will can in no way avail himself of the proceedings in the suit; for there is no privity between him and the original plaintiff. If, however, a bill has been filed by the devisor himself for some matter concerning the estate devised, the second devisee may file a supplemental bill in the nature of a bill of revivor, even if the first devisee have already filed such a bill; for he derives his title so to do solely from the devisor independ-

[4] Mitford's Pl., ch. 1, § 3. See Slack v. Walcott, 3 Mason, 508.

[5] Mitford's Pl., ch. 1, § 3.

[6] Slack v. Walcott, 3 Mason, 508; Vattier v. Hinde, 7 Pet. 252, 266, 8 L. ed. 675, 680; Story's Eq. Pl., §§ 371–387; Daniell's Ch. Pr. (2d Am. ed.) 1719.

[7] Daniell's Ch. Pr. 1720; Story's Eq. Pl., § 385; Rylands v. Latouche, 2 Bligh, 385; Tonkin v. Lethbridge, G. Cooper, 43.

ently of the first devisee.[8] The principal difference between the effect of an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill is that under the former the defendant is absolutely bound by the proceedings in the original suit, whereas under the latter he can avail himself of any defense which has arisen since the original bill was filed, or which he has a right to urge against the new complainant, although it did not exist against the original plaintiff.[9] When the court had jurisdiction of the original suit, a want of difference of citizenship between the parties to the bill in the nature of a bill of revivor will not be a defect in it.[10]

§ 226. Frame of bills in the nature of bills of revivor and proceedings upon them. A bill in the nature of a bill of revivor "must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it."[1] It usually prays that the original suit may be revived, and the party filing it have the benefit of the former proceedings therein.[2] Probably a subpœna issued in accordance with its prayer may be served upon the attorney of an absent defendant, who has already appeared, in the same manner as a subpœna upon a bill filed to stay proceedings at law.[3] Otherwise the form and the proceedings upon bills in the nature of bills of revivor were formerly the same as those upon bills of revivor;[4] and the difference between the two was practically one of mere nomenclature.[5]

§ 227. Manner of revivor upon appeal or error. The Supreme Court Rules provide: "1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party,

8 Oldham v. Eboral, Cooper, Select Cas. 27.

9 Fulton v. Greacen, 44 N. J. Eq. 443.

10 Clarke v. Mathewson, 12 Pet. 164, 9 L. ed. 1041; s. c., 2 Sumn. 262; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886.

§ 226. 1 Mitford's Eq. Pl., ch. 1, § 3.

2 Daniell's Ch. Pr. 1721; Story's Eq. Pl., § 386.

3 Norton v. Hepworth, 1 Hall & Tw. 158; Dunn v. Clarke, 8 Pet. 1, 2. 8 L. ed. 845. See § 96.

4 Daniell's Ch. Pr. 1720, 1721; Rule 56.

5 Grew v. Breen, 12 Met. (Mass.) 369, 46 Am. Dec. 687.

according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or District from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing. 2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate. 3. When either party to a suit in a" District "Court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the" District "Court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative

within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And, provided, also, that in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding such suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And, provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases."[1] The Circuit Courts of Appeals have a similar rule.[2] Where one of several joint defendants to a decree for damages and an injunction against the infringement of a patent dies after an appeal, the suit may be revived in the appellate court at the suit of the survivors, upon notice to the personal representatives of the decedent under the Supreme Court Rule without bringing them in as parties.[3] If in such a case the personal representatives of the deceased appellant voluntarily come in and ask to be made parties, they may be admitted.[4] Where the presence of the personal representatives of a deceased appellant will be required for the due prosecution of an appeal by his survivors, the appellate

§ 227. [1] Supreme Court Rule 15.

[2] C. C. A. Rule 19.

[3] Moses v. Wooster, 115 U. S. 285, 287, 29 L. ed. 391, 392.

[4] Thorpe v. Mathington, 1 Phill. Ch. 200; Moses v. Wooster, 115 U. S. 285, 288, 29 L. ed. 391, 392.

court may order that the appeal be dismissed unless properly revived within a limited time.[5] Where a defendant dies after judgment, an execution issued before the judgment is revived is of no effect and all proceedings thereunder are void; unless, perhaps, when the writ was tested before the death occurred;[6] but the death of a judgment debtor does not affect the validity of a sheriff's deed subsequently executed, but previously ordered.[7] Where a judgment for a personal injury had been erroneously set aside, the appellate court ordered judgment in favor of the original plaintiff *nunc pro tunc* as of a date before his death.[8] Where a writ of error to review a judgment of conviction was dismissed upon the defendant's death and the cause remanded for such further proceedings as "according to right and justice and the laws of the United States ought to be had," on the filing of the mandate the court of first instance had the power to entertain a motion in abatement.[9]

§ 228. Bills of revivor and supplement. A bill of revivor and supplement is a bill which revives a suit after an abatement, and at the same time supplies a defect which has arisen in it since its institution.[1] Thus, where by the death of a defendant new rights accrue to the plaintiffs, a bill of revivor and supplement is necessary to state those facts.[2] And where after the conveyance by the complainant of the debt, he die, a bill of revivor and settlement is required.[3] It has been held in England that by such a bill a defect apparent upon the face of the original bill cannot be cured.[4] A bill of revivor and supple-

[5] Blake v. Bogle, Macq. Pr. of H. of L., 244, note; Moses v. Wooster, 115 U. S. 285, 288, 29 L. ed. 391, 392.

[6] Ransom v. Williams, 2 Wall. 313, 17 L. ed. 803.

[7] Insley v. U. S., 150 U. S. 512, 37 L. ed. 1163.

[8] Coughlan v. District of Columbia, 106 U. S. 7, 27 L. ed. 74. But see Martin's Adm'r v. Baltimore & O. R. Co., 151 U. S. 673, 38 L. ed. 311.

[9] U. S. v. Dunne, C. C. A., 173 Fed. 254, 19 Ann. Cas. 1145.

§ 228. [1] Mitford's Pl., ch. 1, § 2; Story's Eq. Pl., §§ 387, 627; Daniells's Ch. Pr. (2d Am. ed.) 1722, 1723.

[2] Westcott v. Cady, 5 J. Ch. (N. Y.) 334, 342, 9 Am. Dec. 306.

[3] Miller v. Wattier, 165 Fed. 359. See Metal S. Co. v. Crandall, 18 Off. Gaz. 1531, where the court held that it was improper to revive the suit by a bill of revivor and said that he must file a "supplemental bill," evidently intending thereby a bill of revivor and supplement.

[4] Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

ment is merely a compound of a bill of revivor and a supplemental bill, and in its separate parts must be framed and proceed in the same manner.[5] It seems that it may be good as to the revivor, and bad as to the supplemental matter.[6] All parties to the original bill should be made parties to a bill of revivor and supplement, although a revivor is sought against but one defendant.[7] A bill may be sustained upon demurrer where its allegations are sufficient to support equitable relief, whether properly or not styled a bill of revivor and supplement.[8]

§ 229. Supplemental bills in the nature of bills of revivor. A supplemental bill in the nature of a bill of revivor is a bill filed to cure an abatement when the person by or against whom the suit is to be continued, although claiming under the individual whose death caused the abatement, is not the representative whom the law allows to be recognized, but is one whose title could not have been litigated in the English Court of Chancery, but might have been disputed before another tribunal.[1] It has also been held that where during the pendency of a suit a trustee died, and the court appointed a successor to him, the new trustee could only be brought in by supplemental bill in the nature of a bill of revivor.[2] Upon the death of a trustee or assignee in bankruptcy or insolvency his successor is brought in by a bill of this character.[3] Where one of the complainants died leaving a will, which was proved in a foreign country, a motion of his executor and testamentary trustee to revive the suit upon a bill in the nature of a bill of revivor was denied with leave to him and the decedent's devisees to file a supplemental bill.[4] Such a bill, however, although designated as being in the na-

5 Mitford's Pl., ch. 1, § 3; Story's Eq. Pl., §§ 387, 627; Daniell's Ch. Pr. 1722, 1723; Pendleton v. Fay, 3 Paige (N. Y.) 204.

6 Randolph v. Dickerson, 5 Paige (N. Y.), 517. But see Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

7 Lake v. Austwick, 4 Jur. 314.

8 Shainwald v. Lewis, 69 Fed. 487. But see Campbell v. City of New York, 35 Fed. 14.

§ 229. 1 Daniell's Ch. Pr. (2d Am. ed.) 1721.

2 Greenleaf v. Queen, 1 Pet. 138, 148, 7 L. ed. 85, 89.

3 Daniell's Ch. Pr. (2d Am. ed.) 1721.

4 Currell v. Villars, 72 Fed. 330.

ture of a bill of revivor, is neither more nor less than a supplemental bill.[5]

§ 230. What renders a suit defective. If, after the institution of a suit in equity, a person who is a necessary party thereto comes into being, or any other event occurs, which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that the change of interest shall be brought to the attention of the court, and the person not already a party brought before it, the suit is said to become defective.[1] The circumstances causing the change of interest must then be alleged, and the new party brought in by a supplemental bill, or a bill in the nature of a supplemental bill.[2] An assignment during the pendency of a suit, whether made voluntarily,[3] or, such as the election of a trustee in bankruptcy, by operation of law,[4] of the whole or a part of a defendant's interest therein, does not make the suit defective, nor affect the rights of the other parties, since the assignee takes the same rights and is subject to the same obligations as his assignor, and is equally bound or benefited by the decree. The assignee need not, therefore, be made a party,[5] unless the assignment disables the assignor from performing the decree of the court, when he should be brought before it;[6] but he may at any time be brought in at his own request[7] or at the request of the complainant.[8] It has been held: that in a

[5] Daniell's Ch. Pr. (2d Am. ed.) 1721.

§ 230. [1] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[2] Jones v. Jones, 3 Atk. 217; Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

[3] Ex parte Railroad Co., 95 U. S. 221, 24 L. ed. 355; Hazelton T. B. Co. v. Citizens' Street Ry. Co., 72 Fed. 325; Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398.

[4] Hewett v. Norton, 1 Woods, 68; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403.

[5] Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Ex parte Railroad Co., 95 U. S. 221, 24 L. ed. 355.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1664.

[7] Foster v. Deacon, Mad. & Geld. 59; Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Ex parte Railroad Co., 95 U. S. 221, 226, 24 L. ed. 355, 357; *infra*, § 234.

[8] Victor Talking Machine Co. v. Hawthorne & Shehle Mfg. Co., 173 Fed. 617. Cited with approval by Lanning, J., in Pittsburgh, S. & N. R. Co. v. Fiske, C. C. A., 178 Fed. 66, 67.

suit for an injunction, an assignment by a sole plaintiff, of his whole interest in the suit, compels a suspension of the proceedings until his successor is brought in.[9] Where, in a suit for the infringement of a patent, after an interlocutory decree for an injunction and an account, the complainant assigned its entire right to the patent, and took back from the assignees a license, which was not exclusive; it was held, that it could not recover any profits or damages on account of the infringement, which occurred after the execution of the assignment, nor proceed against the defendant for a violation of the injunction.[10] It has been held: that a reassignment to the original complainant does not restore the suit to its original condition, before the assignment by him was made; and that the suit cannot be continued without a bill in the nature of a supplemental bill.[11] The expiration of a patent does not render a suit for its infringement defective or abate the same.[12] It has been said that a person entitled to the benefit of a decree by his subsequent acquisition of an interest in the subject-matter in controversy is not entitled to invoke the aid of the court or take further action until he has made himself a party by a supplemental bill or other appropriate pleading, and has thus brought in the representatives or successors in interest of the original parties, plaintiff or defendant.[13] In a case in admiralty, it was held that a suit brought in the name of Napoleon III., on account of an injury to property,—a French ship held by him in his sovereign capacity,—did not abate by his deposition and the succession of the French Republic to the French Empire, and that the name of the plaintiff could at any time be changed by

9 Hoxie v. Carr, 1 Sumner, 173; Fed. Cas. No. 6,802; Ross v. Ft. Wayne, 63 Fed. 466, 470, 11 C. C. A. 288; Ecaubert v. Appleton, C. C. A., 67 Fed. 917, 923; Goss Printing Press Co. v. Scott, 134 Fed. 880; Automatic Switch Co. v. Cutler-Hammer Mfg. Co., C. C. A., 147 Fed. 250; George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496.

10 Goss Printing Press Co. v. Scott, 134 Fed. 880.

11 Automatic Switch Co. v. Cutler-Hammer Mfg. Co., C. C. A., 147 Fed. 250.

12 George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496; Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co., 182 Fed. 398, Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631.

13 Secor v. Singleton, 41 Fed. 725, 726; *infra*, § 234.

order.[14] Where, after a receiver appointed by a State court had brought suit against a citizen of another State, his appointment was annulled, and he subsequently died; it was held, that the suit could not be continued by a citizen of the defendant's State, appointed to the same receivership after such death.[15]

§ 231. Supplemental bills. The Equity Rules provide: "Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."[1] A supplemental bill is merely an addition to the original bill.[2] At first supplemental bills were filed, not only for the purposes mentioned in the last section, but also to supply such defects as might have been cured by amendment after the time to perfect a bill by amendment had expired.[3] Now, however, that amendments may be allowed at any stage of a suit,[4] they are no longer needed for that purpose; and as the fact that the matter pleaded in a supplemental bill may be inserted in the original bill by amendment, was also good ground of demurrer,[5] the propriety of their use for this purpose is doubtful;[6] but they are still occasionally so used.[7]

[14] The Sapphire, 11 Wall. 164, 20 L. ed. 127. See Allen v. The Mayor, 7 Fed. 483; s. c., 18 Blatchf. 239; Hemingway v. Stansell, 106 U. S. 399, 402, 27 L. ed. 245, 246.

[15] Hubert v. New Orleans, C. C. A., 130 Fed. 21.

§ 231. [1] Eq. Rule 34.

[2] Quoted with approval by Hazel, J., in Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701. See Mitford's Pl., ch. 1, § 2.

[3] Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1653–1663; Story's Eq. Pl., § 334; Jenkins v. Eldredge, 3 Story, 299; Mosgrove v. Kountze, 14 Fed. 315.

[4] Rule 29.

[5] Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

[6] Tubman v. Wason Mfg. Co., 44 Fed. 429; Electrical A. Co. v. Brush El. Co., 44 Fed. 602. See, however, Davies v. Williams, 1 Sim. 5; Nevada Nickel Syndicate v. National Nickel Co., 86 Fed. 486; Mellor v. Smither, C. C. A., 114 Fed. 116, 120.

[7] Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701; Murray v. Orr & Locket Hardware Co., C. C. A., 153 Fed. 369; Napier v. Westerhoff, 153 Fed. 985; St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220; Scott v. Lazell, 170 Fed. 1023.

They must be germane to the purpose of the original bill,[8] and leave to file them may be denied when they might have been duly pleaded by an amended bill and there is no excuse for the delay.[9] Subsequent infringements of a patent,[10] even by a different device from that charged in the bill,[11] or of copyrights in the same series of books,[12] have thus been pleaded. In a suit to restrain the infringement of a patent, "where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension; but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the assertion of a right than can a legislative act which has been repealed without any saving clause of pending actions. Consequently, the infringement of the reissued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit."[13] Where, however, the defendant made no objection to the complainant's filing a supplemental bill setting forth an infringement

[8] Mitchell v. Big Six Development Co., 186 Fed. 552.

[9] Healey Ice Machine Co. v. Green, 184 Fed. 515; Mitchell v. Big Six Development Co., 186 Fed. 552.

[10] Murray v. Orr & Lockett Hardware Co., C. C. A., 135 Fed. 369. After the complainant had finished taking testimony, he was allowed to file a supplemental bill setting up infringements which had occurred after the filing of the original bill. Turrell v. Spaeth, 9 Off. Gaz. 1163.

[11] Houghton v. Whitin Machine Works, 161 Fed. 581. It has been held that the complainant is not bound to bring such new method of infringement into the original suit and that a judgment therein is no bar to a subsequent suit by him for the infringement by means of the subsequent device. T. B. Wood's Sons Co. v. Valley Iron Works, 198 Fed. 869. See *supra*, § 186.

[12] Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701.

[13] Clifford, J., in Reedy v. Scott, 23 Wall. 352, 364, 365, 23 L. ed. 109, 110, 111. See also Fry v. Quinlan, 13 Blatchf. 205; Jones v. Barker, 11 Fed. 597. But compare Woodworth v. Stone, 3 Story, 749; Reay v. Raynor, 19 Fed. 308.

of a reissued patent, but filed to it a plea similar to that which he had previously filed to the original bill, it was held that he had waived his right to object upon appeal that the suit was improperly continued, and that an original bill should have been filed.[14] After the institution of suits to enjoin the enforcement of State statutes fixing freight rates, supplemental bills to enjoin the enforcement of subsequent statutes fixing passenger rates [15] and to enjoin proceedings in the State court to obtain an adjudication there of the question previously pending in the Federal court,[16] have been permitted. A forfeiture of the defendant's franchise pending a suit for an injunction may be pleaded by supplemental bill.[17] In a patent case, brought by an exclusive assignee, he was allowed to show by a supplemental bill that pending the suit the patent had been assigned to him.[18] When an event happens subsequently to the filing of an original bill which gives a new interest in the matter in dispute to any person, whether or not already a party, without depriving of their interest all of the original plaintiffs suing in their own right, the defect arising from this event may be supplied by a supplemental bill.[19]

[14] Reedy v. Scott, 23 Wall. 352, 23 L. ed. 109.

[15] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220. So, when the statute in force at the beginning of the suit, which authorized public officers to sue, to enforce the same, was repealed and a new law enacted subject, to the same objections, which provided that private persons might sue because of its violation. Central of Georgia Ry. Co. v. Railroad Com. of Ala.

[16] Missouri Pac. Ry. Co. v. Jones, 170 Fed. 124.

[17] Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 269, 54 L. ed. 190, 192.

[18] Owatonna Mfg. Co. v. F. B. Fargo & Co., 94 Fed. 519; Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701, a copyright case.

[19] Quoted with approval by Hazel, J., in Banks' Law Pub. Co. v. Lawyers' Co-Operative Pub. Co., 139 Fed. 701. See Hobson v. McArthur, 16 Pet. 180; Daniell's Ch. Pr. 1663–1675; Story's Eq. Pl., §§ 336–343; Mitford's Pl., ch. 1, § 3. It has been held that supplemental bills may be filed to plead the removal, subsequent to the original bill, of liens which were obstacles to part of the plaintiff's claim (Sheffield & B. I. & Ry. Co. v. Newman, C. C. A., 77 Fed. 787), and to plead an election to declare the principal of a mortgage due, made subsequent to the original bill to foreclose for a default in interest (Seattle, L. S. & G. Ry. Co. v. Union Tr. Co., 79 Fed. 179); or to plead subsequent defaults in interest. N. Y. Security & Tr. Co. v. Lincoln Stone Ry. Co.,

Where a board of directors seek to dismiss a suit by a corporation, minority stockholders may be allowed to come in by supplemental bill, and to continue the suit in their own right, and at their own expense, upon compliance with Equity Rule 27.[20] Where, pending a foreclosure suit, a majority of the bondholders, in accordance with the trust deed, removed the trustee, who had brought the suit, and appointed another in his place; the latter was permitted to file a supplemental bill to procure his substitution as complainant, when there appeared to be no fraud in his appointment.[21] A remainderman may also, in this same manner, be made a party to a suit brought by or against a tenant in tail upon the determination of the latter's estate, and the acquisition by the former of the present interest to the property in litigation.[22] A supplemental bill which brings in a new party may be original as to him, but supplemental as to the rest.[23] If, pending a suit, a tenant in tail of an estate thereby affected by it is born;[24] or if, pending a suit against a husband and wife concerning the latter's estate, the man dies, and the wife thus acquires a new interest;[25] or if one of two or more plaintiffs suing in their own right is entirely deprived of his interest, by any other event than an assignment of it;[26] or if the interest of a sole plaintiff suing in a representative capacity entirely determines by death or otherwise, and some other person becomes entitled to the same property under the same title,[27]—the defect in the suit thereby occasioned must be cured by a supplemental bill. So, if pending a suit a party becomes a lunatic, or if pending a suit by or against a lunatic and his committee a new committee is appointed, the committee should be brought in by a supplemental bill.[28] A supplemental bill may be filed after a decree in aid of the same; as, it has been held,

74 Fed. 67. See also s. c., 77 Fed. 525.

20 Eagle Iron Co. v. Colyar, 156 Fed. 954. See *supra*, § 145.

21 March v. Romare, C. C. A., 116 Fed. 355.

22 Lloyd v. Johnes, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.), 1668–1672.

23 Mitford's Pl., ch. 1, § 3.

24 Mitford's Pl., ch. 1, § 3.

25 Daniell's Ch. Pr. (2d Am. ed.) 1663.

26 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

27 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.), 1665; Marriott v. Tarpley, 9 Sim. 279.

28 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

by a purchaser at a foreclosure sale to enjoin an attack upon his title by proceedings in a State court after suit by privies to the original suit, such as stockholders or creditors,[29] and to enjoin the taking possession of property to which the complainant is entitled under the decree,[30] or to enforce a decree by consent.[31] Before the act of February 8th, 1899,[32] it was held: that the successor in office of a cabinet officer could not be substituted for him in a suit for an injunction, and for a decree directing the issue of a patent;[33] but, that a supplemental bill might be filed to enjoin a State Attorney-General from continuing, in the State court, a suit, the prosecution of which, by his predecessor, had been enjoined.[34] After an interlocutory decree for an injunction and an accounting in a patent suit, and the conclusion of the accounting thereunder; the court refused to permit the complainant, by a supplemental bill, to bring in the officers and directors of the defendant, in order to charge them with individual liability upon the final decree.[35] But where such officers were originally made parties, proof that since the commencement of the suit the corporation has become insolvent and has transferred its property, may be received without the filing of a supplemental bill.[36] Pending a suit to restrain a house-owner from interfering with complainant's wires by moving his building along a street, leave was refused to file a supplemental bill against other house-movers moving other houses on the same road over the same street under separate permits.[37] Assignees of defendants enjoined from using a trade-mark, who use the mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the orig-

29 Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24. But see Keoknk & W. R. Co. v. Scotland County, 152 U. S. 318, 38 L. ed. 457.

30 Root v. Woolworth, 150 U. S. 401, 37 L. ed. 1123.

31 Chapman v. Yellow Poplar Lumber Co., C. C. A., 143 Fed. 201.

32 30 St. at L. 822. Quoted *supra*, § 174.

33 Warner Valley Stone Co. v. Smith, 165 U. S. 28, 41 L. ed. 621.

34 Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587.

35 H. C. Cook Co. v. Little River Mfg. Co., 156 Fed. 676.

36 Saxlehner v. Eisner, 140 Fed. 938.

37 Edison El. Light & Power Co. v. Blomquist, 185 Fed. 615.

inal suit by supplemental bill.[38] A bill by a surviving partner to settle the partnership affairs is a separate and distinct proceeding from a suit subsequently brought by the same party to subject real estate of the deceased partner to the payment of debts held by his heirs, and the statute of limitations cannot be avoided by styling the second bill a supplemental bill.[39] According to Lord Redesdale, upon the death of one suing in behalf of himself and others in the same position with him, if his representative do not choose to file a bill of revivor, any one of the class on behalf of whom he sued may revive;[40] but it seems that a more proper course would be for the one wishing to continue the suit to do so by means of a supplemental bill, which he can only obtain leave to file upon notice to the representatives of the deceased plaintiff, as well as to the defendants.[41] Where, however, a suit brought by one in a representative capacity becomes defective by his death, and another acquires the right to continue it under a different title,—as upon the death of an executor or administrator succeeded by an administrator *de bonis non*, according to Lord Redesdale and Daniell, the latter may continue by a bill of revivor,[42] according to Judge Story, only by a bill in the nature of revivor;[43] in no case by a supplemental bill. It has been held that in a case where the defendant is entitled to affirmative relief in his answer without a cross-bill, as a suit under Section 4918 of the Revised Statutes, the complainant may plead in a supplemental bill any matter in defense to such a claim for affirmative relief, that he might have pleaded by supplemental answer to a cross-bill, had one been filed.[44] A supplemental bill must not be inconsistent with the original bill. Thus, where the original bill stated that the defendants claimed to be a corporation, but were not incorporated, it was

38 Dadirrian v. Gullian, 80 Fed. 986.

39 White v. Miller, 158 U. S. 128, 39 L. ed. 921.

40 Mitford's Pl., ch. 1, § 3.

41 Houlditch v. Marquis Donnegall, 1 S. & S. 491; Dixon v. Wyatt, 4 Madd. 392; Daniell's Ch. Pr. (2d Am. ed.) 1671, 1672; Story's Eq. Pl., § 265.

42 Mitford's Pl., ch. 2, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Owen v. Curzon, 2 Vern. 237; Huggins v. York Buildings Co., 2 Eq. Abr. 3, pl. 14.

43 Story's Eq. Pl., § 382, n. 1.

44 Electrical A. Co. v. Brush El. Co., 44 Fed. 602, 607; *supra*, §§ 154-171.

held improper to file a supplemental bill claiming relief upon the ground that the defendants were a corporation.[45] Where the original bill against a corporation prayed an injunction and, as incidental relief, a receiver, and the defendant was dissolved by proceedings in a State court, after the issue of an inquisition, but before the appointment of a receiver, a supplemental bill seeking to continue the injunction against the liquidators was held improper.[46] A defective original cannot be cured by new matter subsequently arising, set forth in a supplemental bill, such as the entry of judgment in favor of the plaintiff subsequent to his filing a creditor's bill.[47] The only exceptions to this rule are the probate of a will, or obtaining letters of administration by a party who has sued as executor or administrator, and a few other cases of the perfection of an inchoate right.[48]

§ 232. Parties and frame of a supplemental bill. As a general rule, all parties to the original suit must be made such to a supplemental bill filed to supply a defect in it,[1] unless such a bill be filed to bring in a mere formal defendant, or to allege matter which cannot possibly affect a decree against more than one defendant, when the others need not be made parties to it.[2] An objection for want of parties must, however, be made by motion to dismiss, answer, or when the motion for leave to file the bill is argued. It may be too late to make it at the hearing.[3] If the court had jurisdiction of the original bill it will take jurisdiction of the supplemental bill, no matter what may be the citizenship of the new parties;[4] provided at least that they have a right to sue and be sued in a Federal court.[5] A "supplemental bill must state the original

45 Maynard v. Green, 30 Fed. 643.

46 Lang v. Louisiana Canning Co., 56 Fed. 675.

47 Putney v. Whitmore, 66 Fed. 385; Neubert v. Massman, 37 Fla. 91, 19 So. 625; Heffron v. Knickerbocker, 57 Ill. App. 339; N. Y. Security & Tr. Co. v. Lincoln Street Ry. Co., 74 Fed. 67. But see s. c., 77 Fed. 525.

48 *Supra*, § 164.

§ 232. 1 Daniell's Ch. Pr. (2d Am. ed.) 1678; Jones v. Jones, 3 Atk. 217; Dyson v. Morris, 1 Hare, 413; Jones v. Howells, 2 Hare, 342.

2 Greenwood v. Atkinson, 5 Sim. 419; Dyson v. Morris, 1 Hare, 413; Wilkinson v. Fowkes, 9 Hare, 193; Story's Eq. Pl., § 343.

3 Jones v. Jones, 3 Atk. 217.

4 Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. ed. 886. See § 21.

5 See Adams Express Co. v. Denver & R. G. R. Co., 16 Fed. 712;

bill, and the proceedings thereon, and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties."[6] The Equity Rules provide that "It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."[7] This, however, although copied in substance from an English Chancery order,[8] is merely a reaffirmance of the pre-existing practice.[9] If the bill brings in no new party, there is never any need of its containing any of the statements in the original pleadings.[10] When, however, it brings in a new party, as it is in fact original as to him, it must state enough of the former proceedings to show an equity against him.[11] These need not be averred positively; but it will be sufficient to state that such matters were alleged in the former bill or answer,[12] and only so much of the original pleadings need be set forth as suffice to show an equity against the new party.[13] The prayer of a supplemental bill is adapted to the object for which it is exhibited. It formerly always concluded with a prayer for process in the usual form.[14] Whether this is now necessary when no new defendants are brought in may be doubted.[15] It should be signed by the solicitor,[16] and in other respects conform to the form of an original bill.[17] Where no objection to the form of proceedings is made, relief which regularly should only be granted upon a supplemental bill, may be allowed upon a petition.[18] A supplemental bill may be filed

Omaha H. R. Co. v. Cable T. Co., 33 Fed. 689.

6 Mitford's Pl., ch. 1, § 3.

7 Eq. Rule 35; copied from Eq. Rule 58 of 1842.

8 See Order 47 in Chancery, of August, 1841.

9 Daniell's Ch. Pr. (2d Am. ed.) 1675–1678.

10 Daniell's Ch. Pr. (2d Am. ed.) 1675.

11 Baldwin v. Mackown, 3 Atk. 817; Daniell's Ch. Pr. (2d Am. ed.) 1675, 1676.

12 Lloyd v. Jones, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1676.

13 Vigers v. Lord Audley, 9 Sim. 72; Attorney-General v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1676, 1677.

14 Daniell's Ch. Pr. 1680.

15 See Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333.

16 Eq. Rule 24.

17 Daniell's Ch. Pr. (2d Am. ed.) 1680.

18 Coburn v. Ohio Valley Land & Cattle Co., 138 U. S. 196, 223, 34 L. ed. 876, 887.

at any time during the progress of a suit, as well after as before a decree,[19] and even during the pendency of an appeal.[20] It seems, however, that if matters which make it necessary or advisable were known to the party filing it before the entry of the decree, afterwards it will be too late;[21] though such an objection must be taken before the hearing upon the supplemental bill.[22]

§ 233. Proceedings upon supplemental bills. The Equity Rules provide: "Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof."[1] The petition for leave to file such a bill need not state the averments which are intended to be inserted therein; but must state sufficient to advise the opposite parties and the court of the ground upon which the relief is sought.[2] It was held that upon the return of the order to show cause an objection which was a proper ground for a demurrer could not be raised.[3] The objection that a supplemental bill was filed without leave was not a ground of demurrer, but only for a motion to dismiss which rested in the discretion of the court.[4] A motion would not lie to take a supplemental bill off the file for irregularity upon the ground that it does not state supplemental matter.[5] The proper course in such a case

19 Root v. Woodworth, 150 U. S. § 401, 37 L. ed. 1123; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24; Daniell's Ch. Pr. (2d Am. ed.) 1659, 1660; Story's Eq. Pl., §§ 333, 338*a*; 2 Barbour's Ch. Pr. 167; O'Hara v. Shepherd, 3 Md. Ch. Dec. 306; Jenkins v. Eldredge, 3 Story, 299; Woodward v. Woodward, 1 Dick. 33; Dormer v. Fortesque, 3 Atk. 124; Secor v. Singleton, 41 Fed. 725.

20 Woodward v. Woodward, 1 Dick. 33.

21 Pendleton v. Fay, 3 Paige (N. Y.), 204; Story's Eq. Pl., § 338*a*.

22 Fulton Bank v. N. Y. & S. C. Co., 4 Paige (N. Y.), 127.

§ 233. 1 Equity Rule 34.

2 Parkhurst v. Kinsman, 2 Blatchf. C. C. 72.

3 Oregon & Trans. Co. v. N. Pac. Ry. Co., 32 Fed. 428.

4 Henry v. Travelers' Ins. Co., 45 Fed. 299, 303.

5 Bowyer v. Bright, 13 Price, 316; Daniell's Ch. Pr. (2d Am. ed.) 1682.

was to demur, or to object to the order allowing it to be filed.[6] Such motion might, however, be granted if a bill filed should be different from that which the order allowed. A supplemental bill filed without leave may by a subsequent order be allowed to remain on file.[7] No subpœna need be issued upon such a bill unless new defendants are to be brought in; and then they only need be served with process.[8] Such a subpœna is in the same form as one issued upon the filing of an original bill, except that it specifies the nature of the bill upon which it is issued.[9] A demurrer to a supplemental bill was in general subject to the same rules except as to time of filing the same, and would lie for the same reasons as if the bill were original;[10] but there were some grounds of demurrer peculiar to bills of this class. Thus, a demurrer would lie if it appeared upon the face of the bill that it pleaded matters which occurred before the institution of the suit, and which it was not too late to insert by amendment into the original bill.[11] A supplemental bill was demurrable where it showed on its face that the plaintiff knew the facts therein alleged before his time to amend had expired.[12] A supplemental bill was demurrable if when filed after a decree for an account it pleaded matter which it showed that the plaintiff knew before the decree;[13] when filed to introduce a claim founded upon a title entirely distinct from that in the original bill; as, when a man first sued claiming as heir-at-law, and afterwards sought by supplemental bill to plead a purchase of the interest of the true heir-at-law;[14] and when brought against a person who neither had nor claimed any interest in the subject-matter of the original suit.[15]

6 Ibid.

7 Mackintosh v. Flint & P. M. R. Co., 34 Fed. 582.

8 Shaw v. Bill, 95 U. S. 10, 14, 24 L. ed. 333, 334.

9 Daniell's Ch. Pr. (2d Am. ed.) 1680.

10 Daniell's Ch. Pr. (2d Am. ed.) 1681; Secor v. Singleton, 41 Fed. 725.

11 Mitford's Pl., ch. 2, § 2, part 1; Story's Eq. Pl., § 614; Stafford v. Howlett, 1 Paige (N. Y.), 200.

12 Henry v. Travelers' Ins. Co., 45 Fed. 299, 302.

13 Henry v. Travelers' Ins. Co., 45 Fed. 299, 303.

14 Tonkin v. Lethbridge, G. Cooper, 43; Daniell's Ch. Pr. (2d Am. ed.) 1681.

15 Baldwin v. Mackown, 3 Atk. 817; Mitford's Pl., ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

Any objections to a supplemental bill which do not appear upon its face may be taken by answer, which, in general, is subject to the same rules as answers to original bills.[16] If a defendant has not answered the original bill, his successor may be called upon in the supplemental bill to do so.[17] When that is done, the usual course is to include the answer to the original and that to the supplemental bill in the same pleading,[18] although it is not absolutely irregular to separate them.[19] A defense cannot be pleaded to a supplemental bill which has previously been pleaded to the original bill and overruled.[20] If the plaintiff wished to join issue upon averments in the answer, he might file a replication to it.[21] If the new matter in the supplemental bill is not admitted, it must be proved, or the bill will be dismissed with costs.[22] For this purpose evidence may be taken and a hearing had as upon an original bill.[23] Discovery might be obtained by a supplemental bill.[24] If there has been no previous hearing and decree, both bills may be brought to a hearing together, and a single decree will suffice for both.[25] If the supplemental bill is heard alone, the evidence taken in the original suit may be read in support of or in opposition to it.[26] The effect of a supplemental bill when sustained is to put the suit in the same condition as if the supplemental matter had been alleged and the new party, if any, brought in at its institution.[27] A bill improperly styled a supplemental bill was dismissed upon a demurrer, which specified that objection, although it might have been sustained as a bill in the nature of a supplemental bill.[28] Where, pend-

16 Daniell's Ch. Pr. (2d Am. ed.) 1682.

17 Vigers v. Lord Audley, 9 Sim. 408.

18 Vigers v. Lord Audley, 9 Sim. 408.

19 Sayle v. Graham, 5 Sim. 8.

20 Pentlarge v. Pentlarge, 22 Fed. 412; Scott v. Lazell, 177 Fed. 608.

21 Daniell's Ch. Pr. (2d Am. ed.) 1683; Perkins v. Hendryx, 31 Fed. 522.

22 Daniell's Ch. Pr. (2d Am. ed.) 1683; Pedrick v. White, 1 Met. (Mass.) 76.

23 Lloyd v. Jones, 9 Ves. 27; Daniell's Ch. Pr. (2d Am. ed.) 1683.

24 Mitford's Pl., ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1684, 1685.

25 Daniell's Ch. Pr. (2d Am. ed.) 1684; Turrell v. Spaeth, 9 Off. Gaz. 1663.

26 Daniell's Ch. Pr. (2d Am. ed.) 1666, 1667.

27 Ibid.

28 Campbell v. New York, 35 Fed. 14. But see Ross v. City of Ft. Wayne, 58 Fed. 404, 406.

ing an appeal, a supplemental bill was filed; it was held, that a mandate ordering the dismissal of the original bill did not affect the supplemental pleading.[29] The refusal of permission to file a supplemental bill will rarely be a ground of refusal upon an appeal, when the complainant has the right to file an original bill for the same relief.[30] After a reversal, where the mandate gives directions "to grant leave to both sides to adduce further evidence," the court of first instance has power to permit the filing of a supplemental bill.[31]

§ 234. Bills in the nature of supplemental bills in general. A bill in the nature of a supplemental bill is a bill filed to obtain the benefit of a suit, either after an abatement which cannot be cured by bill of revivor or a bill in the nature of a bill of revivor, or after the suit has become defective in cases which do not admit of a supplemental bill to supply that defect.[1] Cases frequently occur in practice where the interest of an original party to a suit is completely determined, and another person becomes interested in the subject-matter by a title not derived from the other, but in such a manner as to make it proper that the benefit of the former proceedings should be had by or against the latter, without incurring the expense of commencing an entirely new proceeding. In such a case, the benefit of the former proceedings may be obtained by means of a bill called an original bill in the nature of a supplemental bill, or a bill in the nature of a supplemental bill.[2] Such a bill must be filed to bring into a suit the assignee of a sole plaintiff who had acquired his interest during its pendency.[3] The reason given for this is the doctrine of main-

29 Berliner Gramaphone Co. 1 Seaman, C. C. A., 113 Fed. 750; *infra*, § 518.

30 Brookfield v. Novelty Glass Mfg. Co., C. C. A., 170 Fed. 960.

31 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 268, 54 L. ed. 190, 192.

§ 234. 1 Mitford's Pl., ch. 1, § 3; Campbell v. New York, 35 Fed. 14; Tappan v. Smith, 5 Biss. 73. But see Secor v. Singleton, 41 Fed. 725, 726; Napier v. Westerhoff, 153 Fed. 985; Haarmann-DeLaire-Schaffer Co. Co. v. Lenders, 135 Fed. 120.

2 Daniell's Ch. Pr. (2d Am. ed.) 1685; Mitford's Pl., ch. 1, § 3.

3 Daniell's Ch. Pr. (2d Am. ed.) 1667; Campbell v. New York, 35 Fed. 14; Ross v. City of Ft. Wayne, 58 Fed. 404; s. c. on appeal, 65 Fed. 466; Tappan v. Smith, 5 Biss. 73; George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496; Pittsburgh, S. & N. R. Co. v. Fiske, C. C. A., 178 Fed.

tenance, in consequence of which "it is not enough for the new plaintiff to state that his assignor instituted a suit and assigned to him the benefit of it; he must show that his assignor had the property in respect of which the suit was instituted, and that property has been assigned and carries with it the right to sue."[4] Such a bill may be brought by the assignee of the complainant to a bill to enjoin the infringement of a patent and for an account of profits and damages, although the assignment was made, and the bill in the nature of a supplemental bill was filed, after the expiration of the patent, pending the suit, and merely for the purpose of collecting damages.[5] Where a majority of the bondholders had removed a trustee, after he had brought a suit for the benefit of the minority, the court refused to permit the new trustee, who was hostile to the suit, to be substituted for the original plaintiff by a bill in the nature of a supplemental bill.[6]

The assignee of a decree for an injunction and an account of damages caused by the infringement of a trade-mark may have the benefit of the suit by filing an original bill in the nature of a supplemental bill.[7] An assignee, who files a bill in the nature of a supplemental bill, is ordinarily entitled to the benefit of all the proceedings in the original suit, as against the original defendants; but they may avail themselves of any equity or defense, which could be urged against the new complainant, although it did not exist against the original complainant; and also of any equity or defense, which has arisen since the original bill was filed.[8] Neither such a bill nor a supplemental bill will be sustained when filed by a purchaser of a railroad at a foreclosure sale to obtain the benefit of a decree enjoining the collection of taxes obtained by stockholders in a

66. But see Hoxie v. Carr, 1 Summ. 173; Sedgwick v. Cleveland, 7 Paige (N. Y.) 290; Murray v. Orr & Lockett Hardware Co., C. C. A., 153 Fed. 369.

[4] White on Supplement and Revivor, 126, 174; Daniell's Ch. Pr. (2d Am. ed.) 1667.

[5] Ross v. City of Ft. Wayne, 58 Fed. 504; s. c. on appeal, 63 Fed. 466.

[6] March v. Romare, 114 Fed. 200.

[7] Walter Baker & Co. v. Baker, 89 Fed. 673. But see New York, B. & P. Co. v. N. J. C. S. & R. Co., 47 Fed. 504.

[8] Haarmann-DeLaire-Scheffer Co. v. Lenders, 135 Fed. 120.

suit brought subsequent to the mortgage.[9] So where a defendant dies before appearance or a decree against him *pro confesso,* his successor can only be brought in by a bill in the nature of a supplemental bill, which, however, is considered merely supplemental as to the defendants.[10] Such a bill may be filed by a purchaser of the complainant's interest even after a decree;[11] but where the purchase was made after a direction for a decree, the bill should not be filed until after the decree is entered.[12]

§ 235. Frame of a bill in the nature of a supplemental bill. A bill in the nature of a supplemental bill "must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill."[1] It will not be impertinent for it to restate allegations of the bill or answer in the original suit, nor to charge new matter which occurred before the original bill was filed, for the purpose of meeting a defense in the original answer.[2] But a bill in the nature of a supplemental bill need contain no more of the allegations in the original bill than suffices to show a cause of action against the defendants to it.[3] Otherwise, its form should be, as far as possible, in compliance with that of an original bill. If, however, its object be merely to obtain the benefit of the proceedings in the original suit, the want of the difference of citizenship necessary to support an independent original bill will

9 Keokuk & S. W. R. Co. v. Scotland County, 152 U. S. 317, 38 L. ed. 457.

10 U. S. v. Fields, 4 Blatchf. 326; Crowfoot v. Mander, 9 Sim. 396; Asbee v. Shipley, M. & G. 296; Daniell's Ch. Pr. (2d Am. ed.) 1673.

11 Walter Baker & Co. v. Baker, 89 Fed. 673; Hazleton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. 325.

12 Hazleton T. R. Co. v. Citizens' St. Ry. Co., 72 Fed. 325.

§ 235. 1 Mitford's Pl., ch. 1, § 3.

2 Woods v. Woods, 10 Sim. 197; Atty Gen. v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1667, 1668.

3 Daniell's Ch. Pr. (2d Am. ed.) 1675–1677; Vigers v. Lord Audley, 9 Sim. 72.

not deprive the court of jurisdiction of it, provided the first suit were properly brought.[4] A bill, which complies with the requirements of an original bill in the nature of a supplemental bill, may be sustained as one, although it is styled a supplemental bill.[5]

§ 236. Proceedings upon bills in the nature of supplemental bills. A bill in the nature of a supplemental bill is filed in the same manner as a supplemental bill, and the same rule governs the time of the filing of pleadings to it.[1] Otherwise, proceedings upon bills in the nature of supplemental bills resemble those upon independent original bills.[2] According to Lord Redesdale, "a new defense may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree."[3] As has been remarked by Lord Eldon, this passage contains an obscurity of language which is due to an obscurity in the subject.[4] But the probable meaning and the view of the matter best supported by authority are that upon the filing of what is called a bill in the nature of a supplemental bill, no further benefit of the proceedings in the original suit can be obtained than would be if it were styled merely an original bill; and the evidence and admissions and the benefit of the decree in the former suit will only be allowed when the parties to the second are in privity with those to the first suit.[5]

[4] Minnesota Co. v. St. Paul Co., 2 Wall. 609.

[5] Haarmann-DeLaire-Scheffer Co. v. Leuders, 135 Fed. 120. See Ross v City of Ft. Wayne, 58 Fed. 404, 406. But see Campbell v. City of New York, 35 Fed. 14.

§ 236. [1] Rule 57. See § 189.

[2] Mexican Ore Co. v. M. G. M. Co., 47 Fed. 351, 356.

[3] Mitford's Pl., ch. 1, § 3. See O'Brien v. Wheelock, 184 U. S. 450, 485, 46 L. ed. 636, 652.

[4] Lloyd v. Jones, 9 Ves. 37, 56.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1685, 1688; Great Western Tel. Co. v Purdy, 162 U. S. 329, 40 L. ed. 986. But see George W. Jackson, Inc. v. Friestedt Interlocking Channel Bar Co., 159 Fed. 496.

CHAPTER XIV.

IMPERTINENCE AND SCANDAL.

§ 237. Impertinence. Impertinence in a pleading consists of the introduction of any matter into the pleading which is not properly before the court for decision at the particular stage of the suit.[1] Facts not material to the decision are impertinent.[2] No matter is impertinent which is material in establishing the rights of the parties or in ascertaining the relief to be granted.[3] If an allegation in a bill, when proved, could exercise any proper influence upon the decision of the cause, it cannot be said to be impertinent.[4] Objections for impertinence are only sustained when it is apparent that the matter excepted to is not material or relevant or that the same is stated with needless prolixity. If it may be material, the objection will not be sustained, as that would leave the pleader without a remedy; but the allegations objected to will be allowed to remain and the effect thereof, if found to be true, determined on the final hearing.[5] Where the question whether matter in an answer was impertinent or not depended upon the date of the facts alleged and the date was omitted, it was held that the answer must be construed against the pleader and was subject to exception for impertinence.[6] Deductions from the facts stated, for example, allegations concerning the legal effect of instruments, are sometimes proper in equity pleadings and they are then not considered to be impertinent.[7] It

§ 237. [1] Blanton v. Chalmers, 158 Fed. 907.

[2] Chancellor Kent in Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106. See also Hood v. Inman, 4 J. Ch. (N. Y.) 437.

[3] Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

[4] South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

[5] Independent Baking Powder Co. v. Boorman, 130 Fed. 726; Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117; *supra*, §§ 68, 147.

[6] Greene v. Aurora Rys. Co., 158 Fed. 909.

[7] Allen v. O'Donald, 23 Fed. 573;

has been said to be permissible and it has been customary, to plead in answers in equity matters of law as well as matters of fact that constitute a defense.[8] It is customary in bills seeking the protection or enforcement of rights dependent upon complicated provisions of Federal or State statutes, to set forth such statutes, either at length or according to their legal effect; and when the complainant depends upon historical facts, of which the court will take judicial notice, to state such facts also. Sometimes, especially in patent cases,[9] former decisions of the court are pleaded. Although this practice is not strictly correct, it is still convenient for the court as well as counsel, inasmuch as the case shown by the bill is thereby made more easy of comprehension. It seems that exceptions to such allegations for impertinence cannot be sustained.[10] So, in a patent case,

Louisville & N. R. Co. v. Wright, 190 Fed. 252.

8 Deady, J., Chapman v. School Dist. No. 1, Deady, 108, 110. See, also, Louisville & N. R. Co. v. Wright, 190 Fed. 252.

9 Steam Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; Peters v. Chicago Biscuit Co., 142 Fed. 779.

It was held not to be impertinent when a complaint charged fraud in a partition suit, for the answer to set forth facts to show the good faith and regularity of the proceedings in the same. Mound City Co. v. Castleman, 171 Fed. 520. Nor, when a bill referred to a decision of a court, for the answer to aver that it involved no consideration of a question in the pending suit and had no relation thereto. Louisville & N. R. Co. v. Wright, 190 Fed. 252.

10 Wells v. Oregon Ry. & N. Co., 15 Fed. 561; s. c., 8 Sawyer, 600; Allen v. O'Donald, 23 Fed. 573; Steam Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; Peters v. Chicago Biscuit Co., 142 Fed. 779; Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117; South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

In a bill to enjoin the enforcement of an order of a State railroad commission for the reduction of railroad charges, an allegation that the reduction was made at the instance of the governor who was not a member of the commission; and quotations from his message to the legislature, and averments that he had in an address to the commission attacked a decision of the Supreme Court of the United States in violent language, were all held to be *impertinent;* but a statement of the action of the defendant's predecessors upon the same subject, and of the defendant's inaction against other railroad companies, was held to be relevant and *not* impertinent. Wilmington & W. R. Co. v. Board of R. Com'rs, 90 Fed. 33. See Einstein v. Schnebley, 89 Fed. 540. In a suit by a commercial exchange, to restrain the counterfeiting or simulating of the complainant's quotations of prices of grain and pork, it was held; that it was *im-*

allegations concerning the issue of foreign patents and the acquiescence therein in this and other countries, were held not

pertinent to allege the number of members of the complainant, the cost of maintaining and conducting its operations, the manner in which the necessary funds were raised, the market value of a seat therein, the character of the persons who might be admitted, the relations and contracts between the complainant and certain telegraph companies, with which it was not claimed that the defendants were in any way connected; and that no person or corporation was receiving market quotations from any of the telegraph companies specified, without having executed complainant's written contract restraining the furnishing of such quotations to bucket shop operators; but that paragraphs were *not* impertinent, which contained a recital of the objects of the complainant's incorporation and of the powers conferred by its charter, the manner of its operations, the way in which information concerning the sales made there was distributed by telegraph companies throughout the country, the time occupied in the dissemination of this information, and the circumstances which induce the complainant to refuse to allow its quotations to be given to telegraph companies, except under contracts that the latter would not furnish the same to persons who operated bucket shops. Board of Trade of Chicago v. National Board of Trade of Kansas City, 154 Fed. 238. In a bill by a stockholder against his corporation and its directors, to enjoin the enforcement of a contract made by them, whereby the profits and earnings of the corporation were fraudulently diverted from its stockholders and paid to one of the directors as royalties for the use of a worthless patent, which also prayed the recovery from him of the sums he had already received under the contract, alleging that he was practically insolvent, and asking that he be enjoined from transferring his stock; it was held: that allegations that three of the other defendant directors were sons of this defendant, and with him constituted a majority of the board, and were corruptly influenced by him in their directorial action, that they had no business, and were dependent upon him for support, and were living in an expensive and extravagant manner at his cost are *not* scandalous, nor impertinent. Burden v. Burden, 124 Fed. 259. In a suit against an administrator and others, to enforce an agreement by an intestate to make the plaintiff his heir, and to protect plaintiff's rights in the business carried on by such intestate; it was held: to be proper to allege that the decedent carried on the business during his lifetime in partnership with one of the defendants; that the same became extremely profitable and its good will of great value; that he had trouble with his relatives, which led to an estrangement; that he left no will; that administrators of his estate were appointed in another State; that complainant had no notice of proceedings in the Probate Court, which resulted in the appointment of one of the defend-

to be impertinent;[11] but it was held that averments as to decrees obtained by consent against strangers to the suit, and as to interference proceedings in the patent office, with which the defendants were not connected, were impertinent.[12] Great liberality is allowed in actions founded on the anti-trust act, where proof of a conspiracy is necessary,[13] and in suits to determine the validity of statutes fixing railroad rates.[14] It has been held that a short sentence, inserted out of abundant caution, should not be expunged as impertinent.[15] Needless repetitions are impertinent.[16]

§ 238. Scandal. Scandal is impertinent matter which is also reproachful.[1] Scandal is impertinent matter which is also criminatory or which otherwise reflects upon the character of an individual.[2] Usually nothing is considered scandalous which is relevant or responsive to the allegations of the bill.[3]

ants as administrator in the State where the suit was brought; that the relatives are so scattered and the property so widely distributed that it is impossible for the complainant to join all the parties in interest; and that she intends to institute another action in another State, to restrain them from interfering with the business there carried on; but that it was *impertinent* to allege; how the stores maintained by the decedent became valuable: and how interference with them in the manner proposed by defendants will destroy such value; and that complainant is trying to collect certain checks and drafts given her for value during her lifetime: and the administrators object and propose to contest. Hall v. Bridgeport Tr. Co., 122 Fed. 163. It has been said in England that similar allegations are improper. Hun Pr. 1913, p. 316.

11 Peters v. Chicago Biscuit Co., 142 Fed. 779.

12 Western El. Co. v. Williams, Abbott El. Co., 83 Fed. 842. See Board of Trade v. National Board of Trade, 154 Fed. 238.

13 Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 124.

14 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

15 Farmers' L. & T. Co. v. N. P. R. Co., 76 Fed. 15. But see Florida Mhg. & Inv. Co. v. Finlayson, 74 Fed. 671.

16 Kelly v. Boettcher, 85 Fed. 55, 60; Norton v. Woods, 5 Paige (N. Y.), 260; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; Nevada Nickel Syndicate v. National N. Co., 86 Fed. 486.

§ 238. 1 Chancellor Kent in Woods v. Morrell, 1 J. Ch. (N. Y.) 103, 106. See also Hood v. Inman, 4 J. Ch. (N. Y.) 437. For an illustration of scandal, see the record in U. S. v. Schurz, 102 U. S. 378, 26 L. ed. 167.

2 Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

3 Peck v. Peck, Mosely, 45; Woods v. Morrell, 1 J. Ch. (N. Y.)

But in an English case brought by a clergyman, where the defendant included in a schedule of accounts a charge for money paid by him for an order of filiation of a bastard made upon the plaintiff, the court held the item, although relevant, a proper subject of exception, because the mode of bringing it forward was intended to drive the plaintiff out of his parish.[4] It may be doubted whether so much respect for the cloth would be shown by an American court. Matters that are relevant are not scandalous, unless expressed in a needlessly offensive manner.[5] It has been held: that an allegation that a proposed decree was made "without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein," and not "after full consideration," is not scandalous, since it contains no imputation upon the court;[6] and that an averment in an answer to an action upon a judgment, that the judgment was fraudulent and had been obtained by false and perjured testimony, was not impertiment or scandalous.[7] Allegations concerning motives are scandalous when not material.[8] When material, they are not scanda-

103, 106; Fisher v. Owen, L. R. 8 Ch. D. 645; McNulty v. Wiesen, 130 Fed. 1012; Story's Eq. Pl., § 862; Portsmouth v. Fellows, 5 Mass. 450. In a bill to remove the directors of a bank for paying a loss resulting from an illegal loan made by the officers, it was held proper to allege the previous unlawful management of the bank. Wilkinson v. Dodd, 42 N. J. Eq. 234; s. c. as Dodd v. Wilkinson, 42 N. J. Eq. 647. Allegations to meet charges of bad faith made in the bill were held not scandalous. Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 84 Fed. 379.

4 Atty. Gen. v. Hewit, in Chanc., July, 1801; cited in Cooper's Eq. Pl. 319; Story's Eq. Pl., § 862.

5 Burden v. Burden, 124 Fed. 250.

6 Miller v. Buchanan, 5 Fed. 366.

7 Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006.

8 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225, averments of the motive of State officers and legislature prescribing and enacting a law: U. S. v. Kettenbach, 175 Fed. 463, holding that in a suit to cancel land patents under the timber and stone act (Act of June 3, 1878, c. 151, 20 St. at L. 89, Comp. St. 1901, p. 1545) for fraud, charging that the entrymen did not make their entries in good faith, but with intent to transfer their rights to others, charges of transfers and acts indicating a motive at the time final proof was made to transfer the land were subject to exception for impertinence, since the illegal purpose in the primary application was the sole test of good faith. It was further held that allegations setting forth the rules and regulations of the Department of the Interior prescribing interrogatories to applicants for

lous.[9] Allegations of want of good faith in the entry of the land were impertinent, since good faith in the primary application for entry was not averred.[10] Matter which is purely evidentiary is ordinarily held to be impertinent.[11] Threats to violate an injunction, if granted, were held not to be impertinent, nor scandalous, in a bill praying such injunction.[12] Averments that power conferred by a statute on a railroad commission was so used as to discriminate against the complainants and to favor their rivals, as a reward for dismissing suits brought by the latter to test the law's validity, are neither impertinent nor scandalous.[13]

§ 239. Striking out scandal and impertinence. Before the Equity Rules of 1912, objections to matter as impertinent or scandalous were raised by exceptions, which were regularly referred to a master.[1] The Equity Rules of 1912 provide: "The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, im-

timber land at the final proof and the scope of the alleged conspiracy and other acts relating solely to such final proofs, together with allegations of the inducement by the defendant of the entrymen to make false answers to such questions, and the false answers made accordingly "for the purpose and to the end that the said officers and the other officers of the United States concerned and charged with the administration of the laws governing the disposal of the public lands might, and should, thereby be deceived, imposed upon, and fraudulently misled, and so prevented from further inquiry, investigation, and consideration concerning such entries"; were all impertinent. Ibid. 175 Fed. 463, 465. An allegation is an answer that plaintiff brought this suit in a State distant from that of the defendants' residence for the purpose of harassing them and involving them in large expense was held to be impertinent. Whittemore v. Patten, 84 Fed. 51.

9 Portsmouth v. Fellows, 5 Madd. 450, holding that allegations that a trustee was actuated by corrupt and improper motives were not scandalous or impertinent in a suit by the beneficiaries to remove him.

10 U. S. v. Kettenbach, 175 Fed. 463.

11 Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117. But see South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

12 South & N. A. R. Co. v. Railroad Commission of Ala., 171 Fed. 225.

13 Ibid.

§ 239. 1 Eq. Rules of 1842, 26 and 27; Langdon v. Goddard, 3 Story, 13; Hood v. Inman, 4 J. Ch. (N. Y.) 437; Foster's Fed. Pr., 4th ed., §§ 68, 147.

pertinent or scandalous matter stricken out, upon such terms as the court shall think fit." [2] Before the adoption of these rules, the court had power to expunge scandalous matters on its own motion at any time.[3] Under Equity Rule 21, it has not yet been decided whether, in this manner, objections to the sufficiency in law of part of a charge in a bill or part of a defense in an answer can be raised. Under the former practice, it was held that such matter in a bill [4] or answer [5] might be expunged by motion. But these cases have not been generally followed,[6] and it was sell settled that mere insufficiency of matter in an answer that was responsive could not be tested by exception [7] or by demurrer,[8] unless it was an erroneous conclusion of law.[9] The Equity Rules of 1912, however, provide: that the defendant may move to dismiss any part of the bill upon five days notice; and that any point of law going to the whole or a material part of the cause or causes of action stated in the bill or defense, theretofore presentable by plea in bar or abatement, may be separately heard and disposed of before final hearing in the discretion of the court; [10] and that if an answer sets up an affirmative defense, the sufficiency of the same may be tested upon motion to strike out, upon five days' notice or such further time as the court may allow.[11] "Exceptions for insufficiency of an

2 Eq. Rule 21.

3 Kelly v. Boetteher, 85 Fed. 55; *Ex parte* Simpson, 15 Ves. 476; Daniell's Ch. Pr. (2nd Am. ed.) 402, 403; Story's Eq. Pl., § 270. See, also, Langdon v. Goddard, 3 Story, 13.

4 Hobbs Mfg. Co. v. Gooding, C. C. A., 176 Fed. 259.

5 Savings & Tr. Co. v. Bear Valley Irr. Co., 112 Fed. 693, 702, 704.

6 In U. S. v. Kettenbach, 175 Fed. 463, held that such a motion to strike out part of an amended bill could not be made. In Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 123, held that such a motion could not be made to test the sufficiency of the complaint.

7 Walker v. Jack, C. C. A., 88 Fed. 576, 31 C. C. A. 462; Greene v. Aurora Rys. Co., 158 Fed. 909.

8 Crouch v. Kerr, 38 Fed. 549; Grether v. Wright, C. C. A., 75 Fed. 742, 23 C. C. A. 498, 43 U. S. App. 770; Besson & Co. v. Goodman, 147 Fed. 887; Blanton v. Chalmers, 158 Fed. 907; Louisville & N. R. Co. v. Wright, 190 Fed. 252

9 Adams v. Bridgewater Iron Co., 6 Fed. 179; Bower-Barff R. I. Co. v. Wells R. I. Co., 43 Fed. 391. But see Ford v. Douglas, 5 How. 143, 165, 12 L. ed. 89, 99; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478; s. c., below, 7 New Mexico, 666.

10 Eq. Rule 29.

11 Eq. Rule 33.

answer are abolished."[12] "If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter."[13]

Under the former practice, matter that otherwise might have been considered to be impertinent or scandalous was not stricken out when intermingled with essential allegations so that their omission would render a sentence without meaning.[14] Neither scandal, nor impertinence, however gross, is a ground for dismissing the whole bill, it being a maxim of pleading that *utile per inutile non vitiatur*.[15] Under the former practice, it was held that an exception for impertinence must be allowed in the whole or not at all.[16]

[12] Ibid.

[13] Ibid.

[14] Ware-Kramer Tobacco Co. v. Am. Tobacco Co., 178 Fed. 117, 123.

[15] Daniell's Ch. Pr. (2d Am. ed.) 401. See, also, Pacific R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505, 516, 522, 28 L. ed. 498, 502, 504.

[16] Chapman v. School District, Deady, 108, 117.

CHAPTER XV.

MOTIONS TO MAKE PLEADINGS MORE DEFINITE AND CERTAIN AND BILLS OF PARTICULARS.

§ 240. Distinction between motions to make pleadings more definite and certain and bills of particulars. The Equity Rules provide: "A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."[1] The distinction between these two kinds of relief is not clear. In Wisconsin it has been held that there is no such distinction.[2] In New York, an order will be made directing a pleading to be made more definite and certain only when its precise meaning or application is not clear.[3] Matters of time, place and circumstances, unless they constitute material parts of a cause of action or a defense, can only be obtained by a bill of particulars. It has been held that items of an account can only be obtained by a bill of particulars.[4]

§ 241. Motions to make pleadings more definite and certain. A demurrer for lack of certainty to the whole bill or to a part thereof took the place now occupied by a motion to make the bill more definite and certain.[1] Such demurrers were

§ 240. [1] Eq. Rule 20.

[2] Conover v. Knight, 84 Wisc. 639, 642, 54 N. E. 1002.

[3] Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Dumar v. Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Suppl. 669. See Cook v. Matteson, 33 N. Y. St. Rep. 497; Jackman v. Lord, 56 Hun (N. Y.) 192; Ronget v. Haight, 57 Hun (N. Y.) 119; Madden v. Underwriting Pub. Co., 10 Misc. (N. Y.) 27; Harrington v. Stillman, 120 App. Div. (N. Y.) 659, 105 N. Y. Supp. 75.

[4] Clegg v. Am. Newspaper Union, 7 Abb. N. C. (N. Y.) 59; St. John v. Beers, 24 How. Pr. (N. Y.) 377. *Contra*, MacAdam v. Scudder, 127 Mo. 345, 30 S. W. 168; Meyer v. Chambers, 68 Mo. 626; Gfeller v. Graefemann, 64 Mo. App. 162.

§ 241. [1] Chicago, M. & St. P. R. Co. v. Pullman P. C. Co., 50 Fed. 24; Green v. Terwilliger, 56 Fed.

especially favored as regards allegations of fraud.[2] Such motions have been granted in the case of alternative averments;[3] or a failure to show the nature or source of a title pleaded;[4] or whether a contract was oral or in writing;[5] or in what a failure of consideration consisted;[6] or in what character the defendant was sued;[7] and as to allegations of time or place, which were material parts of the cause of action or defense as to which the motion was made.[8] Such motions have also been granted when denials were indefinite,[9] and when knowledge or information was denied concerning matters presumptive-

384; Thomas v. Nantahala, M. & T. Co., C. C. A., 58 Fed. 485. In an action for damages because of the infringement of a patent, the court ordered the plaintiff to make his complaint at common law more definite and certain so as to show which of several patents, one of which had expired, the defendant's articles infringed. Fischer v. Automobile Supply Mfg. Co., 199 Fed. 191.

2 Rorback v. Dorsheimer, 25 N. J. Eq. 516, 518; Mason v. Daly, 117 Mass. 403; James v. City Investing Co., 188 Fed. 513; § 137, *supra*. See Patton v. Whitney, 5 N. Y. St. Rep. 845; Claflin v. Smith, 13 Abb. N. C. (N. Y.) 205, 4 Civ. Pro. R. (N. Y.) 240, 66 How. Pr. (N. Y.) 168. *Contra*, Williams v. Folsom, 26 Abb. N. C. (N. Y.) 374, 37 N. Y. St. Rep. 635.

3 Hasberg v. Moses, 81 N. Y. App. Div. 199, 80 N. Y. Supp. 867; Corbin v. George, 2 Abb. Pr. (N. Y.) 465.

4 Livingston v. Ruff, 65 S. C. 284, 43 S. E. 678; Waldo v. Milroy, 19 Wash. 156, 52 Pac. 1012.

5 New York First Presb. Church v. Kennedy, 72 N. Y. App. Div. 82, 76 N. Y. Supp. 284.

6 Griffith v. Wright, 21 Wash. 494, 58 Pac. 582.

7 Seasongood v. Fleming, 74 Hun (N. Y.) 639, 26 N. Y. Supp. 831.

8 Pierce v. Baird, 48 Ind. 378; Melvin v. St. Louis, etc., R. Co., 89 Mo. 106, 1 S. W. 286; People v. Ryder, 12 N. Y. 433; Mutual L. Ins. Co. v. Raymond, 118 N. Y. App. Div. 828, 103 N. Y. Supp. 839; Pigone v. Lauria, 115 N. Y. App. Div. 286, 100 N. Y. Supp. 976; Cerro De Pasco Tunnel, etc., Co. v. Haggin, 106 N. Y. App. Div. 401 (action for libel); Warner v James, 94 N. Y. App. Div. 257, 87 N. Y. Supp. 976; Dumar v. Witherbee, 88 N. Y. App. Div. 181, 84 N. Y. Supp. 669; Bennett v. Lawrence, 71 N. Y. App. Div. 413, 75 N. Y. Supp. 902; Dexter v. Fulton, 86 Hun (N. Y.) 433, 33 N. Y. Supp. 901; Barlow v. Pease, 5 Hun (N. Y.) 564; McGehee v. Cooke, 55 Misc. (N. Y.) 40, 105 N. Y. Supp. 60; Rosenthal v. Rosenthal, 10 N. Y. Supp. 455; Lynch v. Walsh, 11 N. Y. Civ. Proc. 446; 31 Cyc. 650.

9 Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Pfaudler Process Fermentation Co. v. McPherson, 3 N. Y. Supp. 609; Burley v. German Am. Bank, 5 N. Y. Civ. Proc. 172; O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399; Borsuk v. Blauner, 93 N. Y. App. Div. 306, 87 N

ly within the knowledge of the pleader.[10] Under the practice of the different States it has been held: that a motion to make a pleading more definite and certain will not be granted when the indefinite allegations are immaterial,[11] or surplusage;[12] nor where the uncertainty has been removed by allegations in a subsequent part of the pleading;[13] nor where the details demanded pertain to the case or defense of the moving party.[14] A few cases hold: that the motion will not be granted where it appears that the matter demanded is not within the reach of the pleader,[15] although, in one case, it was held that the objectionable allegations, if not sufficiently definite, should be stricken out;[16] or where it appears that the moving party has sufficient information upon the subject,[17] or as much information as the pleader.[18]

Y. Supp. 851; Morgan v. Sammons, 66 S. C. 388, 44 S. E. 966.

10 Winchester v. Browne, 11 N. Y. Supp. 614, 25 Abb. N. Cas. 148; Hardman v. Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 544, 14 Cinc. L. Bul. 346.

11 Smith v. Trafton, 3 Robertson (N. Y.) 709; Maretzek v. Cauldwell, 2 Robertson (N. Y.) 715.

12 Choctaw, etc., R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870; Knox v. Trafalet, 94 Ind. 346; Indiana Stone Co. v. Stewart, 7 Ind. App. 563, 34 N. E. 1019; Schoonover v. Hinckley, 46 Iowa, 207; Davidson v. Seligman, 51 N. Y. Super. Ct. 47; Pearce v. Weidemeyer, 52 Misc. (N. Y.) 456, 102 N. Y. Supp. 505; Cook v. Matteson, 11 N. Y. Supp. 572; Parshall v. Tillou, 13 How. Pr. (N. Y.) 7; Shoemaker v. Dayton, etc., R. Co., 10 Ohio Dec. (Reprint) 252, 19 Cinc. L. Bul. 322; McCarville v. Boyle, 89 Wis. 651, 62 N. W. 517; Spensley v. Janesville Cotton Mfg. Co., 62 Wis. 549, 22 N. W. 574; 31 Cyc. 647.

13 Barron v. Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528.

14 Vanderveer v. Moran, 79 Neb. 431, 112 N. W. 581; Anonymous, 4 Ohio Dec. (Reprint) 234, 1 Clev. L. Rep. 148.

15 Corns v. Clouser, 137 Ind. 201, 36 N. E. 848; Louisville, etc., R. Co. v. Balch, 105 Ind. 93, 4 N. E. 288; Wheelock v. Barney, 27 Ind. 462; Baltimore, etc., R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. 265; Atchison, etc., R. Co. v. Davis, 70 Kan. 578, 79 Pac. 130; Orth v. St. Paul, etc., R. Co., 43 Minn. 208, 45 N. W. 151; Kellogg v. Baker, 15 Abb. Pr. (N. Y.) 286.

16 Pugh v. Winona, etc., R. Co., 29 Minn. 390, 13 N. W. 189.

17 St. Louis, etc., R. Co. v. French, 56 Kan. 584, 44 Pac. 12; West v. O'Neill, 14 Misc. (N. Y.) 235, 35 N. Y. Supp. 714; People v. New York City Cent. Under-Ground R. Co., 15 N. Y. Supp. 225.

18 Dr. Blair Medical Co. v. U. S. Fidelity, etc., Co., (Iowa 1902) 89 N. W. 20; Booco v. Mansfield, 66 Ohio St. 121, 64 N. E. 115; Herklotz v. Chase, 32 Fed. 433; Union

§ 242. Bills of particulars. Bills of particulars were formerly unknown to equity practice,[1] although they were frequently ordered in actions at common law. Where domination and undue influence was alleged, the plaintiff has been required to set forth the nature of her claim of domination and the particulars of the undue influence which she claimed existed, whether the same was exercised by threats, actual fraud or concealment, and to specify the nature of the threats, fraud concealment, or other instrumentality.[2] Where, in a suit to set aside a release as fraudulent, the answer set forth that the release was in consideration of a large sum of money advanced by the defendant to the plaintiff, a bill of particulars was ordered as to the amount of such advances.[3] A bill of particulars is usually ordered when a fiduciary relation exists.[4] A bill of particulars will not be ordered concerning immaterial allegations,[5] nor concerning allegations as to which the burden of proof is on the applicant.[6] In England, it has been held that the knowledge by the party is no bar to his motion for a bill of particulars.[7] The rule in New York seems to be otherwise.[8]

Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600; Barron v. Pittsburg Plate Glass Co., 10 Ohio S. & C. Pl. Dec. 114, 7 Ohio N. P. 528; Steelman v. Quaker City F. Ins. Co., 10 Pa. Co. Ct. 362; 31 Cyc. 646.

§ 242. [1] See Cornell v. Bostwick, 3 Paige (N. Y.) 160.

[2] Davis v. Davis, (Lehman, J., N. Y. Sup. Ct.) N. Y. L. J. March 2, 1912. In an action for conspiracy, the plaintiff was required to give a bill of particulars stating the respects in which the defendant's acts were unlawful and the manner of their combination or agreement to injure plaintiff, but not of the damages suffered by the plaintiff when there was no claim of special damages. Patterson v. Corn Exchange of Buffalo, 197 Fed. 686.

[3] Weiler v. Mooney, 9 N. Y. St. Rep. 651.

[4] Zierenberg v. Labouchere, (1893) 2 Q. B. 183.

[5] Cave v. Torre, 54 L. T. 515; Gibbons v. Norman, 2 Times Rep. 676.

[6] James v. Radnor County Council, 6 Times Rep. 40; Roberts v. Owen, 6 Times Rep. 172.

[7] Harbord v. Monk, 38 L. T. 411. But see Keogh v. Incorporated Dental Hospital of Ireland, (1910) 2 Irish R. 166.

[8] Powers v. Hughes, 39 N. Y. Supr. 482; Blackie v. Neilson, 6 Bosw. (N. Y.) 681; Young v. De-Mott, 1 Barb. (N. Y.) 30; Hoeninghaus v. Chaleyer, 22 N. Y. St. Rep. 528; Fink v. Jetter, 38 Hun (N. Y.) 163; Wigand v. Dejonge, 18 Hun (N. Y.) 405; Passavant v. Sickle, 14 Civ. Pro. R. (N. Y.) 57; Train v. Friedman, 4 Civ. Pro. R. (N. Y.) 109; Stevens v. Webb, 12

§ 243. Practice upon motion for bill of particulars. It is the better practice to precede a motion for a bill of particulars by a demand for such a bill.[1] The New York rule is that the application must be accompanied by an affidavit showing that the moving party has no knowledge or information respecting the matters as to which the particulars are demanded and has no means of obtaining information in regard thereto.[2] The affidavit must be made by the party and not by his attorney,[3] unless it appears that the attorney is the only person who has knowledge of all the facts therein alleged, and that it is impossible to obtain the party's affidavit.[4] The affidavit must further show that the allegations, as to which particulars are asked, are denied by the party applying for the order.[5]

Daly (N. Y.) 88, 4 Civ. Pro. R. (N. Y.) 64; Butler v. Mann, 9 Abb. N. C. (N. Y.) 49; Belasco v. Klaw, 96 App. Div. (N. Y.) 268.

§ 243. [1] See 31 Cyc. 583.

[2] Coolidge v. Stoddard, 120 N. Y. App. Div. 641, 105 N. Y. Supp. 544; Constable v. Hardenbergh, 76 Hun (N. Y.) 434, 27 N. Y. Supp. 1022; Webster v. Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Supp. 220; Dorgan v. Scheer, 31 Misc. (N. Y.) 801, 62 N. Y. Supp. 1030 (*affirmed* in 31 Misc. (N. Y.) 829, 64 N. Y. Supp. 383); Bowman Cycle Co. v. Dyer, 23 Misc. (N. Y.) 620, 52 N. Y. Supp. 159; Villiers v. Third Ave. R. Co., 22 Misc. (N. Y.) 17, 48 N. Y. Supp. 614; Wales Mfg. Co. v. Lazzaro, 19 Misc. (N. Y.) 477, 43 N. Y. Suppl. 1110 (*reversing* 18 Misc. (N. Y.) 352, 41 N. Y. Supp. 1134); Garfield Nat. Bank v. Peck, 1 Misc. (N. Y.) 126, 20 N. Y. Supp. 650; Gridley v. Gridley, 7 N. Y. Civ. Proc. 215; Orvis v. Dana, 1 Abb. N. Cas. (N. Y.) 268.

[3] Toomey v. Whitney, 81 N. Y. App. Div. 441, 80 N. Y. Supp. 826; Mungall v. Bursley, 51 N. Y. App. Div. 380, 64 N. Y. Supp. 674; Stevens v. Smith, 38 N. Y. App. Div. 119, 56 N. Y. Supp. 540; Mayer v. Mayer, 29 N. Y. App. Div. 393, 51 N. Y. Supp. 1079; Van Olinda v. Hall, 82 Hun (N. Y.) 357, 31 N. Y. Supp. 495; Gallerstein v. Manhattan R. Co., 27 Misc. (N. Y.) 506, 58 N. Y. Supp. 374 (*reversing* 26 Misc. (N. Y.) 852, 57 N. Y. Supp. 394; Mori v. Pearsall, 14 Misc. (N. Y.) 251, 35 N. Y. Supp. 829; Groff v. Hagan, 13 Misc. (N. Y.) 322, 34 N. Y. Supp. 462; Hoeinghaus v. Chaleyer, 4 N. Y. Supp. 814; Dueber Watch Case Mfg. Co. v. Keystone Watch Case Co., 21 N. Y. Supp. 342, 50 N. Y. St. 417, 23 N. Y. Civ. Proc. 44. But see Sanders v. Soutter, 54 Hun (N. Y.) 310, 7 N. Y. Supp. 549. Statutes providing for the verification of pleadings by attorney or agent do not apply to affidavits in support of applications of this character. Cohn v. Baldwin, 74 Hun (N. Y.) 346, 26 N. Y. Supp. 457.

[4] Mungall v. Bursley, 51 App. Div. (N. Y.) 380, 64 N. Y. Supp. 674. See 31 Cyc. 586.

[5] Talmadge v. Sanitary Security Co., 2 N. Y. App. Div. 43, 37 N. Y.

§ 244. Remedy for failure to give a bill of particulars. In New York, the remedy for a failure to give a bill of particulars, which has been ordered, is a motion to preclude the party from giving evidence concerning the matter, the particulars of which were directed,[1] or by a motion to strike out the pleading.[2] Where an insufficient bill is given, the remedy is a motion for a further bill.[3] Evidence upon the point omitted will not be excluded until such further bill had been ordered and the order disobeyed.[4] It is the safer practice there to return the defective bill served when demanding a compliance with the original order.[5] It is the better practice to procure a specific order precluding the party from giving evidence, after his failure to comply with the second order for a bill, or to insert in the order for the further bill a provision precluding evidence upon any points not therein specified.[6]

§ 245. Form of bill of particulars. A bill of particulars will be held to be sufficient if it fairly, in substance, gives the opposite party the information to which he is entitled,[1] as re-

Supp. 177; Webster v. Fitchburg R. Co., 32 Misc. (N. Y.) 442, 66 N. Y. Supp. 220.

§ 244. [1] Gross v. Clark, 87 N. Y. 272, 276; Foster v. Curtis, 121 App. Div. (N. Y.) 689; Prym v. Peck & Mack Co., 136 App. Div. (N. Y.) 566; Loscher v. Hager, 124 App. Div. (N. Y.) 568.

[2] Symonds v. Craw, 5 Cowen (N. Y.) 279; Whitmore v. Jennys, 1 Barbour (N. Y.) 53; Purdy v. Warden, 18 Wendell (N. Y.) 671; Gross v. Clark, 87 N. Y. 272, 276.

[3] Beirne v. Sanderson, 83 App. Div. (N. Y.) 62, 82 N. Y. Supp. 493; Romer v. Kensico Cemetery, 79 App. Div. (N. Y.) 100, 80 N. Y. Supp. 38; Mueller v. Tenth St., etc., Ferry Co., 38 App. Div. (N. Y.) 622, 56 N. Y. Supp. 310; Dueber Watch Case Mfg. Co. v. American, etc., Watch Co., 22 N. Y. Supp. 69, 29 Abb. N. Cas. 412; Mathushek Piano Co. v. Pearce, 21 N. Y. Supp. 920; Virtue v. Beacham, 17 N. Y. Supp. 450 (*affirmed* in 18 N. Y. Supp. 949); Gas-Works Constr. Co. v. Standard Gas-Light Co., 1 N. Y. Supp. 265; Bates v. Wotkyns, 2 How. Pr. (N. Y.) 18; Barnes v. Henshaw, 21 Wend. (N. Y.) 426; Purdey v. Warden, 18 Wend. (N. Y.) 651; James v. Goodrich, 1 Wend. (N. Y.) 289.

[4] Cerra de Pasco Tunnel, etc., Co. v. Haggin, 114 N. Y. App. Div. 116, 99 N. Y. Supp. 683; Reader v. Haggin, 114 N. Y. App. Div. 115, 99 N. Y. Supp. 684; Reader v. Haggin, 114 N. Y. App. Div. 112, 99 N. Y. Supp. 681.

[5] Ward v. Littlejohn, 2 Silv. Sup. (N. Y.) 589, 6 N. Y. Supp. 170, 17 N. Y. Civ. Proc. 178.

[6] Locker v. Am. Tobacco Co., 200 Fed. 973.

§ 245. [1] Boykin v. Persons, 95 Ala. 626, 11 So. 67; Ames v. Bell, 5 Cal. App. 1, 89 Pac. 619; Vila v

quired by the terms of the order directing the service of the same.[2] It should be as definite as the means of information at the command of the party serving the same will allow.[3] In England, a party may be allowed to give the best particulars he can, with leave to supplement the same within a reasonable and specified time before the trial.[4] A party suing or being sued in a representative capacity is only ordered to give the best particulars he can.[5] It was held that a paper improperly filed as an amended pleading might be treated as an amplification of a bill of particulars previously filed.[6] It has been said that, ordinarily, a bill of particulars need not be verified, unless an affidavit is required by statute.[7]

§ 246. Amendment of bill of particulars. In England an application to amend, or add to, a bill of particulars, if made a reasonable time before the trial will usually be allowed.[1] but

Weston, 33 Conn. 42; Columbia County v. Branch, 31 Fla. 62, 12 So. 650; Leib v. Butterick, 68 Ind. 199; Pierce v. Wilson, 48 Ind. 298; Morehead v. Anderson, 100 S. W. 340, 30 Ky. L. Rep. 1137; Scott v. Leary, 34 Md. 389; Snell v. Gregory, 37 Mich. 500; Voorhees v. Barr, 59 N. J. L. 123, 35 Atl. 651; Matthews v. Hubbard, 47 N. Y. 428; Kindberg v. Chapman, 115 N. Y. App. Div. 153, 100 N. Y. Supp. 685; Baker v. Sutton, 86 Hun (N. Y.) 588, 33 N. Y. Supp. 1072; Moss v. Crimmins, 30 Misc. (N. Y.) 300, 63 N. Y. Supp. 416; Redmond v. Buckley, 20 N. Y. Supp. 969; Donohue v. Pomeroy, 19 N. Y. Supp. 569; Duffy v. Ryer, 17 N. Y. Supp. 843; Stanley v. Millard, 4 Hill (N. Y.) 50; Smith v. Hicks, 5 Wend. (N. Y.) 48; MacDonald v. New York, etc., R. Co., 25 R. I. 40, 54 Atl. 795; Columbia Acc. Assoc. v. Rockey, 93 Va. 678, 25 S. E. 1009; Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389; Chesapeake, etc., Canal Co. v. Knapp, 9 Pet. 541, 9 L. ed. 222; Church v. Spiegelberg, 33 Fed. 158; Whitaker v. Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463; Perkins v. Irvine, 23 Nova Scotia, 250.

[2] Quinn v. Fitzgerald, 87 N. Y. App. Div. 539, 84 N. Y. Supp. 728; Mueller v. Tenth St., etc., Ferry Co., 38 N. Y. App. Div. 622, 56 N. Y. Supp. 310; People v. Cox, 23 Hun (N. Y.) 269; Mason v. Ring, 10 Bosw. (N. Y.) 598.

[3] Baremore v. Taylor, 53 N. Y. Super. Ct. 119; Mason v. Ring, 10 Bosw. (N. Y.) 598; Humphry v. Cottleyou, 4 Cow. (N. Y.) 54; Sullivan v. Waterman, 21 R. I. 72, 41 Atl. 1006; Long v. Kinard, Harp. (S. C.) 47; 31 Cyc. 588.

[4] 14 days' time. Marshall v. Interoceanic, etc., Co., 1 Times Rep. 394; Harbord v. Monk, 38 L. T. 411.

[5] Higgins v. Weekes, 5 Times Rep. 238.

[6] Ontario Powder Works v. Powell, 132 Mich. 451, 93 N. W. 1075.

[7] 31 Cyc. 589, citing Jones v. Barnett, 35 Md. 258.

§ 246. [1] Clarafede v. Commercial Union Ass'n. (C. A.) 32 W. R. 262.

not if it is sought thereby to introduce a new cause of action, such as fraud;[2] nor to increase a claim after payment of the full original claim into court.[3] At the trial, leave to amend a bill of particulars has usually been refused,[4] although a change of date has then been allowed on terms.[5] The rule in the different States of this Union is similar,[6] except that amendments of a bill of particulars at the trial are often granted when the opposite side will not be prejudiced by surprise.[7]

2 Cocksedge v. Metropolitan Coal Consumers' Ass'n., 65 L. T. 432.

3 Sanders v. Hamilton, (1907) 96 L. T. 679.

4 Moss v. Mailings, 33 Ch. D. 603.

5 McCarthy v. Fitzgerald, (1909, Ca.) 2 Irish R. 445.

6 31 Cyc. 589, 590.

7 31 Cyc. 589; citing Brownell Imp. Co. v. Critchfield, 96 Ill. App. 84 (*affirmed* in 197 Ill. 61, 64 N. E. 332); Farmers', etc., Bank v. Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Marion County School Dist. No. 73 v. Dudley, 28 Kan. 160; Gardner v. Gardner, 2 Gray, (Mass.) 434; Felter v. Manville, 23 Kan. 191. *Compare* Tate v. Hamilton, 81 Mich. 221, 45 N. W. 822. Fielder v. Collier, 13 Ga. 496; Reed v. Cooper, 30 Kan. 574, 1 Pac. 822; Towle v. Blake, 38 Me. 528; Lester v. Thompson, 91 Mich. 245, 51 N. W. 893; Mead v. Glidden, 79 Mich. 209, 44 N. W. 596; Collins v. Beecher, 45 Mich. 436, 8 N. W. 97; Haviland v. Fidelity Ins., etc., Co., 3 Pa. Co. Ct. 222; Lewis v. Jewett, 51 Vt. 378; Hopkins v. Stefan, 77 Wis. 45, 45 N. W. 676. But see Goforth v. Stingley, 79 Miss. 398, 30 So. Rep. 690.

CHAPTER XVI.

MOTIONS AND PETITIONS.

§ 247. Definition and classification of interlocutory applications. An interlocutory application is a request, not incorporated in a bill, made to the court for its interference in a matter arising in a cause either before or after a decree. An interlocutory application is made by motion or petition.

§ 248. Definition and classification of motions. A motion has been defined as "an application either by a party or his counsel, not founded upon any written statement addressed to the court." [1] But the rules of the Supreme Court of the United States provide that "all motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.[2] And most motions are supported by affidavits. Motions are either of course or special. Special motions are either *ex parte* or upon notice."

§ 249. Motions of course. Motions of course are those which, by some rule or practice of the court, are invariably granted without notice, and to which no opposition is allowed.[1] In Federal equity practice, the term is usually confined to such motions as are granted as of course by the clerk without the intervention of a judge of the court.[2] The equity rules provide that "all motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for taking bills *pro confesso;* and for other pro-

§ 248. [1] Daniell's Ch. Pr. (2d Am. ed.) 1787. See the language of Folger J., in Shaft v. Phoenix Mut. L. Ins. Co. 67 N. Y. 544, 547, 23 Am. Rep. 138. It has been said, however, that a careful practitioner should prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299.

[2] Supreme Court Rule 6.

§ 249. [1] U. S. v. Parrott, 1 McAll. 447, 454; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390; s. c., 14 C. C. A. 449.

[2] Robinson v. Satterlee, 3 Saw. 134, 141.

ceedings in the clerk's office which do not require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."[3] The order dismissing a bill for an omission to duly file a replication is an order as of course.[4] It has been held that an order for the issue of a commission is not.[5]

§ 250. Special motions without notice. A special motion is a motion which can only be granted by a judge of the court under special circumstances or in his discretion.[1] Such motions are either upon notice or without notice. Orders granted upon motions without notice are said to be *ex parte;* and the same term is applied to the motions upon which they are granted. An *ex parte* special motion must be supported by an affidavit.[2] *Ex parte* special motions are not common.[3] They are usually granted to prevent some irreparable injury to the moving party which would otherwise occur within the time limited for notice, when the same is required; and the court should always lend a willing ear to an application to discharge or set aside an *ex parte* order.[4] *Ex parte* orders may be obtained at any time and in any place within the jurisdiction of the judge, whether in court or elsewhere.[5] As a general rule, where a party has appeared he is entitled to receive notice of every application for an order, except applications for an extension of time and those of a like nature and motions which are granted as of course. No preliminary injunction

3 Equity Rule 5.

4 Robinson v. Satterlee, 3 Saw. 134, 141.

5 U. S. v. Parrott, 1 McAll. 447.

§ 250. 1 U. S. v. Parrott, 1 McAll. 447, 454; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390; s. c., 14 C. C. A. 449.

2 Daniell's Ch. Pr. (2d Am. ed.) 1789.

3 McLean v. Lafayette Bank, 3 McLean, 503; U. S. v. Parrott, 1 McAll. 447; Marshall v. Mellersh, 5 Beav. 496; Gray v. C. I. & N. R. Co., 1 Woolw. 63.

4 Daniell's Ch. Pr. (2d Am. ed.) 1789, 1790; Isnard v. Cazeaux, 1 Paige (N. Y.), 39; Hart v. Small, 4 Paige (N. Y.), 551.

5 Daniell's Ch. Pr. (2d Am. ed. 1789; Equity Rule 3; Horn v. Pere Marquette R. Co., 151 Fed. 626; *infra*, § 255.

6 Isnard v. Cazeaux, 1 Paige (N. Y.) 38; Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 390; s. c., 14 C. C. A. 449. See, also, Marshall v. Mellersh, 5 Bev. 496; Daniell's Ch. Pr., (2d Am. ed.), 1789, 1790.

is granted without notice; [7] but when notice has been given of a motion for an injunction, and there appears to be danger of irreparable injury from delay, a temporary restraining order may be granted without notice.[8] The matter must then be returnable within ten days, and the stay order is dissolved unless the party who obtained the order proceeds with his application for an injunction. It may also be dissolved or modified upon two days' notice.[10] Under extraordinary circumstances, receivers may be appointed *ex parte*.[11] Writs of *ne exeat republica* are usually granted *ex parte*.[12] The proper practice, when the judge is absent, is to submit the motion papers to the clerk, not to send them to the judge by mail.[13]

§ 251. Notice of motion. "Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." [1] "Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solictors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order." [2] The length and manner of service of notices of motion is usually regulated by rule or local practice differently in the several districts or circuits. The State practice is often followed.[3] It has been held, that service of a notice of a motion for a

7 Eq. Rule 73; *infra*, § 292.

8 Ibid. Jud. Code, § 263, 36 St. at L. 1087.

9 Ibid.

10 Ibid.

11 Phelps v. Mutual Reserve Fund Life Ass'n., C. C. A., 61 L.R.A. 717, 112 Fed. 453; Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; and other cases cited *infra*, § 317.

12 Collinson v. ————, 18 Ves. 353; Daniell's Ch. Pr., (2d Am. ed.) 1789, 1937; *infra*, § 328.

13 *Re* Kinney, C. C. A., 135 Fed. 340.

§ 251. 1 Eq. Rule 1.

2 Eq. Rule 4. But see Eq. Rule 8; quoted *infra*, § 257.

3 S. D. N. Y., Rule 15.

Where the attorney for a party has died and no successor has appeared or been appointed, it seems

relief by a receiver may be made by mail, addressed to a party to the suit, who lives outside the district.[4] Notice of a motion for any process of contempt or commitment, when notice is required, must be served personally on the party against whom the process is sought,[5] except, perhaps, when an order for substituted service has been previously obtained.[6] In England, under special circumstances, notice of a motion could be made upon an agent of a person without the jurisdiction.[7] An appearance in court upon the day appointed for the motion or a consent to an adjournment, is a waiver of a defect in the time and manner of service[8] and in the form of the notice[9] unless the objection is first specifically made. Notice of motion is given either by a notice signed by the solicitors or parties or by an order to show cause granted by the court. An order to show cause is an order requiring a party to appear and show cause why a certain thing should not be done or permitted.[10] It is equivalent to a notice of motion, and except in cases where it is required by statute,[11] its ordinary use is to procure the argument of a motion within a shorter time than the term for notice required by the rules or statute. In England the corresponding practice is by what is termed a rule *nisi*.[12]

A notice of motion should be properly entitled in the cause or matter in which it is made.[13] Where there are separate plaintiffs or defendants, a notice is not defective which names

that notice of a motion may be served upon such a party personally. Hoffman v. Rowley, 13 Abb. Pr. N. Y. 399.

4 Appeal dismissed in Bache v. Hunt, 193 U. S. 523. *Cf.* Re Wood & Henderson, 210 U. S. 246, 52 L. ed. 1046; Re Brockton Ideal Shoe Co., C. C. A., 200 Fed. 745; See Staunton v. Wooden, C. C. A., 179 Fed. 61; Re Waukesha Water Co., 116 Fed. 1009; and Chapter on Bankruptcy, *infra*.

5 Daniell's Ch. Pr. (2d Am. ed.) 1794; Gray v. C., I. & N. R. Co., 1 Woolw. 63; *supra*, § 165.

6 Hope v. Hope, 4 De G., M. & G. 328.

7 Daniell's Ch. Pr. (2d Am. ed.) 1794; Hope v. Hope, 4 De G., M. & G. 328; Cooper v. Wood, 5 Beav. 391; Pultency v. Shelton, 5 Ves. 147; Hunt v. Lever, 5 Ves. 147; and *supra*, § 165.

8 New York Times v. Sun Printing & Publishing Co., 195 Fed. 173.

9 Marye v. Strouse, 6 Sawyer, 204.

10 Spaetah v. Sells, 176 Fed. 797.

11 See Spaeth v. Sells, 176 Fed. 797.

12 Geneva Basket Co., 71 Misc. (N. Y.) 156. See People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750, 752.

13 Barb. Ch. Pr. 570; Rowlatt v. Cattell, 2 Hare, 186; Salomon v.

the first of each of them with the affix "and others," provided the opposite party is not misled thereby.[14] Where there are two titles and one is incorrect, if the other is correct the notice is good.[15] When the parties are the same, the same notice may be entitled in several actions.[16] The notice should be addressed to the solicitor of the party intended to be affected by it, or to the party himself when he appears in person or personal service is intended. It should be dated,[17] and signed by the solicitor for the moving party, or by that party himself if he appears in person.[18] It has been held in New York that a notice signed in person by a defendant who has previously appeared by a solicitor who has not been removed is irregular.[19] A notice of motion should state the day, place, and hour at which the motion will be made.[20] It is usual, however, to designate the hour by the expression "at the opening of the court on that day," and to add the words "or as soon thereafter as counsel can be heard."[21] Where the motion can be made only by leave of the court, the notice ought to mention that it is so made; or, otherwise, it seems that it may be disregarded.[22] Where the object of the motion is to discharge an order for irregularity, it is usual for the notice to state the ground of the application.[23] It is usual for the notice also to state before what judge the motion will be made; and to specify the affidavits and other documents which will be used in its support.[24] The notice must state

Stalman, 4 Beav. 243; Davis v. Barrett, 7 Beav. 171; Morrall v. Prichard, 11 Jur. (N. S.) 969; Foote v. Emmons, 2 How. Pr. (N. Y.) 89; Hawley v. Donnelly, 8 Paige (N. Y.) 415.

14 Jerauld County v. Williams, 7 S. D. 196, 63 N. W. 905.

15 Matter of Ungrich, 201 N. Y. 415.

16 Hornfager v. Hornfager, 6 How. Pr. (N. Y.) 13.

17 Barb. Ch. Pr. 570; Moody v. Hebberd, 11 Jur. 941; Hutchinson v. Horner, 9 Jur. 615; Parker v. Francis, 9 Jur. 616, note.

18 Barb. Ch. Pr. 570; Perry v. Walker, 4 Beav. 452.

19 Halsey v. Carter, 6 Robertson (N. Y.), 535; Webb v. Dill, 18 Abb. Pr. (N. Y.) 264.

20 Barb. Ch. Pr. 570; Bodwell v. Willcox, 2 Caines (N. Y.), 104; Anon., 1 J. R. (N. Y.) 143

21 Barb. Ch. Pr. 570; In re Electric Tel. Co. of Ireland, 10 W. R. 4.

22 Hill v. Rimell, 8 Sim. 632; Jacklin v. Wilkins, 6 Beav. 607.

23 Brown v. Robertson, 2 Phil. 173; Alexander v. Esten, 1 Caines (N. Y.), 152; Jackson v. Stiles, 1 Cowen (N. Y.), 134.

24 Daniell's Ch. Pr. (2d Am. ed.) 1793; Clement v. Griffith, C. P. Coop. 470; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425.

clearly the terms of the order which will be asked for, and everything which the party would have should be expressed, as the court will not extend the order beyond the notice.[25] For this reason, it is prudent to add a notice of a motion for general relief; that is, "for such other or further order or relief as to the court shall seem just;" under which, other relief germane to that, a motion for which has been specifically noticed, may be granted.[26]

A number of objects not inconsistent with each other, and even inconsistent objects, if prayed for in the alternative, may be included in the same notice and motion.[27] The court will discourage when directing as to costs the making of separate motions for objects which might have been conveniently obtained by a single application.[28] It is irregular to grant affirmative relief to a party opposing a motion, when he has served no notice of his application for the same.[29] After notice of a

25 Barb. Ch. Pr. 570; Mann v. King, 18 Ves. 297.

26 Barb. Ch. Pr. 570. People v. Turner, 1 Cal. 152; Landis v. Olds, 9 Minn. 90; Ferguson v. Jones, 12 Wendell (N. Y.) 241; Rogers v. Toole, 11 Paige (N. Y.) 212; Bissell v. New York Cent. & H. R. R. Co., 67 Barbour (N. Y.) 385; Boylen v. McAvoy, 29 How. Pr. (N. Y.) 278; Van Slyke v. Hyatt, 46 N. Y. 259; Randall v. Randall, 139 App. Div. (N. Y.) 674; People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750, 752. But see Schneider v. Meyer, 56 Mo. 475; Northrop v. Van Dusen, 5 How. Pr. (N. Y.) 134; 3 Code Rep. (N. Y.) 140; Bellinger v. Martindale, 8 How. Pr. (N. Y.) 113; De Walt v. Kinard, 19 S. C. 286. It has been held that on the hearing of a motion for the production of papers under a subpoena *duces tecum* coupled with a prayer for general relief, if the other party appears by counsel, an order may be granted committing him, or, if a corporation, committing its officers, for contempt for disobedience to the subpoena, Edison El. L. Co. v. U. S. El. L. Co., 44 Fed. 294, 300; that a motion for the appointment of a receiver cannot be made at the hearing of a motion for an injunction against an interference with a railroad claimed to be in the possession of the moving party, St. L., K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691, that a motion to suppress depositions brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witness examined, if the party moving to suppress has never done anything to waive the objection, Bradley, J., in Eslava v. Mazange, 1 Woods, 623, 627.

27 Daniell's Ch. Pr. (2d Am. ed.) 1792, 1793.

28 Hawke v. Kemp, 3 Beav. 288.

29 Garcie v. Sheldon, 3 Barbour (N. Y.) 232.

motion has been served, it cannot be withdrawn without the consent of the court.[30]

A motion may be made by any party to a cause except one who is in contempt.[31] It has been said: that a party in contempt cannot move for any other purpose than to discharge the contempt proceedings,[32] or to expunge scandal from the record;[33] and in such cases he should apply by petition.[34] The rule in the Federal courts, however, is that he is only debarred from applications which are not of strict right, but are matters of favor in the discretion of the court,[35] such as an application to open a default,[36] and that his answer cannot be stricken out of the record nor can he be denied a hearing.[37] No one should join in a notice for a motion in which he is not directly interested.[38] The joinder of one disinterested party with others who had an interest was held in England a sufficient reason for refusing the whole motion.[39] A motion in the course of proceedings under an information cannot be made on behalf of the relators, but only on behalf of the attorney-general or district attorney.[40] Where it is clearly for the interest of a person under a disability to make a motion, and he has no next friend, or his next friend refuses to do so, a next friend for the purposes of the application may move on his behalf.[41] After a motion has been denied, it cannot, without leave of the court, be renewed upon the same papers, nor upon additional proof of facts that existed at the time the original

30 People v. Hart, N. Y. L. J. June 5th, 1905.

31 Daniell's Ch. Pr. (2d Am. ed.) 1787; Nicholson v. Squire, 16 Ves. 259, 260.

32 Daniell's Ch. Pr. (2d Am. ed.) 554–558, 1787 Anon., 5 Ves. 656.

33 Everett v. Prythergeh, 12 Sim. 363.

34 Lord Eldon v. Nicholson v. Squire, 16 Ves. 259, 260.

35 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215.

36 Ellingwood v. Stevenson, 4 Sandf. Ch. (N. Y.) 366.

37 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215; Sibley v. Sibley, 76 App. Div. (N. Y.) 132, 136. *Contra*, Walker v. Walker, 82 N. Y. 260; Pickett v. Ferguson, 45 Ark. 177, 191. See Bennett v. Bennett, 208 U. S. 505, 52 L. ed. 590.

38 Daniell's Ch. Pr. (2d Am. ed.) 1793; Folland v. Lamotte, 10 Sim. 486.

39 Folland v. Lamotte, 10 Sim. 486.

40 Atty. Gen. v. Wright, 3 Beav. 447.

41 Cox v. Wright, 9 Jur. (N. S.) 981; Guy v. Guy, 2 Beav. 460; Furtado v. Furtado, 6 Jur. 227; *supra*, §§ 32, 33.

motion was made;[42] but where the new motion is made on facts that have occurred since the former motion was made, no leave to renew is necessary, and the motion may be made as a matter of right.[43] Leave to renew will not be granted when the time to appeal has expired.[44]

§ 252. Argument of motions. The manner of bringing motions to a hearing is regulated by local rule or usage differently in the different circuits. Either no method is observed, and motions are made by counsel as they catch the judge's eye, or a calendar is made and called upon which motions are placed by the clerk in the order in which they were first brought to his attention. In the Supreme Court of the United States the Attorney-General and the Solicitor-General take precedence.[1]

[42] Mitchell v. Allen, 12 Wendell (N. Y.) 290; Sheehan v. Carvalho, 12 App. Div. (N. Y.) 430; Haskell v. Moran, 117 App. Div. (N. Y.) 251, 252; De Lacy v. Kelly, 147 App. Div. (N. Y.) 37.

[43] Le Lacy v. Kelly, 147 App. Div. (N. Y.) 37.

[44] Stierle v. Union Railroad Co., 11 Misc. (N. Y.) 124; Matter of Silliman, 38 Misc. (N. Y.) 226; A. Klipstein & Co. v. Marchmedt, 39 Misc. (N. Y.) 794; Security Warehouse Co. v. Am. Exchange Nat. Bank, per Hendrick, J., N. Y. L. J. May 7, 1910.

§ 252 [1] Lord Campbell has thus described the former English practice, which was abolished by Lord Mansfield, whose rules for the hearing of motions at common law were followed by the Court of Chancery: "Day by day during the term, each counsel when called upon had been accustomed to make as many motions successively and continuously as he pleased. The consequence was, that by the time the Attorney and Solicitor-General, and two or three other Dons, had exhausted their motions, the hour had arrived for the adjournment; and as the counsel of highest rank was again called to at the sitting of the court next morning, juniors had no opportunity of making any motions with which they might be intrusted till the last day of the term, when it was usual, as a fruitless compliment to them, to begin with the back row,—after the time had passed by when their motions could be made with any benefit to their clients. The consequence was, that young men of promise were unduly depressed, and more briefs were brought to the leaders than there was time for them to read, even had they been toiling all night at their chambers instead of sitting up in the House of Commons,—absorbed in party struggles. Thus the interests of the suitors were in danger of being neglected, and the judges did not receive the fair assistance from the bar in coming to a right conclusion which they were entitled to expect. To remedy these evils, a rule was

"Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district."[2]

When, at the hearing of a motion, the opposite party is not represented, proof of service must be shown by affidavit, or admission, and the hearing then proceed *ex parte*.[3] When the moving party does not then appear, his motion will be dismissed. When both sides are represented, the moving party has the right of opening and replying.[4] The English rule was that, "in injunction cases, where upon an order to dissolve an injunction *nisi* the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for the order *nisi* being considered as the application, to which the plaintiff answers by showing cause upon the merits; after this, the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply."[5] As a general rule, no person can be heard in support of a motion unless he has been one of the parties who gave notice of it.[6] But when the object of a motion is to reverse the conclusion of a master, it seems that all persons interested in the master's report are entitled to be heard in its support.[7]

Proof of facts, which are not established by documents, is then regularly given by affidavits;[8] but, in the Circuit Court of

made that the counsel should only make one motion apiece in rotation; and that if by chance the court rose before the whole bar had been gone through, the motion should begin next morning with him whose turn it was to move at the adjournment. The business was thus both more equally distributed and much better done." Campbell's Lives of the Chief Justices, ch. xxxiv, pp. 398, 399. See also Daniell's Ch. Pr. (2d. Am. ed.) 1797.

[2] Eq. Rule 6.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1799.

[4] Ibid.

[5] Ibid.

[6] Stubbs v. Sargon, 3 Beav. 408; Daniell's Ch. Pr. (2d Am. ed.) 1793.

[7] Johnston v. Todd, 5 Beav. 394; Daniell's Ch. Pr. (2d Am. ed.) 1793.

[8] *Infra*, §§ 334–338.

the United States for the Eastern District of Pennsylvania, a valid rule provides: that "on all motions or rules to show cause, on the hearing of which, facts are to be investigated, the testimony of witnesses shall be taken by deposition in writing * * * and no witness shall be examined at the bar unless by special previous order of the court;"[9] and a witness there may be subpœnaed to give testimony by deposition for use on such a hearing in an action at law.[10]

At the hearing, if the English practice which prevails to some extent in the First Circuit should be followed, any affidavit might be read by either party that had been filed in the clerk's office before the hearing. If an affidavit were filed too late for the other side to take a copy of it, or to obtain an affidavit controverting facts stated therein, that was a ground for moving to postpone the hearing. No affidavit filed previous to the entry of the motion could be used by the moving party, unless he had in his notice of motion stated specifically that he intended to use it. By permission of the court, subsequent affidavits may be served, provided that the opposite party is given a reasonable opportunity to answer the same.[11] A separate notice to that effect, if served a reasonable time before the hearing of the motion, might, however, be sufficient.[12] This subject is, however, by local rule or custom regulated differently in the different circuits. A verified answer has the effect of an affidavit.[13]

In New York, no affidavit in chief can be read in support of a motion unless a copy of the same has been served on the adverse party.[14] Affidavits upon information and belief, where the grounds of the belief are set forth, may be read in support of a motion,[15] and other proof which would be incompetent upon a trial may be used.[16]

9 Rule 7, § 4. Despeaux v. Pennsylvania R. Co., 147 Fed. 926.

10 Despeaux v. Pennsylvania R. Co., 147 Fed. 926.

11 Rubino v. Mariano, 65 App. Div. (N. Y.) 314, 317.

12 Daniell's Ch. Pr. (2d Am. ed.) 1797, 1798.

13 Dady v. Georgia & A. Ry. Co., 112 Fed. 838, 844.

14 Northrup v. Village of Sidney, 97 App. Div. (N. Y.) 271.

15 City of Detroit v. Detroit City Ry. Co., 54 Fed. 1.

16 Casey v. Cincinnati Typographical Union No. 3, 12 L.R.A. 193, 45 Fed. 135, 147; Coeur d'Alene Am. Mining Co. v. Mining Union of Warden, 19 L.R.A. 382, 51 Fed. 260; Mercantile Trust Co. v. Texas & P.

§ 253. Petitions in general. A petition is a request in writing directed to the judge or judges of the court, and showing some matter or cause whereupon the petition prays some direction or order.[1] It may be made by one who is, or by one who is not, a party to a cause pending in the court. Lord Erskine said formerly: "I do not find that there are any precise or positive boundaries betwen motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the court to grant or refuse them, according to circumstances; but, generally speaking, motions which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly cognizant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."[2] But petitions are now rarely filed by a party to a cause, since any relief which he desires can usually be obtained equally well by a motion supported by an affidavit containing the allegations which would be necessary in a petition. A party who by his contempt has forfeited the right to make a motion should apply by petition. It has been held, in New Jersey, that where a motion is founded upon prior proceedings in the cause, the proper practice is to present the matter by a written petition, so that the grounds of the application can be made a matter of record.[3] Petitions are usually filed by some person not a party in order to obtain the benefit of proceedings in a cause pending in the court, or else to obtain an order in relation to some matter which is not the subject of any litigation in it. Peti-

Ry. Co., 51 Fed. 529, 542; Buck v. Hermance, 1 Blatch. 322; Mathews v. Ironclad Mfg. Co., 19 Fed. 321; *infra*, §§ 232, 269, 386.

§ 253. [1] 2 Barb. Ch. Pr. 579.

[2] Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 387, 393. See, however, Nicholson v. Squire, 16 Ves. 259, 260.

[3] Holcomb v. Coryell, 12 N. J. Eq. 289.

tions which are made in a cause are termed cause petitions.[4] The most common instances of cause petitions are petitions for the appointment of a next friend, petitions of intervention, petitions for payment out of a fund in the hands of an officer of the court, and petitions for leave to sue a receiver. But in most, of these cases, the application can also be made by motion, unless a long statement of facts is needed to show the right of the applicant to relief.[5] It has been held that the right to intervention, for which no provision has been made by a previous order or decree, can only be made by a petition.[6] The most common instances of petitions which are not cause petitions are petitions for the appointment, removal, or resignation of a trustee, and petitions for the appointment of the guardian of an infant, and the maintenance of the infant out of his property. In New York, applications affecting trust funds may be instituted by petition.[7]

After a decree which purports to finally dispose of the suit, one plaintiff cannot obtain relief against another by means of a petition setting up matters which could not have been introduced by an amended or supplemental bill; at least without notice to the party against whom he seeks relief.[8] Ordinarily, a petition cannot be presented in a cause before the bill has ben filed.[9] A petition for leave to sue *in forma pauperis* is an exception to this rule;[10] and in an extraordinary case a stay order might perhaps be granted upon a petition before the filing of a bill.[11] The objection, that a party who has proceeded by a petition should have filed a cross-bill, a supplemental bill, or a supplemental answer, is too late when not taken till after an answer to the petition and a decree thereupon.[12] A paper

4 Daniell's Ch. Pr. (2d Am. ed.) 1801.

5 Jones v. Roberts, 12 Sim. 189; Barker v. Todd, 15 Fed. 265.

6 Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 561. See *infra*, §§ 258, 259.

7 Matter of Foster, 15 Hun (N. Y.) 387; Matter of Ungrich, 201 N. Y. 415.

8 Smith v. Woolfolk, 115 U. S. 143, 29 L. ed. 357.

9 Daniell's Ch. Pr. (2d Am. ed.) 1801.

10 *Infra*, § 413.

11 Mayor of London v. Bolt, 5 Ves. 129 Daniell's Ch. Pr. (2d Am. ed.) 1801.

12 Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. ed. 961, 963; Coburn v. Cedar V. C. & L. Co., 138 U. S. 196, 222, 34 L. ed. 876, 886.

improperly styled a petition may, if it contains the necessary allegations, be sustained as a dependent original bill,[13] and a paper improperly described as a cross-bill or other bill not original, may be sustained as a petition.[14]

§ 254. Form of petitions and practice upon them. A petition should be properly entitled in the cause in which it is presented.[1] When not a cause petition, a petition is entitled "In the matter of the application of," &c. The petitioner, if not a party to a cause in which the petition is filed, should state his name, residence, and description.[2] Where a petition is founded upon a former decree it is sufficient to state that decree without setting out the papers upon which that decree was rendered.[3] Where its title recites the name of a pending suit or proceeding, the petition need not state, in its body, the pendency of the same;[4] although the better practice is to make such a statement. A petition should contain no scandal or impertinence; which, as in any other proceeding, may be expunged.

It is the usual practice to verify a petition by the oath of the petitioner. An affidavit by the petitioner, that the allegations in the petition "are true as he verily believes," was held to be sufficient; and, in the absence of a traverse, they were presumed to be true upon an appeal.[6] A petition need not be signed by counsel unless it seeks a rehearing on appeal.[7] Petitions are usually signed by the party making them, either personally or by his solicitor.[8]

"Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special

[13] Central Tr. Co. of N. Y. v. Marietta & N. G. R. Co., 63 Fed. 492.

[14] Heath v. Erie Ry. Co., 9 Blatchf. 316; *supra*, § 253; *infra*, § 259.

§ 254. [1] Daniell's Ch. Pr. (2d Am. ed.) 1802.

[2] Glazbrook v. Gillatt, 9 Beav. 492.

[3] Davis v. Davis, 65 Fed. 380.

[4] In re Goldberg, 117 Fed. 692.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1803; Eq. Rule 21, § 239, *supra*.

[6] Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 687–689, 43 L. ed. 1130, 1135, 1136, s. c. as Farmers' Loan & Trust Co. v. Louisville, New Albany & C. Ry. Co., 103 Fed. 110, 115.

[7] Daniell's Ch. Pr. (2d Am. ed.) 1803.

[8] Daniell's Ch. Pr. (2d Am. ed.) 1803.

matters a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained as of course, upon petition."[9] All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way and at the same time before the hearing as that of notices of motions.[10] If actual, and not constructive, service is required, it seems that it must be made by delivering a copy of the petition, and at the same time showing the original to the person served,[11] unless the court otherwise directs. By the Chancery practice objections to the form of a petition could regularly be taken only by demurrer.[12] It has been said: that in the case of a petition for intervention, the right of the petitioner to intervene should be contested by plea, demurrer or motion, and is waived by an answer upon the merits.[13] By answering a respondent loses his right to demur,[14] and, it has been held, waives the objections that the petitioner had a complete and adequate remedy at law,[15] that he should have proceeded by bill instead of by petition;[16] and, if a receiver, that he has not obtained leave to sue.[17] Adverse parties may file answers denying the facts stated in a petition, or setting up other facts in avoidance. Such answers should be verified by affidavit.[18] If the parties are at issue as to the facts, according to the more formal practice testimony may be taken as in the regular course of a suit;[19] but the more usual course is for the parties on either side to support their claim by affidavits, in the same manner as when supporting or opposing a motion.[20] Proceedings upon the hearing of petitions are similar to those upon the hearing of motions.[21] It has been said by Daniell that a petition cannot be amended by adding

9 Daniell's Ch. Pr. (2d Am. ed.) 1802.

10 See Rules 5 and 6 Daniell's Ch. Pr. (2d Am. ed.) 1804.

11 Daniell's Ch. Pr. (2d Am. ed.) 1804.

12 U. S. R. S., § 954; Newman v. Moody, 19 Fed. 858.

13 Horn v. Pere Marquette R. Co., 151 Fed. 626, 629.

14 Newman v. Moody, 19 Fed. 858.

15 Newman v. Moody, 19 Fed. 858.

16 Newman v. Moody, 19 Fed. 858; Horn v. Pere Marquette R. Co., 151 Fed. 626, 629.

17 Newman v. Moody, 19 Fed. 858.

18 Mitford's & Tyler's Pl. 448.

19 Mitford's & Tyler's Pl. 448.

20 Daniell's Ch. Pr. (5th Am. ed.) 1608.

21 Daniell's Ch. Pr. (2d Am. ed.) 1805.

to it a statement of facts which have occurred since it was filed;[22] but an English judge has held otherwise.[23]

§ 255. Orders. An order is a direction of the court or a judge thereof in writing.[1] A telegram may be an order, but a message by telephone is not.[2] The absence of a formal order of a court need not necessarily prevail over its essential action; and a court of review may treat the case as if an order, evidently intended, had been made.[3] Orders are described as either judge's orders or court orders. The distinction may be of importance, since, formerly at least, a judge's order upon an application for habeas corpus was not appealable.[4] The rules of the District Court for the Southern District of New York provide: "In any action or proceeding any order, whether known in practice as a court order or judge's order, may be made and entered by any judge."[5] It has been said: that a court cannot make an order *nunc pro tunc*, as of a preceding term; although the judge has, at such preceding term, expressed his willingness to make the same.[6] When contained in a decree, an order is termed a decretal order. An order is regularly entitled in the cause in which it is entered, and it is irregular to entitle the same order in several cases.[7] Such orders, when not objected to, are valid,[8] and where the parties to the two suits were the same, and orders entitled in both were thus made concerning a receivership under an order in one; it was held, that the objection that there had been no order formally extending the receivership to the other suit, could not subsequently avoid an order therein for the sale of property by such receiver.[9]

22 Daniell's Ch. Pr. (5th Am. ed.) 1610.

23 Malins, V. C., In re Westbrook's Trusts, L. R. 11 Eq. 252.

§ 255. 1 See U. S. R. S., § 719; Klein v. Southern Pac. Co., 140 Fed. 213.

2 See Schofield v. Horse S. C. Co., 65 Fed. 433, 435; State v. Holmes, 56 Ia. 588, 41 Am. Rep. 121.

3 Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

4 Carper v. Fitzgerald, 121 U. S. 87, 30 L. ed. 882. See § 467, *infra*.

5 U. S. D. C., S. D. N. Y., Rule 25.

6 Klein v. Southern Pac. Co., 140 Fed. 213.

7 August v. Fourth Nat. Bank, 9 N. Y. Supp. 270.

8 Gila Bend Reservoir & Irr. Co. v. Gila Water Co. 202 U. S. 270, 273, 50 L. ed. 1023.

9 Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

It has been held: that restraining orders may be made in a suit, before the bill in equity is filed;[10] that a receiver cannot be appointed upon petition, before the bill is filed;[11] that a receiver may be appointed by a judge at chambers upon the presentation of a bill and answer which have not been filed, in an order containing a direction that it shall take effect upon the filing thereof; that thereupon the appointment relates back to the date of the judge's signature, so as to cut off all intervenings rights;[12] and that when an order is filed before the date recited in the same, it takes effect from its filing, and not from the latter date.[13]

Orders may be made at any place within the territorial jurisdiction of the court.[14] "The District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."[15] Whatever a judge may lawfully do in chambers, he may do at any other place within the

[10] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220.

[11] In re Brant, 96 Fed. 257; and cases cited *infra*, § 315.

[12] Horn v. Pere Marquette R. Co., 151 Fed. 626, 633. *Contra*, Wilcox v. Nat. Shoe & Leather Co., 67 App. Div. (N. Y.) 466.

[13] In re McCall, C. C. A., 145 Fed. 898.

[14] In re Tampa S. R. Co., 168 U. S. 583, 588, 42 L. ed. 589, 590; Goodyear Dental Vulcanite Co. v. Folsom, 3 Fed. 509. It has been held, that when a District Judge has, under the order of the Circuit Judge, tried a case in another district than his own, he may hear in his own district a motion for a new trial when the counsel for all parties waive his return to the district of the trial for the purpose of hearing and deciding the motion. Cheesman v. Hart, 42 Fed. 98, 105.

[15] Jud. Code, § 9, 36 Stat. at L. 1087. It has been said: that any order in a suit in equity which tends to prepare the cause for a hearing, or to preserve the subject-matter until a hearing, may be made at chambers. Horn v. Pere Marquette R. Co., 151 Fed. 626, 636. An order for the release of a vessel which has been libelled, may

district.[16] It has been held that the clerk may make entries of adjournments by a rubber stamp,[17] and that they may be recorded on days subsequent to their entry at any time during the term.[18] It has been held: that an order in a suit in equity, pending in another district of the same circuit, may be made by a Circuit Judge in any part of the circuit.[19] Where no objection was taken below, it was held: that an appeal from an order, upon an application for the writ of *habeas corpus,* might be argued before the Circuit Justice at chambers in any district of the circuit.[20] If the former practice is followed in a District Court, when all judges authorized to sit therein are absent from the circuit, an order may be made by a Justice of the Supreme Court sitting anywhere within the United States.[21] The Judicial Code provides that "no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district."[22] It is customary to recite in an order or judgment, upon whose motion the same was granted; but it has been said that this is not necessary, nor appropriate, although the order or judgment should show who moved for the relief and what he asked.[23] Where an order or judgment grants less,[24] or other relief[25] than that for which the mover asks,

be made at chambers. U. S. v. The Little Charles, 1 Brock. 380; Fed. Cas. No. 15,613.

16 Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495.

17 Harlan v. McGourin, 218 U. S. 442, 449, 54 L. ed. 1101, 1105, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

18 U. S. v. Louisville & N. R. Co., 177 Fed. 780, 785.

19 Horn v. Pere Marquette R. Co., 151 Fed. 626, 635, *Cf.* Hollon v. Parker, 131 U. S. 221, 225, 33 L. ed. 123, 124.

20 Roberts v. Reilly, 116 U. S. 80, 93, 29 L. ed. 544, 548.

21 U. S. v. Louisville & P. C. Co., 4 Dill. 601; Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621; U. S. R. S., § 719, 8 Ry. & Corp. L. J. 200. Thus, in United States v. Louisville, &c., Canal Co., 4 Dill. 601, Fed. Cas. No. 15,633, Mr. Justice Miller granted an injunction upon a bill pending in the Sixth Circuit, at chambers in New Jersey; although he was not the Justice allotted to that circuit.

22 Jud. Code, § 264, 36 St. at L. 1087.

23 Davis v. Fogarty, 134 App. Div. (N. Y.) 500.

24 Ibid.

25 Raymond v. Tiffany, 115 App. Div. (N. Y.) 350, where terms were

a recital that it was made upon his motion is erroneous, and if inserted should be striken out upon a resettlement. The recital in an order that it was granted "upon all the papers and proceedings" was said to be too indefinite.[26] Where improper recitals are embodied in an order, it has been held by a State court: that the objection cannot be made by an appeal from the order, but only by a motion for a resettlement and an appeal from the order denying such motion.[27] It is possible that in the Federal courts, there might be a remedy by an application to the Circuit Court of Appeals for a mandamus.[28] It is usual, though not indispensable, in the Federal courts, before the entry of an order or decree upon the decision of the court after argument, to serve upon the attorney for the opposite party a copy of the paper proposed to be entered, with a notice that it will be presented for settlement at a specified time and place.[29] If the attorneys live in the same town as the judge, one day's notice of settlement is usually sufficient. It is the better practice for the solicitor who obtains an order upon an interlocutory application, to serve a copy of the same upon the solicitor of the opposite party. When the order is made without notice to a party, in his absence, it is the duty of the clerk to mail him a copy of the same.[30] Usually attorneys of record are chargeable with notice of all proceedings taking place in open court.[31] If the other party takes a step in the action after an *ex parte* order has been obtained but before its service, "that step in itself regular, the order which had been obtained and not served cannot afterwards be acted upon, if it will interfere with the step so taken."[32] Where a decree directs the performance of a specific act, it should prescribe the time within which the act shall be done, and the defendant will be bound

imposed upon the moving party without his consent; Rector, &c., of St. Stephen's Church v. Rector, &c., of the Church of the Transfiguration, 134 App. Div. (N. Y.) 452.

26 Faxon v. Mason, 87 Hun (N. Y.), 139.

27 Matter of Radam Microbe Killer Co., 114 App. Div. (N. Y.) 199.

28 *Infra*, § 467.

29 Nevada Nickel Syndicate v. Nat. Nickel Co., 103 Fed. 391, 394.

30 Eq. Rule 4.

31 Rio Grande Dam & Irrigation Co. v. U. S., 215 U. S. 266, 54 L. ed. 190. See *infra*, Chapter on Appeals.

32 Nevada N. S. v. National N. Co., 103 Fed. 391, 394.

without further service to take notice thereof.[33] Ordinarily, if it is intended to enforce the order by contempt proceedings, it should be served personally upon the party to be affected by it,[34] unless possibly, in an extraordinary case, an order should be granted allowing substituted service.[35]

Interlocutory orders made upon motion may be altered or vacated at any time before the final decree;[36] and orders made *ex parte* upon petition may also be discharged upon motion for irregularity.[37] According to the English practice, orders made after a hearing upon a petition could not be altered or discharged without the filing of a petition for a rehearing, or upon appeal.[38] A court has, during the term at which it is entered, the power to review and modify or set aside any order or decree, interlocutory or final.[39] It has been held to be improper to file a bill of review or supplemental bill in the nature of the same in order to set aside an interlocutory order or decree.[40] It has been held that an order in an action at common law staying plaintiff's proceedings till he pays costs of a former action is *res adjudicata* upon a subsequent motion, and is in so far a final order that it cannot be modified or set aside at a subsequent term.[41] It has been held that, even in a criminal case, the court, at a term after final judgment, may enter an order correcting a clerical error, *nunc pro tunc* as of the preceding term.[42] An order granted after a

[33] Eq. Rule 8. See *infra*, § 428.

[34] Daniell's Ch. Pr. (2d Am. ed.) 1789; Church v. Marsh, 2 Hare, 652.

[35] Re Cary, 10 Fed. 622.

[36] Hunter v. ——, 6 Sim. 429; Lorton v. Seaman, 9 Paige (N. Y.), 609; People v. Brower, 4 Paige (N. Y.), 405; Stafford v. Brown, 4 Paige (N. Y.), 360.

[37] Daniell's Ch. Pr. (2d Am. ed.) 1616, 1807; Eslava v. Mazange, 1 Woods, 623, 627; Nelson v. Barker, 3 McLean, 379.

[38] In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1807.

[39] Bishop v. Willis, 2 Ves. Sen. 113; In re Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed. 1808. But see In re Dovenby Hospital, 1 Myl. & Cr. 279; West v. Smith, 3 Beav. 306.

[40] Doss v. Tyack, 14 How. 297, 313, 14 L. ed. 428, 435; Bassett v. U. S., 9 Wall. 38, 41, 19 L. ed. 548, 549; Henderson v. Carbondale C. & C. Co., 140 U. S. 25, 40, 35 L. ed. 332, 338. See *infra*, § 443.

[41] Buckles v. Chicago, M. & St. P. Ry. Co., 53 Fed. 566.

[42] C. & A. Potts Co. v. Creager, 71 Fed. 74. In re Wright, 134 U. S. 136, 33 L. ed. 865. Regularly the date of an order should be the day when it was pronounced, not the

hearing before one judge of a court will not, unless under extraordinary circumstances, be modified or vacated by another except upon appeal.[43] Unless limited by their terms, or by a rule, or by statute,[44] orders within the jurisdiction of the judge or court that grants them remain in force until discharged by a subsequent order;[45] or until the final decree, when, unless renewed by its terms, all orders expire.[46] Before the Evarts Act, no appeal lay before the final decree from an interlocutory order which was not final in its nature.[47] It has been said by Chief Justice Taney, that "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if by an interlocutory order or decree he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order is immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal, as practiced in the English chancery jurisdiction, and as restricted by the act of Congress,

day of its entry. Ex parte Hookey, 4 De G., F. & J. 456; Ex parte Whitton, 13 Ch. D. 881.

[43] Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 685, 689; Oglesby v. Attrill, 14 Fed. 214; Newcomb v. Burbank, 159 Fed. 569; *Ex parte* Steele, 162 Fed. 694; *Re* Ennis, 183 Fed. 859. But see Birch v. Steele, C. C. A., 165 Fed. 577; *Re* Steele, 161 Fed. 886; of which the former overruled *Re* Steele, 156 Fed. 853; *Ex parte* Steele, 162 Fed. 694.

[44] See Eq. Rule 73 quoted *infra* § 292.

[45] Eslava v. Mazange, 1 Woods, 623, 627.

[46] Gardner v. Gardner, 87 N. Y. 714; Daniell's Ch. Pr. (2d Am. ed.) 1902.

[47] See *infra*, chapters on Writs of Errors and Appeals.

and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order."[48] An appeal lies to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction or appointing a receiver.[49]

§ 256. Judges who may grant orders. An order may be made by any judge authorized to sit in the court in which the cause is pending. In the Supreme Court it is the custom for each Justice to refer to the full bench every application of importance which is made to him.[1] Orders in a case pending in a District Court may be made by any judge of that district;[2] or by any district judge, in the same circuit, who has been designated by a circuit judge of the circuit; or, in the absence of all the circuit judges, by the Circuit Justice of the same;[3] or, in case of the absence and disability of all the circuit judges and the Circuit Justice, by the Chief Justice of the United States;[4] or by any circuit judge of the circuit, designated by the senior circuit judge or Circuit Justice thereof or the Chief Justice of the United States;[5] or by any member of the Commerce Court, assigned by the Chief Justice of the United States for service therein.[6] In case of the absence from the district or disability of the district judge, any circuit judge of the circuit may grant an injunction or restraining order in any case pending in the District Court.[7]

It is ordinarily the duty of a judge to follow a ruling made in the same cause;[8] or when rules of property or practice are

48 Forgay v. Conrad, 6 How 201, 205, 12 L. ed. 404, 406.

49 Act of June 16, 1900, 31 St. at L. 660; *infra*, § 300.

§ 256. 1 Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80.

2 See Jud. Code, § 1, 36 St. at L. 1087; Birch v. Steele, C. C. A., 165 Fed. 577.

3 Jud. Code, § 14, 36 St. at L. 1087. *Cf.* Ibid., §§ 13, 16, 17, 18, 19, 20. All of these are quoted in § 370, *infra*. An order made by the District Judge of another district in the same State who was not sitting nor designated to sit in the district where the suit was pending, the office of District Judge of the latter district not being vacant, was held null and void. Am. L. & T. Co. v. East & West R. Co., 40 Fed. 182.

4 Jud. Code, § 15, 36 St. at L. 1087; quoted *infra*, § 370.

5 Jud. Code, § 18, 36 St. at L. 1087; quoted *infra*, § 370.

6 Jud. Code, § 205, 36 St. at L. 1087; quoted *infra*, § 370.

7 Jud. Code, § 264, 36 St. at L. 1087.

8 Plattner Implement Co. v. International Harvester Co., C. C. A. 133 Fed. 376, 379.

involved, in another cause, by a judge of co-ordinate jurisdiction;[9] but when he has so done, he may be reversed, if the court of review construes the ruling to be erroneous.[10] If there is no ruling by the Circuit Court of Appeals for the same circuit, a Circuit or District Judge will ordinarily follow a decision of a Circuit Court of Appeals in another circuit.[11]

Greater respect is paid to a ruling by a Circuit Justice than to one by a Circuit or District Judge;[12] and a ruling by a Circuit Judge has more weight than one by a District Judge.[13] Where there were two district judges in the same district, each with equal and concurrent authority, and one, during the absence of the other from the district, had appointed a referee in bankruptcy; it was held that the latter might, without the former's concurrence, remove the referee from office.[14] It has been held that a judge of another district, assigned generally to hold court, may make orders in cases tried by a resident judge;[15] but that he should not make such orders when in his own district and the district judge of the other district is present therein.[16]

§ 257. The clerk's office. All court orders should be filed in the clerk's office. Restraining orders, signed by a judge, must also be forthwith filed there.[1] Orders to show cause are not usually filed there until their return. Orders extending time are not usually filed, unless some motion is founded upon the same. The Judicial Code provides: A clerk shall be appointed for each district court by the judge thereof,

[9] Plattner Implement Co. v. International Harvester Co., C. C. A., 133 Fed. 376, 378.

[10] Plattner Implement Co. v. International Harvester Co., C. C. A., 133 Fed. 376, 379.

[11] In re Baird, 154 Fed. 215.

[12] Preston v. Walsh, 10 Fed. 315. But see U. S. v. Huggett, 40 Fed. 636, 644.

[13] *Cf.* E. Regensberg & Sons v. Am. Exch. Cigar Co., 130 Fed. 549. *Infra*, § 375. But see U. S. v. Huggett, 40 Fed. 636, 644.

[14] Birch v. Steele, C. C. A., 165 Fed. 577; *Re* Steele, 161 Fed. 886; of which the former overruled *Re* Steele, 156 Fed. 853, *Ex parte* Steele, 162 Fed. 694.

[15] Hall v. McKinnon, C. C. A., 193 Fed. 572.

[16] Gay v. Hudson River El. Power Co., 190 Fed. 812.

[17] U. S. v. Alexander, 46 Fed. 728; Norton v. Shelby Co., 118 U. S. 425, 30 L. ed. 178. But see Manning v. Weeks, 139 U. S. 504, 35 L. ed. 264; Ball v. U. S., 140 U. S. 118, 35 L. ed. 377.

§ 257. [1] Eq. Rule 73.

except in cases otherwise provided for by law."[2] "Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasance in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime."[3] "The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes."[4] "The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge."[5] The equity rules direct: "The clerk shall keep a book known as 'Equity Docket,' in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number. The clerk shall also keep a book entitled 'Order Book,' in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and

2 Jud. Code, § 33, 36 St. at L. 1087.

3 Ibid. § 4.

4 Ibid. § 5.

5 Ibid. § 6.

also all orders made or passed by the judge in chambers. He shall also keep an 'Equity Journal,' in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time. Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court."[6] "Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order."[7] "All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills pro confesso; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown."[8]

The Revised Statutes provide: "All moneys paid into any court of the United States or received by the officers thereof in any case pending or adjudicated in such court shall be forthwith deposited with the Treasurer or Assistant Treasurer or a designated depository of the United States in the name and to the credit of such court, provided that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court."[9] "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term time or in vacation to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn, and it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid which have remained in the registry of the court unclaimed for ten years or longer to be deposited in

[6] Eq. Rule 3.
[7] Eq. Rule 4.
[8] Eq. Rule 5.
[9] U. S. R. S., § 995, Comp. St. 1901, p. 711

a designated depository of the United States to the credit of the United States."[10] The clerk is entitled to demand the payment of his fees in advance;[11] but when tendered a fee for service demanded of him, he cannot refuse to perform the same until fees due him for other services have been paid.[12] It is customary in the Second Circuit to require a deposit, as security for costs, to be paid by each party before any paper is filed by him.[13]

All books in the offices of the clerks of the District Courts containing the docket or minutes of the judgments, or decrees thereof, must during office hours be open to the inspection of any person desiring to examine the same, without any fees or charges therefor.[14] A title insurance company has the right to make such inspection, provided it does not interfere with the rights of other searchers.[15] The sureties upon a clerk's bond are liable, by a suit in the name of the United States, for the use of a private suitor, who has been damaged by his misconduct in refusing to file papers in a case.[16] Such sureties are similarly liable to the owner of a fund deposited with the clerk, which the latter has misappropriated.[17] But where the clerk had refused to enter judgment by default in a case where garnishee process had been issued, it was held that his sureties were not liable for damages in the absence of proof that there were funds of the defendant in the hands of the garnishee subject to garnishment.[18] The complaint is filed when it is lodged in the hands of the clerk and his fees are paid, although he fails to put the file marks upon the same.[19]

10 U. S. R. S., § 996, as amended by Act of February 19, 1897, ch. 265, § 3, 29 St. at L. 578, Comp. St. 1901, p. 711. See *Re* Moneys in Registry of District Court, 170 Fed. 470; *infra*, chapter on "Admiralty".

11 Aiken v. Smith, C. C. A., 57 Fed. 423, 425; Hoysradt v. Delaware, L. & W. R. R., 182 Fed. 880.

12 Jennings v. Johnson, C. C. A., 148 Fed. 337.

13 In equity, on filing bill of complaint $25, on filing appearance by defendant $15; at law, on filing summons $15, on filing appearance by defendant $10; appraisers' appeals, on filing petition $5.

14 U. S. R. S., § 828; *Re* McLean, 9 Cent. L. J. 425; s. c., 2 Flip. 512.

15 Bell v. Commonwealth Title Ins. Co., 189 U. S. 131, 47 L. ed. 741.

16 U. S., to Use of Kinney v. Bell, C. C. A., 135 Fed. 336.

17 Howard v. U. S., 184 U. S. 676, 46 L. ed. 754.

18 U. S. v. U. S. Fidelity & Guaranty Co., C. C. A., 186 Fed. 477.

19 Emmons v. Marbelite Plaster Co., 193 Fed. 181.

CHAPTER XVII.

INTERVENTIONS.

§ 258. Petitions of intervention. A petition of intervention is filed in a pending cause by a person who is not a party to it; and prays permission to intervene and become a party, either plaintiff or defendant. A person not named as a party to the pleadings cannot ordinarily intervene without permission of the court.[1] New parties can always intervene by consent of the original parties.[2] By the Equity Rules of 1912, "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[3] To what extent this changes the pre-existing practice has not yet been decided. The general rule was that the court had no power to allow a stranger to a cause "to be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like."[4] Persons belonging to a class represented in the suit are regarded as *quasi*-parties; and for that reason they are often allowed to intervene.[5] In a suit brought by a mem-

§ 258. [1] Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Forbes v. Memphis El. P. & Pac. Ry. Co., 2 Woods, 323; Putnam v. New Albany, 4 Bissell, 365, 367; Gregory v. Pike, 67 Fed. 837; U. S. Gypsum Co. v. Hoxie, 172 Fed. 504.

[2] Galveston R. Co. v. Cowdrey, 11 Wall. 459, 464, 20 L. ed. 199; French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956.

[3] Eq. Rule 37.

[4] Bradley, J., in Anderson v. Jacksonville, P. & M. R. Co., 2 Woods, 628, 629. See also Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621, 625; Shields v. Barrow, 17 How. 130, 145, 15 L. ed. 158, 162; Bronson v. Railroad Co., 2 Black, 524, 17 L. ed. 347; Coleman v. Martin, 6 Blatchf. 119; Drake v. Goodridge, 6 Blatchf. 151; Page v. Holmes B. A. Tel. Co., 18 Blatchf. 118.

[5] Fidelity Tr. & S. D. V. Co. v. Mobile S. Ry. Co., 53 Fed. 850.

ber of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complaint[6] can always intervene,[7] even after a decree for a sale, provided there has been no distribution of the assets,[8] upon payment of his share of the costs, expenses, and reasonable counsel fees which have been previously paid or incurred.[9]

Ordinarily an intervenor in a suit brought on behalf of a class will be joined as plaintiff. If he is a citizen of the same state as one of the defendants, that will not in most, if in any, cases deprive the court of jurisdiction.[10] If there should be any danger that it would, he may be joined as a defendant.[11] If he intends to act in hostility to the original complainant, the court may, in its discretion, add him to the defendants.[12] After an agreement for a settlement of the entire litigation had been made between the original complainant who sued on behalf of himself and the rest of a class, and one of the defendants, a motion to intervene by a member of the class, for whose benefit the suit was brought, was denied; although no motion to dismiss the bill, nor for a discontinuance, had been made or noticed.[13]

6 Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323. The right was denied where the petitioner acquired his claim pending the suit. Terry v. Bank of Cape Fear, 20 Fed. 777. *Cf.* Davis v. Sullivan, 33 N. J. Eq. 569.

7 Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. ed. 349; s. c., 22 How, 380, 16 L. ed. 349; Myers v. Fenn, 5 Wall. 205, 18 L. ed. 604; Ex parte Jordan, 94 U. S. 248, 24 L. ed. 123; First Nat. Ins. Co. v. Salisbury, 130 Mass. 303; Hallett v. Hallett, 2 Paige (N. Y.), 432; Leigh v. Thomas, 2 Ves. Sen. 312; Story's Eq. Pl. § 99. See Tift v. Southern Ry. Co., 159 Fed. 555. It has been said that where the bill is not expressly filed in behalf of all the stockholders, but they are all interested in the relief, other stockholders have no absolute right of intervention: but the court may, in its discretion, permit them to intervene. Jackson Co. v. Gardiner Inv. Co., 200 Fed. 113, 117.

8 George v. St. Louis C. & W. Ry. Co., 44 Fed. 117.

9 Central R. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

10 Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329. But see Mangels v. Donau Br. Co., 53 Fed. 513.

11 Brown v. Pac. M. S. S. Co., 5 Blatchf. 525, 535.

12 Galveston R. Co. v. Cowdrey, 11 Wall. 459, 478; Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323.

13 Snyder v. DeForest Wireless Telegraph Co., U. S. C. C., E. D. Mo. 1907. But see Snyder v. DeForest Wireless Telegraph Co. (D.

In suits brought by or against a trustee, or otherwise affecting trust property, the beneficiaries of the trust, such as holders of bonds secured by a railroad mortgage, may be allowed to intervene for the purpose of protecting their interests;[14] but ordinarily the right to intervene has been denied them in the absence of fraud, neglect, inability, collusion or bad faith by the trustee,[15] even when the application was made for the purpose of taking an appeal, after the trustee had refused to appeal.[16] The better rule is that bondholders should always be allowed to intervene when their trustee refuses to make an active contest against the validity of a prior lien or of other bonds secured by the same mortgage. The facts showing misconduct or collusion by the trustee must be specifically pleaded. A general allegation of fraud, collusion, and co-operation with one of two parties of bondholders, is insufficient.[17]

Where a trustee represents bondholders under different mortgages with conflicting interests; or where, if a corporation, one of its officers or directors or controlling stockholders or counsel is a member of a reorganization committee which intends to buy the mortgaged property or is interested in a large claim against it, the trustee is under such disability to exercise unbiased judgment that an intervention should always be allowed.[18] It has been held: that the fact that certain of direc-

M.), 154 Fed. 142, 145. See § 361, *infra*.

[14] Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559; Drew v. Harman, 5 Price, 319; Saylors v. Saylors, 3 Heisk. (Tenn.) 525; Birdsong v. Birdsong, 2 Head (Tenn.), 289; Carter v. New Orleans, 19 Fed. 659; Farmers' L. & Tr. Co. v. Mo. I. & N. Ry. Co., 21 Fed. 264; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 66 Fed. 169; Central Tr. Co. v. Washington County, 124 Fed. 813.

[15] Richards v. Chesapeake & O. R. Co., 1 Hughes, 28, 36; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320, 350–352, per Bond, J., Hughes, J., dissenting; Farmers' L. & Tr. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182; Clyde v. Richmond & D. R. Co., 55 Fed. 445; Bowling Green Tr. Co. v. Va. Passenger & Power Co., 132 Fed. 921. See *supra*, § 171. Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269. See Eq. Rule 37.

[16] Fink v. Bay Shore Terminal Co., C. C. A., 144 Fed. 837.

[17] Bowling Green Tr. Co. v. Virginia Passenger & Power Co., 164 Fed. 753, 756; Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600. See Howard v. Shinn, C. C. A., 190 Fed. 940.

[18] Farmer's L. & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. 169; Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. 38; Grand Tr. Ry.

tors of the trustee are also holders of bonds and stock of the defendant is not, in itself, alone sufficient to allow the individual holders of a small minority of the bonds of intervene.[19] A provision in the mortgage, that no bondholder can bring a foreclosure suit until after a refusal by the trustee, does not preclude the intervention of a bondholder.[20]

When there is a substantial dispute between the bondholders as to the policy to be pursued, it is also proper to allow the intervention of committees representing them.[21] Except in extraordinary cases, it has not been the practice in the Second Circuit to allow individual creditors to intervene before a time has been appointed for the proof of their claim.[22] In general, injustice is more apt to result from the denial, than from the grant, of a prayer for intervention in a railroad foreclosure suit.

Analogous rules regulate the intervention by stockholders, in suits brought by or against their corporation.[23] In suits brought by or against a corporation, stockholders may be allowed to intervene if there is any danger of their being injured by fraud, neglect or collusion on the part of the officers;[24] and in some such cases stockholders have been allowed

Co. v. Central Vt. Ry. Co., 88 Fed. 622; Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 36 L.R.A. 826, 78 Fed. 664, 672. See Bowling Green Tr. Co. v. Virginia Passenger & Power Co., 164 Fed. 753, 756; Howard v. Shinn, C. C. A., 190 Fed. 940. But see Clyde v. Richmond & D. R. Co., 55 Fed. 445.

19 Bowling Green Tr. Co. v. Va. Passenger & Power Co., 132 Fed. 921.

20 Farmers' Loan & Tr. Co. v. Nor. Pac. R. Co., 66 Fed. 169.

21 Farmers' L. & Tr. Co. v. Cape Fear & Y. V. Ry. Co., 71 Fed. 38; Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168; Pennsylvania Steel Co. v. N. Y. City Ry. Co., 181 Fed. 285. Where the trustee was not proved to be guilty of co-operation with those wishing to reorganize the corporation, except that against the protest of the minority he had brought a foreclosure suit at the majority's request and that he had failed to answer within two days a series of questions by a bondholder; leave to intervene was denied. Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600.

22 Sands v. E. S. Greeley & Co., 80 Fed. 195; Pa. Steel Co. v. N. Y. City Ry. Co., 160 Fed. 222.

23 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Pa. Steel Co. v. N. Y. City Ry. Co., 160 Fed. 222.

24 Bayliss v. Lafayette, M. & B. Ry. Co., 8 Biss. 193. See U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

to file an answer and defend the suit in the name of the corporation.[25] The court has also allowed cross-bills to be filed for the same purpose.[26] In the absence of fraud, neglect, or collusion by the officers of the corporation, stockholders will not ordinarily be allowed to intervene before a decree;[27] unless a receiver has ben appointed, when each separate group of stockholders with conflicting interests or taking opposite positions may be allowed an intervention.[28] The failure of the board of directors to defend a foreclosure action, when a colorable defense exists, is a sufficient ground for allowing the intervention.[29] In the Second Circuit, the usual practice after receiverships is to permit the intervention of committees of stockholders representing conflicting interests; but ordinarily, not to allow individual stockholders or additional committees to intervene.[30]

25 Bronson v. La Crosse & M. R. Co., 2 Wall. 283, 17 L. ed. 725; Guarantee Tr. & S. Co. v. Duluth & W. R. Co., 70 Fed. 803; Ex parte Jordan, 94 U. S. 248, 249, 24 L. ed. 123; Bayliss v. Lafayette, M. & B. Ry. Co., 8 Biss. 193. *Contra*, Ex parte Printup 87 Ala. 148; Stretch v. Stretch, 2 Tenn. Ch. 140. In Central Tr. Co. v. Marietta & N. G. R. Co., 48 Fed. 14, the facts were held not to justify the intervention; but this case might very properly not be followed. See also Blackman v. Central R. & B. Co., 58 Ga. 189; Central Tr. Co. v. Washington County, 124 Fed. 813.

26 Bartlett v. Gates, 118 Fed. 66.

27 Forbes v. Memphis, El. P. & P. R. Co., 2 Woods, 323, 333. For a peculiar case, see Collin v. Chattanooga W. & P. Co., 44 Fed. 535. For cases where it was held, that there was no collusion, see Land Title & Trust Co. v. Asphalt Co., C. C. A., 127 Fed. 1; Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

28 Fowler v. Jarvis-Conklin M. Tr. Co., 64 Fed. 279; Hamlin v. Toledo, St. L. & K. C. R. Co., 36 L.R.A. 826, 78 Fed. 664, 672. See Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. 497, 535.

29 Farmers' Loan & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49, 53. It has been said: "It will not avail a stockholder, seeking to avoid a default suffered by a corporation, to allege merely that the corporation had cash and cash assets sufficient to pay the claim. The managing officers may, consistently with their duty, resolve not to pay it, and it is incumbent upon the stockholders to show that the refusal to so apply its assets cannot be reconciled with prudent and fair management; and this must be shown by facts of themselves disclosing the fraud or breach of duty, and not by allegations which embody nothing but the ultimate conclusion necessary to be established." Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 613.

30 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 181 Fed. 285. This practice has been followed in one

Where bad faith or oppression on the part of the intervening committee is shown, intervention by an individual stockholder thereby injured should be allowed.[31] To entitle a stockholder to intervene before a judgment in a suit against the corporation, he must set forth facts sufficient to have enabled him to maintain an independent suit to assert or protect the corporate right.[32] A stockholder who prays leave to intervene and defend on behalf of his corporation should show a previous request to the board of directors and their refusal to defend, or else circumstances which would make such a request a vain form;[33] but if a petition defective in this respect shows a good defense, the proceedings should be stayed until an opportunity has been afforded for the petitioner to apply to the board of directors and then file a new petition.[34] It has been said: that stockholders cannot intervene for the purpose of questioning the propriety of the selection of the person appointed receiver;[35] nor to attack the conduct of a receiver because of fraud;[36] and that the proper remedy, in the latter case, is an original bill.[37]

A stockholder or creditor of a corporation may be allowed to intervene in a suit against the receiver of the company; but only under very extraordinary circumstances.[38]

In general, a creditor of a defendant who has no judgment cannot intervene to defend the suit;[39] but where the parties

case at least in the Seventh Circuit. Thomasson v. Guaranty Trust Co. of N. Y., C. C. A., 159 Fed. 126.

31 Thomasson v. Guaranty Trust Co. of N. Y., C. C. A., 159 Fed. 126.

32 Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600. See *supra*, § 145.

33 Farmers' L. & Tr. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49; General El. Co. v. West Asheville Imp. Co., 73 Fed. 386; See § 145, *supra*. The facts must be alleged with particularity. General charges of fraud and collusion are insufficient. Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600.

34 Farmers' L. & T. R. Co. v. Toledo, A. A. & N. M. Ry. Co., 67 Fed. 49, 53; Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Dickerman v. Northern Trust Co., 176 U. S. 181, 185, 44 L. ed. 423, 425.

35 Land Title & Trust Co. v. Asphalt Co., 114 Fed. 484.

36 Forbes v. Memphis El. P. & Pac. Ry. Co., 2 Woods, 323; Fed. Cas. No. 4,926.

37 Forbes v. Memphis El. P. & Pac. Ry. Co., 2 Woods 323, Fed. Cas. No. 4,926.

38 Hosmer v. Darrah, 85 App. D. 485.

39 Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. 325; Farmers' L. & Tr. Co. v. Chicago & N. P. Ry.

act in collusion to cut off the rights of insecured creditors, this may be permitted.[40]

In a suit to cancel a deed, it was held to have been erroneous to refuse one of the representatives of the grantors the right to intervene as a party plaintiff.[41] An administrator, with the will annexed, has been allowed to intervene, to continue a suit brought by an executor who has been removed.[42] A trustee or an ancillary trustee may intervene in the bankrupt's place in any suit in which the bankrupt was a party.[43] A person claiming a right to property held by a marshal[44] or receiver,[45] or claiming a right to share in a fund in court,[46] is usually allowed to intervene *pro interesse suo,* provided that he does not resist the prayer of the complainant;[47] but after a sale by a marshal, permission to intervene to set aside the same was denied to an adverse claimant of the property.[48] In a proceeding under the Pure Food and Drugs' Act, the owner of the property may be allowed to intervene.[49] After permission to intervene and answer had been granted, and subsequently another order was made permitting the answer to be withdrawn and exceptions and a demurrer to the libel and information to be filed; it was held that it was too late for the district attorney to object that there was no proof that the intervenor was a party in interest or

Co., 68 Fed. 412. See George v. St. Louis, C. & M. Ry. Co., 44 Fed. 117.

40 Louisville Tr. Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; *infra,* §§ 261, 394.

41 Billings v. Aspen M. & S. Co. C. C. A., 51 Fed. 338.

42 Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159.

43 The Alert, 199 Fed. 542.

44 Gumbel v. Pitkin, 124 U. S. 131; *supra,* § 52.

45 Lord Pelham v. Duchess of Newcastle, 3 Swanst. 290; Minot v. Mastin, C. C. A., 95 Fed. 734; Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. 513, 517; Foley v. Grand Hotel Co., C. C. A., 121 Fed. 509; Daniell's Ch. Pr. (2d Am. ed.) 1270; *infra,* § 304.

46 Central Tr. Co. v. Marietta & N. G. R. Co., 63 Fed. 492; Rice v. Durham Water Co., 91 Fed. 433. But see as to non-residents, Sands v. E. S. Greeley & Co., C. C. A., 80 Fed. 195; Tift v. Southern Ry. Co., 159 Fed. 555.

47 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; Krippendorf v. Hyde, 110 U. S. 276, 20 L. ed. 145; Esterbrook Co. v. Ahern, 31 N. J. Eq. 3. See Cincinnati Equipment Co. v. Degnan, C. C. A., 184 Fed. 834.

48 Ex parte Mensing, 55 Fed. 17.

49 U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642.

that it was the *bona fide* owner of the article seized.[50] It has been held that a party interested in a fund, to recover which an action at law is pending, cannot be allowed to intervene therein, since the court has no jurisdiction to distribute the proceeds of the suit.[51] Upon a motion to set off one judgment against another, a person claiming an assignment of the second judgment has a right to intervene by a motion which, although made in an action at law, is of an equitable nature.[52] A telegraph company, claiming the right to use the railroad's right of way, was allowed to intervene in a foreclosure suit.[53] A party claiming the equitable title to land held by a railway company of which the receiver had not taken possession, and which was exempted from the receivership by order, and not otherwise mentioned in the proceedings, was denied leave to intervene in a suit to foreclose a mortgage on the property of the railroad.[54]

Ordinarily, a stranger whose rights cannot be affected by a decree to which he is not a party, will not be allowed to intervene.[55] The Attorney-General of the United States may intervene for the protection of the Federal government in a suit between two States affecting their boundaries.[56] But not in a suit between two States affecting the right to use the waters of a stream, which is not navigable.[57] A district attorney of the United States was refused permission to intervene in a civil suit brought by a person charged with a crime to obtain possession of certain papers needed as evidence before a grand jury.[58] The United States[59] or a State[60] may usually

[50] U. S. v. Forty-six Packages and Bags of Sugar, 183 Fed. 642, 644.

[51] McKemy v. Supreme Lodge A. O. U. W., C. C. A., 180 Fed. 961.

[52] Cathay Trust v. Brooks, C. C. A., 193 Fed. 973.

[53] Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. 513; Union Tr. Co. v. Atchison, T. & S. F. R. Co., 8 N. M. 327, 43 Pac. 701.

[54] Cutting v. Florida Ry. & Nav. Co., 45 Fed. 444.

[55] Morton Tr. Co. v. Metropolitan St. Ry. Co., 168 Fed. 941, where the pledgee of bonds pledged by a corporate mortgage was not allowed to intervene in the foreclosure suit, to litigate the question of its liability, since he had a right to contest the same in an action by the purchaser.

[56] Florida v. Georgia, 17 How. 478, 15 L. ed. 181; *supra*, § 3.

[57] Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956.

[58] Potter v. Beal, C. C. A., 50 Fed. 860.

[59] Stanley v. Schwalby, 147 U. S. 508, 513, 37 L. ed. 259, 261.

[60] Tennessee v. Quintary, 80 Fed.

intervene in a suit affecting property in which the government claims an interest. A State cannot intervene in a foreclosure suit affecting property upon which it claims no lien, in order to enjoin the proceedings upon the ground that the plaintiff is forbidden by a State statute from acting as trustee for the mortgage bondholders.[61] But the State was allowed to intervene in a foreclosure suit to enforce its rights under a contract to which it was not a party.[62] Persons interested in disputing the validity of a patent have been allowed to intervene to defend a suit brought against their bailee, to enjoin the use by it of cars belonging to them;[63] and to move to set aside a decree establishing the validity of a patent entered by collusion, in a suit to which they were strangers.[64] But such persons were not allowed to intervene in a suit to restrain the infringement of a patent when they relied upon a distinct defense not raised therein.[65] Nor in any case where they were not employers of the person sued, nor in direct privity with him.[66] Vendors of the articles charged to constitute an infringement have been allowed to intervene,[67] but not after they had stopped the manufacture and sale of the same.[68] The act creating the Commerce Court provides "that communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commis-

829; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137; *supra*, § 105.

61 Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. 412, 417.

62 Tennessee v. Quintard, 80 Fed. 829.

63 Standard Oil Co. v. Southern Pac. R. Co., 54 Fed. 521. But see W. A. Gaines & Co. v. Rock Spring Distilling Co., 179 Fed. 544, a trademark case.

64 Barker v. Todd, 15 Fed. 265. But see Washburn v. Moen Mfg. Co. v. Colwell S. B. F. Co., 1 Fed. 225; Cochrane v. Deener, 95 U. S. 355, 24 L. ed. 514. In Thomson-Houston El. Co. v. Western El. Co., C. C. A., 158 Fed. 813, a stranger was not allowed to intervene upon an appeal for the purpose of having the case remanded for further proofs, when collusion was charged, but the record did not furnish any evidence thereof and the petitioner had full opportunity to intervene in the court below.

65 Page v. Holmes B. A. Tel. Co., 18 Blatchf. 118; s. c., 2 Fed. 330; Cochrane v. Deener, 95 U. S. 355, 24 L. ed. 514; Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. 75.

66 Thomson-Houston El. Co. v. Sperry El. Co., 46 Fed. 75. *Contra*, Hurd v. Sein, 189 Fed. 591.

67 Curran v. St. Charles Car Co., 32 Fed. 835.

68 Ring R. & I. M. Co. v. St. Louis Ice Mfg. Co., 67 Fed. 535.

sion, or in any suit which may be brought by any one under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof." [69] It has been held that this gives the right of intervention to an incorporated grain exchange or a board of trade, a large number of the members of which are engaged in business that will be directly affected by an order which it is sought to enjoin.[70] An act of Congress gives creditors and materialmen the right to intervene in any action by the United States on the bond of a contractor for the construction or repair of a public building or for the prosecution and completion of a public work, and also to file his claim and be made a party to any suit by another creditor upon such bond.[71] It has been held: that, in such an action, the doctrine of subrogation cannot be applied, and that persons other than the contractor cannot enforce security given to indemnify a surety upon the bond who has become insolvent.[72] That an application of credits once having been made to reduce the claim of an intervenor, there is no authority to make any other application thereof.[73] That such intervenors are subject to the ordinary rules and practice governing interventions, and no creditor can intervene after the action has been dismissed for want of service or has been fully tried and submitted for decision.[74] It has been said: that the court has no power to bring in new parties defendant, against the objection of the complainant, where those who seek themselves to intervene make issues, which would not be disposed of so as to become *res adjudicata* if they were not joined.[75] It has been held in foreclosure suits that the validity of the appointment of the plaintiff as a trustee should not be decided upon the application of intervening bond-

69 Act of June 18, 1910, c. 309, § 5, 36 St. at L. 539, 543.

70 Nashville Grain Exch. v. U. S. (Commerce Ct.) 191 Fed. 37.

71 Act of August 13, 1894, ch. 280, 28 St. at L. 278, Comp. St. 1901, p. 2523, as amended by Act of February 24, 1905, ch. 778, 33 St. at L. 811, Comp. St. Supp. 1909, p. 948.

72 U. S. v. United Surety Co., 192 Fed. 992.

73 U. S. v. Massachusetts Bonding & Ins. Co., 198 Fed. 923, 928.

74 U. S. v. McGee, 171 Fed. 209.

75 Central Tr. Co. v. Washington County, 124 Fed. 813, 814, 815. See also Gregory v. Pike, 67 Fed. 837; *supra*, § 199.

holders,[76] and that where there was no dispute as to the validity of all of the bonds as against the corporation, the holder of a part thereof should not be allowed to intervene before the sale for the purpose of litigating a claim of priority over other bondholders; that being said to be a question, which could be litigated before the master upon the application for the distribution of the proceeds of the sale.[77] Laches may be a reason for denying a stockholder's, bondholder's, or creditor's or other's[78] petition of intervention when equities on the part of the complainant or other parties interested have arisen during the delay.[79] A delay of about three years and a half in presenting a claim for payment in a foreclosure suit was held not to be laches, where the intervenor had in the meantime obtained a judgment against the defendant.[80] Where general creditors of a corporation had made no objection to the acquisition of the possession of property by receivers appointed in a foreclosure suit, until after the property had been sold under a decree and the sale confirmed; it was held, that they were estopped by their laches from maintaining petitions of intervention to compel the payment of their demands from the proceeds of the sale, upon the ground that part of the property was not subject to the lien of the mortgage.[81]

When the court acquired jurisdiction of the original bill, the fact that an intervenor has the same citizenship as a party on the opposite side of the controversy,[82] or that his claim is less

[76] Bowling Green Tr. Co. v. Va. Passenger & Power Co., 132 Fed. 921.

[77] Mercantile Tr. Co. v. U. S. Shipbuilding Co., 130 Fed. 725. See Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269.

[78] Thomson-Houston El. Co. v. Western El. Co., C. C. A., 158 Fed. 813; Leary v. U. S., C. C. A., 184 Fed. 433.

[79] Continental Tr. Co. v. Toledo. St. L. & K. C. R. Co., 82 Fed. 642; Boston S. D. & Tr. Co. v. Am. Rapid Tel. Co., 67 Fed. 165; State Trust Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398; U. S. Trust Co. v. Chicago Terminal T. R. Co., C. C. A., 188 Fed. 292; Trust Co. of America v. Norfolk & S. Ry. Co., 174 Fed. 269.

[80] New York G. & I. Co., v. Tacoma R. & M. Co., C. C. A., 83 Fed. 365. *Cf. supra*, § 258, note 23.

[81] State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

[82] Kripendorf v. Hyde, 110 U. S. 276, 283, 284, 28 L. ed. 145, 148; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Monmouth Inv. Co. v. Means, C. C. A., 151 Fed. 159; *supra*, § 46.

than the jurisdictional amount,[83] will not affect his intervention, nor defeat the jurisdiction, after he has been admitted to the suit.

A State statute authorizing or forbidding interventions in suits of equity will not be followed by a Federal court.[84]

[83] Stanwood v. Wishard, 134 Fed. 959; *supra*, § 6.

[84] Mercantile Tr. Co. v. Atlantic & P. R. Co., 63 Fed. 513, 517.

In an instructive essay, Mr. Edward C. Eliot, of St. Louis, classifies cases of intervention as follows (31 Am. Law Rev. 377, 381, 382, 383, 385, 387, 390, 391, 392):

"The intervention of strangers to the original cause which will be entertained and adjudicated by the Federal courts may have as the basis of their institution one of the following matters of interest:

"1. They may be based upon a right or title to the subject-matter paramount in quality to the claims of the original parties to the suit and extending to the whole matter of rightful ownership. Into this class of intervention will fall almost all those proceedings which are permitted by the Federal courts as incidental to suits at law; and they are closely analogous to the ordinary interpleas permitted by statute and in the State courts. . . .

"2. In the second class of interventions may be placed those which are based upon some statutory or contractual lien which the intervenor has by law, independent of the peculiar jurisdiction of the Federal court, and which he seeks to impose upon the property in the charge of the court and to enforce in the Federal court because of his inability to pursue the same right or remedy in the State courts. Into this class of interventions fall the enforcement of statutory or mechanics' liens, charges or liens which may be the result of private contract between the parties, and also judgment liens of later or earlier date obtained in the State courts, and which by State statute are made precedent in right to the complainant's cause of action. . . .

"3. The third class of interventions consists of those which are based, not upon rights or titles in the subject-matter existing in full force by law, irrespective of the action of the Federal tribunal, but such as rest upon equities which are purely the creation of the Federal courts and which in the judgment of such courts justify the preference of the intervenors, owing to such equities, over the rights of the parties to the suit. It is believed that the interventions which are now referred to are peculiar to railroad foreclosures. . . .

"4. The fourth class includes those interventions which rest upon legal rights or equitable liens upon the subject-matter in the hands of the court, but which are deferred in law or equity to the rights of the complainant. They may be superior to the rights of other parties to the suit. Manifestly these interventions, though they may be adjudicated, have no effect to postpone or interfere with the original purpose of the suit. They apply simply to any possible surplus which may be in the hands of the officers of the

§ 259. Practice upon interventions. A petition of intervention may be filed at any stage of the cause, even after a final

court after the objects of the original suit have been effected. They are then classified among themselves, but are made liens or charges only upon the remnant of the property which may be in the hands of the court.

"5. In the fifth class are interventions based upon contractual obligations which may be made or incurred by the receiver or other officers of the court in charge of the property during the litigation. . . .

"6. The last class of interventions includes those based upon the torts of the receiver in the management of property in the control of the court. . . .

"Owing to the lack of understanding of the real nature of intervening petitions and the fundamental ground upon which the court acts, attempts are often made to extend the jurisdiction of the Federal court upon petitions of this character to matters or for results which the court ought not to consider or to effect. In a railroad foreclosure suit, a deficiency decree against the defendant corporation for the amount of indebtedness not satisfied out of the proceeds of sale is proper, because such is the original cause of action of the complainant. But effort is sometimes made by individual bondholders through interventions, to enforce some statutory or common-law liability upon the stockholders of the defendant corporation. While there may be no direct adjudication to that effect reported, it is evident that this would be an extension of the jurisdiction of the Federal court beyond reason."

But see Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 610. "There may be, of course, causes in which the entire assets of a corporation are taken in charge by the court, as upon creditor's bill, where the individual liability of the stockholders of the corporation may be an asset in the hands of the receiver or other officer of the court. In that event, at the suggestion or motion of a creditor, no doubt the object of the principal cause would justify the enforcement of the liability. But it will be seen that this is really the purpose and object of the principal suit. The matter does not arise collaterally. And the personal liability is one of the property interests seized. So in other cases, attempts have been made through interventions to try titles or rights which have been derived through the receiver or by operation of the decrees or judgment of the court. These, also, are not properly subjects of interventions, although the courts have indeed held that a bill or motion may be entertained as ancillary to a decree of judgment, for the interpretation of that judgment or decree at the instance of a person who claims title under it. This is another case of the extreme limit of the principle. Interventions are also attempted and sometimes entertained to force upon the receiver a duty to make some equitable contract in favor of a public interest. Where such an intervention is to be considered, it ought to rest upon the propriety of the court's advising the receiver, and the proceeding should be considered as in the nature of a peti-

decree, provided, at least, that it is filed at the same term.[1] An intervention has been allowed after an order taking the decree as confessed by the original defendant,[2] and after the decree had been signed but not entered.[3] It has been said: that it will only be granted after final decree, in order to preserve some right which cannot otherwise be protected, or to avoid some complication which is likely to arise.[4] Where the original complaintiff had no interest in the relief prayed in a petition of intervention, it was held to be demurrable because of his joinder as a co-petitioner with the person interested.[5] A petition for leave to intervene should describe the proceedings in the cause in which it is filed, so that the court can see the nature and condition of the suit.[6] It may also contain a statement of the petitioner's view of the case, and pray in addition to intervention the final relief which he desires. While a petition of intervention need not be as formal as a bill of complaint, and should be distinguished for brevity, it should exhibit all the material facts which are relied upon for the specific relief asked, embodying, either by recital or by reference, so much of the record of the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petitioner.[7] Where the petition of intervention contained general averments showing the petitioner's interest in the litigation and closed with a statement that he referred to all of the allegations in the original complaint, in so far as

tion by him for advice. There has been, however, an instance where the intervening petition of a stranger to a suit was entertained to force the receiver to make a contract for the electric lighting, public and private, of a city, which was dependent upon the operation of the property in the hands of the receiver for that purpose. And, in that case, the judge of the United States court said that he would consider the application out of public necessity and because he would not permit his receiver to leave the city in darkness for want of a proper contract." Hodgen v. Met. El. Ry. Co., U. S. C. C., W. D. Mo., per Phillips, D. J., May, 1894.

§ 259. [1] New York G. & I. Co. v. Tacoma Ry. & M. Co., C. C. A., 83 Fed. 365; *supra*, § 413.

[2] Farmers' L. & Tr. Co. v. Toledo, A. A. & N. Ry. Co., 67 Fed. 49, 53.

[3] Guarantee Tr. & S. D. Co. v. Duluth & W. R. Co., 70 Fed. 803.

[4] U. S. v. Northern Securities Co., 128 Fed. 808.

[5] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

[6] Ransom v. Davis' Adm'rs, 18 How. 295, 15 L. ed. 388.

[7] French v. Gapen, 105 U. S. 509, 519, 520, 26 L. ed. 951, 954, 955.

they were not inconsistent with the foregoing statement and claim, and made the same part of his petition; it was held to be not defective for want of specific allegations of the matter thus incorporated by reference.[8] It must conform to the general rules of pleading and must meet the same tests that are applied to ordinary pleadings to determine whether a cause of action or a defense is stated.[9] It will be construed in connection with the original proceedings in the suit.[10] Where, subsequently to the filing of the petition of intervention, proceedings have been had under the original bill which would fortify the right of the intervening petitioner, either to the particular relief demanded or to some other relief, the matter should be incorporated into the petition of intervention by amendment.[11] A petition seeking the payment by a receiver of a claim must specifically allege that he has sufficient funds which are properly applicable to the claim.[12] A petition to intervene and defend a suit should be accompanied by the answer proposed,[13] or, at least, should show the nature of the defense.[14] It is the usual practice to verify a petition of intervention by the oath of the petitioner. An affidavit by the petitioner, that the allegations in the petition "are true as he verily believes," was held to be sufficient; and, in the absence of a traverse, they were presumed to be true upon an appeal.[15] A petition of intervention may be amended by leave of the court.[16] All the parties to the suit are presumed to be parties to the petition of inter-

8 U. S. v. Massachusetts Bonding & Ins. Co., 198 Fed. 923, 927.

9 Continental & C. Tr. & S. Bank v. Allis-Chalmers Co., 200 Fed. 600, 607.

10 Receiver of Cent. R. & B'g. Co. v. Macon, D. & S. R. Co., 115 Fed. 926, 927.

11 Jenkins, J., in Empire Dis. Co. v. McNulta, C. C. A., 77 Fed. 700, 703.

12 Ibid. For allegations in an intervening petition, by the holder of a judgment for death by negligence on the ground that the road was operated by a company acting as the agent of the bondholders, which were held to be too vague and indefinite to sustain a preference, see Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471.

13 Toler v. East Tenn., V. & G. Ry. Co., 67 Fed. 168.

14 Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 569.

15 Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 687–689, 43 L. ed. 1130, 1135, 1136; s. c. as Farmers' Loan & Trust Co. v. Louisville, New Albany & C. Ry. Co., 103 Fed. 110, 115.

16 Willcox v. Jones, C. C. A., 177 Fed. 870, 876.

vention, and, under the former practice were presumed to take notice of the same when it was filed, although it was safer to serve them.[17] Notice of an application for intervention may, by leave of the court, be served on the attorneys for the other parties to the suit, who are beyond the jurisdiction of the court, unless the petition sets up new facts not set out in the bill nor germane to the case thereby made, which are made the basis of a prayer for independent affirmative relief, when it has been held that such substituted service cannot be permitted.[18] New parties brought in by the intervenors should be served with a subpœna or some other notice in the same manner as if the petition were an original bill.[19] It has been held, that, even where the parties are beyond the territorial jurisdiction, they may be served by mailing to them a copy of an order directing that they demur, plead, or answer, to the petition.[20] The proceedings in the suit may be stayed pending the hearing upon a petition of intervention, although such relief is extraordinary.[21]

If any of the original parties wishes to contest the petitioner's right to intervene, he must do so specifically at the hearing upon the petition.[22] Under the former practice, he might file a demurrer, plea, or answer to the petition.[23] Under the Equity Rules of 1912, the objection should be raised by a motion to dismiss,[24] or by a specific defense set up in the answer.[25] Under the former practice it was held to have been waived where the complainant consented to the issue of process on a petition of intervention and demurred thereto, without objecting to the

17 Central Tr. Co. v. Madden, C. C. A., 70 Fed. 451; McLeod v. City of New Albany, 66 Fed. 378; Lombard Inv. Co. v. Seaboard Mfg. Co., 74 Fed. 325. See *supra*, § 257.

18 Fidelity Tr. & S. V. Co. v. Mobile St. Ry. Co., 55 Fed. 850. See *supra*, § 165.

19 Hook v. Mercantile Tr. Co., 95 Fed. 41, 47.

20 Bache v. Hunt, Thompson, J. C. C., N. D. Ohio, W. Div. Dec. 4, 1901. (Appeal dismissed Bache v. Hunt, 193 U. S. 523, 524, 48 L. ed. 774, 775).

21 Pennsylvania Co. v. Jacksonville, T. & K. Ry. Co., 55 Fed. 131.

22 French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956; Meyers v. Fenn, 5 Wall. 205, 18 L. ed. 604.

23 Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

24 See Eq. Rule 29; Horn v. Pere Marquette R. Co., 151 Fed. 626; McClellan v. Blackman, 188 Fed. 934.

25 Eq. Rule 29. See Central Tr. Co. of N. Y. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

right of intervention[26] and by an answer to the merits of the inventor's claim.[27] But the usual practice is to present the objections informally by affidavit or otherwise upon the hearing.[28] It was held that the objection, that the intervenor's claim was barred by his failure to present the same within the time limited by a previous order in the cause, should be raised by plea and not by demurrer.[29] It has been said: that a receiver may be required to plead to the petition.[30] A failure to answer allegations in the petition, or to deny the same by affidavit, is considered to be an admission of the truth of the same.[31] The filing of a replication to a petition of intervention and the proceeding to a hearing were held to be a waiver of objections to the sufficiency of the petition and to the absence of an order granting leave to intervene.[32] At the hearing upon a petition of intervention it is customary for the court to determine the right of the petitioner to intervene; and then, if it decides in his favor in that respect, to refer the case to a master to report upon his right to the other relief which he seeks. But the court may decide the whole case without a reference.[33] If he shows a *prima facie* case, his application will ordinarily be granted; although the questions concerning his rights in the premises are doubtful.[34] It is the rule in the Eighth Circuit, that where the petition sets up a cause of action maintainable at common law the issue shall be tried by a jury.[35] It has been said that a denial of a petition for leave to intervene in an action at law is *res adjudicata* against a bill in equity to enjoin the proceedings and to permit an intervention;[36] but that a denial of leave to intervene in a suit in equity is not *res adjudicata* against an

[26] Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853.

[27] Horn v. Pere Marquette R. Co., 151 Fed. 626.

[28] Interventions in the Federal Courts, by Edward C. Eliot, 31 Am. Law Rev. 377.

[29] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 156.

[30] Mercantile Trust Co. v. Pittsburg & W. Ry. Co., C. C. A., 115 Fed. 475.

[31] Louisville Tr. Co. v. Louisville New Albany & C. R. Co., 174 U. S. 674, 43 L. ed. 1130.

[32] Perry v. Godbe, 82 Fed. 141.

[33] Central Tr. Co. v. Madden, 70 Fed. 450.

[34] Brinckerhoff v. Holland Trust Co., 146 Fed. 203.

[35] Rouse v. Hornsby, C. C. A., 67 Fed. 219. So held in Atkyn v. Wabash Ry. Co., 41 Fed. 193, N. D. Ohio.

[36] McDonald v. Seligman, 81 Fed. 753.

original bill for the same relief.[37] Leave to intervene when granted should be given by order;[38] but, by proceeding without objection, an omission to enter such an order will be waived.[39] In one case, intervening petitions filed without leave were stricken from the files.[40] Leave has been granted to withdraw an intervention, with the pleading of the intervenor and the testimony in proceedings in relation to his contention.[41] The filing of a petition of intervention is a voluntary general appearance in the suit, and the petitioner is thereby estopped from claiming that the court has no jurisdiction over him for any purpose or cause which, by proper amendment of the pleadings, can be brought into it.[42] After intervention the new parties are treated to all intents and purposes as if they had been original parties to the suit.[43] They are entitled to the same notice and hearing of subsequent proceedings that must be afforded to an original party.[44] It has been held that bondholders, who intervene in a creditors' suit, may enforce a guarantee of their bonds, although the trustee of their mortgage is not made a party.[45] The Equity Rules expressly provide: "The intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[46] Previously it was held,

[37] Credits Commutation Co. v. U. S., 177 U. S. 311, 44 L. ed. 782. See Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. 710.

[38] For the form of an order see Ex parte Jordan, 94 U. S. 248, 249, 24 L. ed. 123.

[39] Myers v. Fenn, 5 Wall. 205, 18 L. ed. 604; French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956; Ferry v. Godbe, 82 Fed. 141.

[40] Continental Trust Co. v. Toledo, St. Louis & K. C. Ry. Co., 82 Fed. 642, 661; s. c., 86 Fed. 929, 951. In the same case, as Toledo, St. Louis & K. C. Ry. Co. v. Continental Trust Co., C. C. A., 95 Fed. 497, 536, it was said, speaking of an answer and cross-bill filed by a stranger to the suit without permission: "He should have sought admission as an independent defendant. This he did not do; unless the unauthorized filing of his pleading be regarded as an application for leave to intervene. If so, it was denied him."

[41] Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 461, 50 L. ed. 1102, 1108.

[42] Bowdoin College v. Merritt, 59 Fed. 6; Jack v. D. M. & Ft. D. R. Co., 49 Ia. 627; *supra*, §§ 169, 170. But see Laughlin v. Leigh, 107 Ill. App. 476.

[43] French v. Gapen, 105 U. S. 509, 525, 26 L. ed. 951, 956.

[44] Gay v. Hudson River El. Power Co., C. C. A., 169 Fed. 1020.

[45] Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721, 753.

[46] Eq. Rule 37. See Knickerbock-

that, where no collusion was charged, the jurisdiction of the court in equity and its power to appoint a receiver could not be attacked by an intervenor after a receiver's appointment.[47] But the court will not decide an independent controversy between an intervenor and an original defendant of which it would have no jurisdiction upon an original bill, unless it relates to property in the court's possession.[48] It has been held that an intervening stockholder acquires no greater right in the property than he had before the suit.[49] The stockholder, although the holder of preferred stock, who has intervened in a creditor's suit against a corporation, after insolvency has been charged and admitted and a receiver appointed, cannot oppose a dismissal of the bill and a restoration of the property to the company which consents to the same.[50] Where an intervening petition was filed in a foreclosure suit, asserting a lien superior to that of the mortgage, and the intervenor was found to have no lien; it was held not error to dismiss the petition without awarding him a money judgment.[51] Where the original suit appeared to have been brought by collusion, jurisdiction was re-

er Tr. Co. v. Tarrytown, W. P. & M. Ry. Co., 139 App. Div. 305.

47 Cincinnati Equipment Co. v. Degnan, C. C. A., 184 Fed. 834, where the objection was not raised in the petition of intervention, nor until after property had been surrendered to the intervenor under a stipulation. Where an order permitting a lessee to redeem from a foreclosure decree and to be subrogated to the rights of the mortgagor complaint was made by the consent of a stockholders' committee, which appeared by counsel, and recited that it was without prejudice to the right of the mortgagor or its stockholders to contest the validity of the lease and should not determine such validity, but that no subsequent decree between the parties should affect or impair the subrogation or the right of the lessee to collect the amount of the decree "in the same manner and with the same rights as the original bondholders would have had;" it was held that, under the provisions of the order, the stockholders could not intervene and attack the decree as well as the lease, because the latter was fraudulent, but that they were limited to a proceeding in some proper forum to hold the lessee liable in damages. U. S. Trust Co. v. Chicago Terminal T. R. Co., C. C. A., 188 Fed. 292.

48 United El. S. Co. v. Louisville El. L. Co., 68 Fed. 673; Clyde v. Richmond & D. R. Co., 65 Fed. 336. See Olds Wagon Works v. Benedict, C. C. A., 67 Fed. 1.

49 Shaffer v. McCulloch, C. C. A., 192 Fed. 801.

50 Shaffer v. McCulloch, C. C. A., 192 Fed. 801.

51 U. S. Tr. Co. v. Western Contract Co., C. C. A., 81 Fed. 454.

tained over intervening petitioners who asserted claims to property held by a receiver therein appointed.[52] Where, at the time of the intervention, the suit is pending in a State court, the intervenors may in a proper case remove it.[53] Unless it expressly reserves their rights,[54] they have the right to appeal from the final decree, and can then object to all interlocutory proceedings taken after their intervention.[55] The final order or decree upon a petition of intervention after the intervention has been granted may be reviewed apart from the appeal from the final decree in the whole cause where it is distinct from the same;[56] but where the case is one in which the Circuit Court of Appeals has final jurisdiction of an appeal from the decree in the original cause, its decree upon an appeal from the final decree or order upon the intervenor's claim is likewise final, even though a Federal question is involved therein.[57] It has been held that, where the issues have been decided by a jury trial, the review should be by writ of error,[58] but that the denial of a motion to intervene, to oppose an application for the set-off of judgment, is a final order and should be reviewed by an appeal.[59] Where a denial of the right to intervene is a practical denial of all relief to the petitioner, who has no other means of redress, an appeal will lie from an order denying an intervention.[60] For example: where a suit is brought by a member of a

52 El. Supply Co. v. Port Bay W. L. & Ry. Co., 84 Fed. 740.

53 Hack v. Chicago & G. S. Ry. Co., 23 Fed. 356; Jackson & Sharp Co. v. Pearson, 60 Fed. 113, 123; *infra*, § 384. But see Iowa Homestead Co. v. Des Moines Nav. & R. Co., 8 Fed. 97.

54 Reid v. Judges of Circuit Court of United States for Eastern District of Virginia, C. C. A., 175 Fed. 774.

55 Ex parte Jordan, 94 U. S. 248, 252, 24 L. ed. 123, 125; Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559.

56 Central Tr. Co. v. Grant Locomotive Works, 135 U. S. 207, 34 L. ed. 97; Pennsylvania R. Co. v. Wabash, St. L. & P. Ry. Co., 155 U. S. 335, 39 L. ed. 176; Rouse v. Hornsby, 67 Fed. 219; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396.

57 Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341; Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566; Rouse v. Hornsby, 161 U. S. 588, 40 L. ed. 817.

58 Rouse v. Hornsby, C. C. A., 67 Fed. 219. Otherwise it was held where the trial was in another court before the intervention. Shook v. Dozier, C. C. A., 168 Fed. 867.

59 Cathay Trust v. Brooks, C. C. A., 193 Fed. 973.

60 Credits Commutation Co. v. U. S., 91 Fed. 570, 573; s. c., 177 U. S. 311, 44 L. ed. 782; Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853; U. S. Trust Co. of N. Y. v. Chicago

class, on behalf of the others as well as of himself, any member of that class has the right to appeal from an order denying his application for an intervention.[61] So, where there is a fund in court in the course of administration which will be distributed to others unless the intervenor's claim is forthwith determined.[62] But otherwise an order denying leave to intervene is ordinarily not appealable.[63] Where the right of intervention has been allowed by the court, an order striking the petition from the files is the subject of an appeal.[64] It has been held that the proper practice is for the District Court to grant an appeal in every case, leaving the question of the appealability of the order for the decision of the court of review.[65] It may perhaps be reviewed in an extraordinary case, by an application to the court of review for a mandamus.[66]

A decree in a foreclosure suit, upon the intervention of a receiver for the mortgagor, was held to be binding on all parties to the suit in which he was appointed, including intervenors in the same.[67] A paper styled a cross-bill,[68] or which purports to be an original bill,[69] if otherwise correct in form, may be sustained as a petition of intervention. A paper improperly styled a petition of intervention may, if it contains the necessary alle-

Terminal Transfer R. Co., C. C. A., 188 Fed. 292; Cathay Trust v. Brooks, C. C. A., 193 Fed. 973.

61 Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853, 863.

62 Credits Commutation Co. v. U. S., C. C. A., 91 Fed. 570, 573, aff'd. 177 U. S. 311, 44 L. ed. 782.

63 Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; Jones & Laughlin's L'd v. Sands, 79 Fed. 913; Credits Commutation Co. v. U. S., 91 Fed. 570, 573; s. c., 177 U. S. 311, 44 L. ed. 782; Toledo, St. L. & K. C. R. Co. v. Continental Tr. Co., 95 Fed. 497, 536. *Ex parte* In the Matter of Leaf Tobacco Board of Trade of the City of New York, Petitioner, 222 U. S. 578, 56 L. ed. 323.

64 Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853. But see Louisville Tr. Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; Hamlin v. Toledo, St. L. & K. C. Ry. Co., 36 L.R.A. 826, 78 Fed. 664. See Land Title & Trust Co. v. Tatnall, C. C. A., 132 Fed. 305; and State v. Applebee, C. C. A., 127 Fed. 1.

65 U. S. v. Phillips, C. C. A., 107 Fed. 824.

66 Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Fink v. Bay Shore Terminal Co., C. C. A., 144 Fed. 837.

67 Atlantic Trust Co. v. Dana, C. C. A., 128 Fed. 209.

68 French v. Gapen, 105 U. S. 509, 519, 26 L. ed. 951, 954; Gregory v. Pike, 67 Fed. 837; Minot v. Mastin, 95 Fed. 734.

69 *Supra*, § 172.

gations, be sustained as a cross-bill.[70] Where relief was granted upon a petition for intervention, which regularly should have been sought by an original bill, since all the parties interested had been brought before the court and had had a hearing, the decree was affirmed.[71]

§ 260. Rights of intervening complainants. Under ordinary circumstances, a person who intervenes as plaintiff will not be allowed to be represented by a different solicitor from the one who represents the original complainant at the time of the former's intervention.[1] The person who brought the suit remains *dominus litis*. The court may, however, direct that the intervenor be notified in the event of any proposal to dispose of the cause, otherwise, than in the usual way at final hearing of pleadings and proof, in which case an application to allow him to continue the litigation by his own attorney will be considered.[2] In case of laches by the attorneys for the original complainant, an intervening plaintiff may be allowed to continue the case by his own attorney.[3] Permission to do this may be conditioned upon his giving security to pay whatever the court may find to be due the latter as his ratable proportionate share of the expense of the litigation.[4] When the intervening plaintiff moved to bring in a new defendant, to which the original plaintiff objected, a New York court granted the motion, upon condition that the moving party give a bond to indemnify the plaintiff against any costs that such defendant might recover.[5]

An intervening complainant cannot contest the general object of the suit.[6] It has been held that, where a creditor delays his intervention until after a decision in favor of the plaintiff,

70 Central Tr. Co. of N. Y. v. Marietta & N. Ry. Co., 63 Fed. 492.

71 Central of Georgia Ry. Co. v. Paul, 93 Fed. 878.

§ 260. 1 Bowker v. Haight & Freese Co., 140 Fed. 794; Manning v. Mercantile Tr. Co., 37 Misc. N. Y. 215, 75 N. Y. Supp. 168.

2 Bowker v. Haight & Freese Co., 140 Fed. 794.

3 Manning v. Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Supp. 168; Edwards v. Bay State Gas Co., 120 Fed. 585.

4 Manning v. Mercantile Trust Co., 37 Misc. (N. Y.) 215, 75 N. Y. Supp. 168.

5 Weed v. First National Bank, 117 App. Div. (N. Y.) 340. But see Edwards v. Bay State Gas Co., 120 Fed. 585.

6 Forbes v. Memphis, El. P. & Pac. Ry. Co., 2 Woods, 323, 324.

the payment of his claim may be postponed until after those who have conducted the litigation have received full satisfaction.[7]

§ 261. Rights of intervening defendants. In the absence of fraud or collusion,[1] a intervening defendant can ordinarily set up no defense of which the original defendant could not have availed itself.[2] This is so in the case of intervening stockholders,[3] and creditors.[4] An intervenor, whether a stockholder or creditor, cannot raise the objections: that the court has no jurisdiction;[5] that the defendant corporation, which is a mortgagor, has no legal existence;[6] or, in the case of a creditor's bill, that the complainant has not obtained judgment and execution returned unsatisfied;[7] when these have been waived by the original defendant; nor any other defense which such defendant is estopped from interposing.[8] But a lienor, who intervenes in a foreclosure suit can contest the validity of bonds secured by the mortgage.[9]

7 Smith v. Kraft, 11 Biss. 340; Jones v. Davenport, 45 N. J. Eq. 77, 87. *Cf.* McDermott v. Strong, 4 J. Ch. (N. Y.) 687; Edmiston v. Lyde, 1 Paige (N. Y.), 639, 19 Am. Dec. 454. But see Wilder v. Keeler, 3 Paige (N. Y.), 164, 23 Am. Dec. 781; Strike's Case, 1 Bland (Md.), 57.

§ 261. 1 Louisville Trust Co. v. Louisville, New Albany & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130; Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co., 43 Fed. 223, 225; Bartlett v. Gates, 118 Fed. 66.

2 Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Powell v. Leicester Mills, 92 Fed. 115.

3 Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Dickerman v. Northern Trust Co., 176 U. S. 181, 188, 44 L. ed. 423, 429; Big Creek, G. C. & I. Co. v. Am. L. & Tr. Co., 127 Fed. 625, 633; Forbes v. Memphis, El Paso & Pac. Ry. Co., 2 Woods, 323; Fed. Cas. No. 4,926; Land Title & Tr. Co. v. Asphalt Co., 114 Fed. 484.

4 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Horn v. Pere Marquette R. Co., 151 Fed. 625.

5 Central Tr. Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98; Horn v. Pere Marquette R. Co., 151 Fed. 626, 633.

6 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642.

7 Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403; Horn v. Pere Marquette R. Co., 151 Fed. 626, 633; Grand Trunk Ry. Co. v. Central Vt. Ry. Co., 85 Fed. 87.

8 Farmers' L. & Tr. Co. v. Chicago & N. P. R. Co., 68 Fed. 412; Consol. Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705. But see Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 379, 37 L. ed. 1113.

9 Farmers' Loan & Tr. Co. v. To

Where the mortgagor and the mortgage bondholders have arranged for a sale to a purchaser who agreed to give the stockholders an interest in the property without extending that privilege to unsecured creditors, the creditors who have no judgments may be allowed to intervene and set the foreclosure sale aside.[10] It has been said: that in a creditor's bill, the intervening creditors are not concluded by collateral averments which concede the validity of certain bonds and mortgages affecting the property; and that they may attack the validity of the same.[11] A stockholder, who has intervened as such in a stockholders' suit and received a dividend, cannot subsequently repudiate his subscription as obtained by fraud and claim, as a creditor, a priority over other stockholders.[12]

Under a general creditor's bill, any creditor who intervenes may attack the claim of any other creditor,[13] except, perhaps, that of the complainant.[14] If the complainant prays a preference, an intervenor may attack his claim.[15] When a creditor's suit has been consolidated with a subsequent foreclosure suit, he can attack the mortgage or the right of any bondholder to share in the proceeds of the sale.[16]

A manufacturer, who intervened to defend a patent case brought against one of his customers, was held to be bound by

ledo & S. H. R. Co., 43 Fed. 223, 225; Severens, J.: "In my opinion, the court would assert its dignity with a needlessly high hand if it rejected an application to come in and prevent the same from being the agent of wrong by persons acting collusively upon purely artificial reasons." (The final decree was reversed upon another point S. C., C. C. A., 51 Fed. 338).

[10] Louisville T. Co. v. Louisville, N. & C. Ry. Co., 174 U. S. 674, 43 L. ed. 1130.

[11] Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647.

[12] Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 97.

[13] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647; Shewen v. Vanderhorst, 1 Russ. & M. 347; Owens v. Dickerson, Craig & P. 48, 56; Woodgate v. Field, 2 Hare, 211, 213; Graves v. Wright, 2 Dru. & War. 77, 79.

[14] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642, 647; Fuller v. Redman, 26 Beav. 614; Briggs v. Wilson, 5 De Gex, M. & G. 12.

[15] Ogilvie v. Knox Ins. Co., 2 Black. 539, 17 L. ed. 349; Carter v. New Orleans, 19 Fed. 659; Campau v. Detroit Driving Club, 130 Mich. 147.

[16] Continental Tr. Co. v. Toledo, St. L. & K. C. Ry. Co., 82 Fed. 642, 647.

an estoppel which affected the original defendant.[17] When an intervenor wishes to avail himself of a defense peculiar to him or to assert his individual right before a receiver has been appointed or property is in the custody of the court, the safer practice for him is to file a cross-bill.[18]

[17] Consolidated Rubber Tire Co. v. Finley Rubber Tire Co., 119 Fed. 705.

[18] See Bartlett v. Gates, 118 Fed. 66. *Supra*, § 171.

CHAPTER XVIII.

INJUNCTIONS.

§ 262. Definition, classification, and objects of injunctions. An injunction is a writ issued from a court of equity commanding a person to do an act or acts other than the payment to the complainant of a sum of money, or not to do an act or acts specified therein. According to the different aspects from which they are considered, injunctions are classified as judicial writs, and writs remedial; as mandatory and prohibitory; as provisional and perpetual; or as common and special. Before describing the different characteristics of each of these classes, it may be well to refer briefly to the different occasions for the issue of the writ. Injunctions may be obtained to enforce a trust or other purely equitable right, to compel obedience to a covenant or other contract affecting land, to compel the obedience of corporations to their charters, to prevent a multiplicity of suits, generally to prevent an irreparable injury for which damages at law would be no adequate remedy, and also in cases in which they are expressly authorized by statute.

§ 263. Injunctions to enforce trusts and other purely equitable rights. As trusts and other purely equitable rights are not recognized in courts of law, equity will always interfere to protect them by injunction when they are threatened with infringement.[1] On this account an injunction may be obtained to prevent the revelation or use of a secret of manufacture by a workman who has learned it under an express or implied promise of secrecy, on one to whom such a person has

§ 263. [1] Scott v. Becher, 4 Price, 346; In re Chertsy Market, 6 Price, 261; Sloo v. Law, 3 Blatchf. 459; Draper v. Davis, 104 U. S. 347, 26 L. ed. 783; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Bispham's Eq., § 425; Kerr on Injunctions, 172, 173.

disclosed it;[2] and to restrain the publication of lectures,[3] manuscripts[4] or works of art[5] heard or obtained under an express or implied agreement not to publish or reproduce them. Whether or not the publication of private letters which have no value as literary productions can be restrained at the prayer of their writer, upon the ground that this would be a breach of an implied trust, is, under the authorities, an open question.[6]

§ 264. Injunctions to restrain corporations from violating their charters. The charters of corporations are considered "in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them."[1] On account of the irreparable injury that would otherwise ensue, and in the case of corporation to whom the State's right of eminent domain is delegated, because they are trustees,[2] the disobedience of a corporation to its charter may be restrained by injunction, at the suit either of the Attorney-General[3] of the State to which it owes its existence, or of any individual who suffers special injury thereby.[4] This rule applies whether the act complained of has been forbidden expressly, or merely by implication as not included within the powers expressly given to the corporation and those which are necessary for their proper

[2] Yovatt v. Winyard, 1 Jac. & Walk. 394; Morison v. Moat, 9 Hare, 241; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664. But see Newbery v. James, 2 Meriv. 446.

[3] Abernethy v. Hutchinson, 3 L. J. Ch. 209.

[4] Stapleton v. Foreign V. Ass'n, 12 W. R. 976; Scheile v. Brakell, 11 W. R. 796. See, however, Southy v. Sherwood, 2 Meriv. 435.

[5] Prince Albert v. Strange, 1 Macn. & G. 25, 42.

[6] Woolsey v. Judd, 4 Duer (N. Y.), 379, and Eyre v. Higbee, 35 Barb. (N. Y.), 502, hold that they can, and Judge Story concurs in this view. Folsom v. Marsh, 2 Story, 100, 109, 110; Story's Eq. Jur., §§ 946–948. But the opposite view is maintained in Gee v. Pritchard, 2 Swanst. 402; Wetmore v. Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt v. Mackenzie, 3 Barb. Ch. (N. Y.) 320; Brandreth v. Lance, 8 Paige (N. Y.), 24, 28, 34 Am. Dec. 368.

§ 264. [1] Blakemore v. Glamorganshire Canal Nav., 1 Myl. & K. 154, 162.

[2] M'Coy v. Chicago, L., St. L. & C. R. Co., 13 Fed. 3.

[3] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154; Atty. Gen. v. Railroad Cos., 35 Wis. 425. But see Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[4] Bostock v. North Staffordshire Ry. Co., 3 Sm. & Giff. 283; Colman v. Eastern Counties Ry. Co., 10 Beav. 1.

exercise.[5] "It is," said Lord Hatherley, "a principle of public policy that where Parliament has authorized a company to raise a large capital for a specified purpose, the privilege confers no right upon the company to employ their capital in competition with the general public upon speculations of a different character."[6] Injunctions to restrain corporations, public[7] and private,[8] from wasting their funds, belong to this class. "It is because these companies, being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private trader from the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured."[9] When the corporation violates its charter by refusing to perform an act thereby expressly or impliedly commanded, it has been held that the Attorney-General cannot compel its obedience by a mandatory injunction, but should in such a case apply for a mandamus.[10] A private individual suing to enjoin a corporation from violating its charter must show some special damage caused to himself by the breach.[11] A shareholder in a company is considered to incur special damage by its diverting its funds to other purposes than its charter authorizes, and can obtain an injunction to restrain it from so doing,[12] even, it has been held, if he bought shares in the company for the very object of preventing it;[13] provided that he sues in good faith, and does not act as the mere puppet of a

[5] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154.

[6] Cited in Kerr on Injunctions, p. 473.

[7] Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1071, *supra*, § 79; High on Injunctions, (4th ed.) §§ 1236–1307.

[8] Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466; *supra*, § 145; High on Injunctions, (4th ed.) § 1184.

[9] Atty. Gen. v. Great N. Ry. Co., 1 Dr. & Sm. 154, 159, 160.

[10] Atty. Gen. v. B. & O. J. Ry. Co., 15 Jur. 1024; People v. Albany & Vt. R. Co., 24 N. Y. 261, 82 Am. Dec. 295.

[11] Chamberlaine v. Chester & B. Ry. Co., 1 Exch. 869, 877; Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174, 26 L. ed. 1015, 1017, 1018.

[12] Colman v. Eastern Counties Ry. Co., 10 Beav. 1. *Supra*, § 145; High on Injunctions, (4th ed.) §§ 1224–1229.

[13] Colman v. Eastern Counties Ry. Co., 10 Beav. 1; Atty. Gen. v.

rival corporation;[14] and that the suit is not brought "against the corporation and other parties, founded on rights which may properly be asserted by the corporation."[15] The holder of a lien to secure an indebtedness of a corporation is also, it seems, entitled to an injunction in a similar case.[16] An unsecured creditor cannot bring such a suit,[17] except under very extraordinary circumstances.[18] One whose land has been taken from him for the use of a corporation by the exercise of the State's right of eminent domain can obtain an injunction to restrain the use of the land for any other purpose than is allowed by the company's charter,[19] provided at least that he can show that he is thereby injured.[20] It is, however, no proper ground for complaint by an individual that a corporation by exercising powers not conferred upon it by its charter enters into competition with him, and thereby diminishes the profits of his trade or calling.[21] An English judge has said: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has caused him some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects, by an infringement

Great N. Ry. Co., 1 Dr. & Sm. 154; Bloxam v. Met. Ry. Co., L. R. 3 Ch. 337.

[14] Forrest v. Manchester, S. & L. Ry. Co., 4 De G., F. & J. 126; Filder v. London, B. & S. C. Ry. Co., 1 H. & M. 489; Robson v. Dodds, L. R. 8 Eq. 301; Rogers v. Oxford, W. & W. Ry. Co., 2 De G. & J. 662.

[15] Eq. Rule 27; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827. See *supra*, §§ 79, 145, 156.

[16] Bagshaw v. Eastern U. Ry. Co., 2 Macn. & G. 389; Herrick v. Grand T. Ry. Co., 7 Up. Can. L. J. 240. And it has been held that such a bondholder need not show that the corporation is not in collusion with him. Mercantile T. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 536.

[17] Syers v. Brighton B. Co., 11 L. T. (N. S.) 560; Mills v. Northern Ry. of Buenos Ayres Co., 23 L. T. (N. S.) 719.

[18] Evans v. Coventry, 5 De G., M. & G. 911.

[19] Bostock v. North S. Ry. Co., 3 Sm. & Giff. 283.

[20] East & W. India Docks & B. J. Ry. Co. v. Dawes, 11 Hare, 363; Lee v. Milner, 2 Y. & C. 611; Ware v. Regents Canal Co., 3 De-G. & J. 212.

[21] Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174, 26 L. ed. 1015, 1017, 1018. But see Brady v. South Shore Traction Co., 197 Fed. 669.

of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage." [22]

§ 265. Injunctions to enforce the specific performance of covenants and other contracts affecting land. As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.[1] Accordingly, the specific performance of contracts for the purchase or sale of land and of covenants affecting the same, will be specifically enforced with the aid of an injunction, whenever they are mutual,[2] certain,[3] not unconscionable,[4] and their enforcement would be practicable.[5] The rule concerning the enforcement of covenants affecting land has been thus stated: "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction." [6] This is, however, subject to the exception that if it would be against public policy to enforce the covenant,—for example, if a change of circumstances has rendered it improper to use land in accordance with the terms of a covenant regulating its use,—or if, on account of such a change, the object of the parties to the covenant would not be accomplished by its enforcement, equity will not interfere.[7]

[22] Pollock, C. B. in Chamberlaine v. Chester & B. Ry. Co., 1 Exchequer, 869, 877. See Blakemore v. Glamorganshire Canal Nav., 1 Mylne & Keen, 154, 162.

§ 265. [1] Adderley v. Dixon, 1 Sim. & Stu. 607; Bispham's Eq., § 375.

[2] Dorsey v. Packwood, 12 How. 126, 13 L. ed. 921; Bispham's Eq., § 377.

[3] Colson v. Thompson, 2 Wheat. 336, 4 L. ed. 253; Bispham's Eq., § 377.

[4] Surget v. Byers, Hempst. 715; Roundtree v. McLain, Hempst. 245; Miss. & Mo. R. Co. v. Cromwell, 91 U. S. 643, 23 L. ed. 367; Bispham's Eq., § 376. See Randoph's Ex'r v. Quidnick Co., 135 U. S. 457, 34 L. ed. 200.

[5] Ross v. Union Pac. R. Co., 1 Woolw. 26; Fallon v. Railroad Co., 1 Dill. 121; Texas & Pac. Ry. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385; Bispham's Eq., § 377.

[6] V. C. Wood in Tipping v. Eckersley, 2 K. & J. 264. See also Lord Manners v. Johnson, L. R. 1 Ch. D. 673; Lloyd v. London, C. & D. Ry. Co., 2 De G., J. & S. 568; T. of Columbia College v. Lynch, 70 N. Y. 404. See High on Injunctions, (4th ed.) § 330.

[7] Duke of Bedford v. British Museum, 2 M. & K. 552; Troy & B.

§ 266. Injunctions to prevent a multiplicity of suits. Injunctions are granted in order to prevent a multiplicity of suits under bills of peace. Bills of peace are bills to restrain a number of persons from endeavoring to enforce in different suits the same or similar claims;[1] or to prevent a single person from reiterating in several successive suits the same unsuccessful claim;[2] or to prevent a person from levying a tax, the payment of which will subject the plaintiff to the hazard of a number of suits from other parties;[3] bills of interpleader[4] and in the nature of interpleader;[5] bills to enjoin a continuing trespass,[6] nuisance,[7] infringement of patents,[8] copyrights[9] and trade-marks;[10] and bills to quiet possession.[11] Injunctions to restrain a continuing trespass, nuisance and the infringement of patents, copyrights and trade-marks, are more often said to be granted to prevent irreparable injury, and will, therefore, be considered under that head. An injunction to quiet the possession before the hearing formerly issued to restrain the party to whom it was directed from taking forcible possession of lands pending litigation concerning them. It was issued at the request of either a plaintiff or a defendant to a suit, if the ap-

R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Leake's Digest of the Law of Contracts, 1152. But see Lloyd v. London, Ch. & D. Ry. Co., 11 Jur. (N. S.) 380.

§ 266. [1] Sheffield Water Works v. Yeomans, L. R. 2 Ch. App. 8. See Scottish Union, etc. Ins. Co. v. J. H. Hohlmann & Co., 73 Fed. 66; *supra*, §§ 140, 141. But see Kansas City Southern Ry. Co. v. Quigley, 181 Fed. 190.

[2] Earl of Bath v. Sherwin, 4 Brown Parliamentary Cases, 373. But see United Cigarette Mach. Co v. Winston Cigarette Mach. Co., C C. A., 194 Fed. 947.

[3] Cummings v. National Bank, 101 U. S. 153, 157, 25 L. ed. 903, 904; Pelton v. National Bank, 101 U. S. 143, 148, 25 L. ed. 901, 902; Hills v. Exchange Bank, 105 U. S. 319, 26 L. ed. 1052; *supra*, § 79.

[4] Louisiana State Lottery Co. v. Clark, 16 Fed. 30; s. c., 4 Woods, 169; McLaughlin v. Swann, 18 How. 217, 15 L. ed. 357; City Bank v. Skelton, 2 Blatchf, 14; *supra*, § 157.

[5] Dorn v. Fox, 61 N. Y. 264; *supra*, § 158.

[6] Northern Pac. R. Co. v. Burlington & Missouri R. Co., 2 McCrary, 203; *infra*, § 275.

[7] Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753. See *infra*, § 274.

[8] U. S. R. S., § 4921; *supra*, § 277.

[9] U. S. R. S.,§ 4970; *supra*, § 146; *infra*, § 278.

[10] Shaw Stocking Co. v. Mack, 12 Fed. 707; *supra*, § 279.

[11] Hughes v. Morden College, 1 Ves. Sen. 188. See *supra*, § 82.

plicant had had peaceable possession of the premises for the three years preceding the filing of the bill, and his interest therein had not been determined by forfeiture, surrender, or other lawful means. He was required to swear to these facts in his bill, and according to the practice before Lord Bacon's time to give a bond to the amount of £10 as a security that the information so given was true.[12] Such injunctions were formerly very common; but have now fallen into disuse. The last reported instance was in Lord Hardwicke's time.[13]

§ 267. Injunctions to prevent irreparable injury for which the remedy at law is inadequate; in general. The most ordinary ground upon which an injunction issues, and the one, indeed, which includes all but the first of those previously mentioned, is that, otherwise, the plaintiff would suffer an irreparable injury, for which damages at law would be no adequate remedy. It would be impossible specifically to mention here all the different instances in which an injunction issues for this reason; but the following is an enumeration of those of more frequent occurrence which have not been previously described. An injunction will issue on account of the inadequacy of the remedy at common law; to stay proceedings in other courts, either of law, equity, or admiralty;[1] to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel;[2] to restrain the commission of every species of waste or act in the nature of waste;[3] to suppress the continuance of a public or private nuisance;[4] to prevent a threatened destructive trespass;[5] to prevent the infringement of patents;[6] to prevent the violation of copyright, whether by printed publications, or theatrical representation, or otherwise;[7] to prevent the unauthorized use of trade-marks,[8] and the opening of private letters;[9] to compel the performance or prevent the breach of contracts other than those for the pay-

[12] Eden on Injunctions, ch. xvi, p. 240.

[13] Hughes v. Morden College, 1 Ves. Sen. 188.

§ 267. [1] § 268.

[2] § 269.

[3] § 270.

[4] § 271.

[5] § 272.

[6] § 273.

[7] § 274.

[8] § 275.

[9] § 276.

ment of money only;[10] under very extraordinary circumstances, to compel the delivery of personal property wrongfully withheld,[11] to enjoin the revocation of a license permitting a foreign corporation to do business within the State.[12] An injunction has been granted to restrain the sale by scalpers of return railroad tickets, which by their terms were not transferable, when the use of such tickets could only be made by fraud;[13] and to prevent the creation of a cloud on a title.[14]

§ 268. Injunctions to stay proceedings in other courts. In general. Injunctions to stay proceedings in other courts are of much less frequent occurrence now that discovery and the inspection of documents can be obtained at common law without the aid of equity than they were formerly; but they are still often issued, especially in bankruptcy.[1] Such injunctions must not be confounded with writs of prohibition, which are addressed to the judges of a court, whereas injunctions are directed to the parties to the proceedings which it is desired to restrain.[2] Ordinarily, when two courts have a concurrent jurisdiction over the same thing, whichever court was first possessed of the cause has a right to proceed with the same, and proceedings in it will not be prohibited or restrained by another.[3] An injunction against an application for an injunction should not be granted; since the equities of the complainant can be amply protected in the suit sought to be enjoined.[4] It was at first held that a court had no power to restrain a defendant from suing in a foreign court;[5] but it is now established that it can do

[10] § 278.

[11] § 279.

[12] Ludwig v. Western Union Tel. Co., 216 U. S. 146, 152.

[13] Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 52 L. ed. 171; Nashville, C. & St. L. Ry. Co. v. McConnell, 82 Fed. 65; *supra*, §§ 79, 141.

[14] Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 599.

§ 268. [1] McLean v. Lafayette Bank, 3 McLean, 185; In re Schwartz, 14 Fed. 787.

[2] See Eden on Injunctions, ch. ii; Peck v. Jenness, 7 How. 624, 12 L. ed. 846; Dillon v. K. C. S. B. Ry. Co., 43 Fed. 109, 111.

[3] Nicholas v. Nicholas, Prec. in Ch. 546; Daniell's Ch. Pr. (2d Am. ed.) 1845; *supra*, §§ 52, 60. But see Erie Ry. Co. v. Ramsey, 45 N. Y. 637.

[4] Robertson v. Montgomery Baseball Ass'n, 141 Ala. 348, 109 Am. St. Rep. 30, 37 So. 388, 3 Ann. Cas. 965.

[5] Love v. Baker, 1 Ch. Cas. 67, decided by Lord Clarendon; but the reporter added, "*sed quære*, for all the bar was of another opinion."

so,[6] although such a power is exercised with great caution. Where the parties to a suit, and the greater part of the property which is the subject of the litigation, are within the jurisdiction of a court, where a suit affecting the same was first instituted and complete relief can there be afforded; an injunction against the institution of a suit for the same object, in a foreign jurisdiction, may be granted.[7] The Constitution does not forbid a State court from enjoining in a proper case a person within its jurisdiction from prosecuting a suit in a court of another State.[8] An injunction order providing "that all suits and proceedings on the part of" certain persons "against the said bankrupt, to collect the debt set forth, be, and the same are hereby stayed, to await the determination of the court in bankruptcy on the question of the discharge therein," was held violated by those who after discontinuing a suit then pending, subsequently instituted another to recover the same claim, with new allegations charging fraud.[9]

§ 269. Injunctions to stay proceedings in Federal courts. It was at first doubted whether a Circuit Court of the United States had the power to enjoin the prosecution of a suit in a Federal court in another Circuit;[1] although the power to enjoin the prosecution of a suit in another district of the same Circuit was early exercised.[2] It is now settled, however, that a District Court of the United States can, in a proper case, enjoin the prosecution of a suit in any other court of the United States.[3] A manufacturer, who has obtained a decree in his favor, which has been affirmed by the Circuit Court of Appeals in one Cir-

6 Bunbury v. Bunbury, 1 Beav. 318; Portarlington v. Soulby, 3 Myl. & K. 104; Dehon v. Foster, 4 Allen (Mass.) 545; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Massie v. Watts, 6 Cranch, 148, 3 L. ed. 181; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

7 United Cigarette Mach. Co. v. Wright, 156 Fed. 244.

8 Vail v. Knapp, 49 Barb. (N. Y.) 299; Story's Eq. Jur. §§ 899, 900; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

9 In the matter of Schwartz, 14 Fed. 787. For the construction of an order forbidding the use of a certain defense, see Wakelee v. Davis, 50 Fed. 522.

§ 269. 1 Kelley v. Ypsilanti, D. S. Mfg. Co., 44 Fed. 19, 20, per Brown, J.

2 Monumental Sav. Ass'n v. Fentress, 125 Fed. 812.

3 Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

cuit, can enjoin the complainant, who is defeated, from bringing similar suits based on the same patent against the customers of the former in any Circuit of the United States,[4] or in a foreign country;[5] even in a Circuit where the Circuit Court of Appeals has held under similar facts in favor of the patentee;[6] a suit previously brought may be thus enjoined.[7] The same relief may be obtained by a manufacturer, who, although not a party of record to the suit resulting in the adjudication, had filed there a stipulation that it was defending the case.[8] Ordinarily, suits which have been previously instituted to enjoin the infringement of a patent, will not be enjoined; the defendant being allowed to assert, in such a suit, any equitable defense that he may have;[9] but when there is a multiplicity of suits, involving the same defenses, the courts in which any of such cases are pending may stay proceedings therein, until the suit between the patentee and the principal infringer is decided.[10] Where some of the defendants set up different defenses, it was held that the court "could not restrain in part and permit in part the prosecution of the cases. It would have no right to issue an injunction which should [*sic*] have the effect to split up the cases, enjoining their prosecution as to some branches of the controversy and permitting it as to the others,"[11] A bill to enjoin defendant from prosecuting an action at law for an infringement cannot be sustained when the only grounds alleged are that complainant will be put to great expense for attorney's fees and other costs, and that he is informed that defendant will be unable to pay the same.[12] The subsequent commencement

[4] Ibid.

[5] Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 Fed. 869.

[6] Kessler v. Eldred, 206 U. S. 285, 51 L. ed. 1065.

[7] Kessler v. Eldred, 206 U. S. 285, 286, 51 L. ed. 1065, 1066.

[8] Marshall v. Bryant Electric Co., C. C. A., 185 Fed. 499.

[9] Kelley v. Ypsilanti D. S. Mfg. Co., 44 Fed. 19; Am. School Furniture Co. v. J. M. Sauder Co., 106 Fed. 731; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642; Kryptok Co. v. Stead Lens Co., 190 Fed. 767; Gamewell Fire Alarm Telegraph Co. v. Star Electric Co., 199 Fed. 188.

[10] Rumford Chem. Works v. Hecker, 5 Off. Gaz. 644; Allis v. Stowell, 16 Fed. 783; Nat. Cash Reg. Co. v. Boston Cash I. & R. Co., 41 Fed. 51; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642.

[11] Germain v. Wilgus, C. C. A., 67 Fed. 597.

[12] Dyer, J., in Allis v. Stowell, 16 Fed. 783, 790.

of suits upon the same patent, against the customers of the original defendant, may be enjoined pending the suit against the manufacturer in a proper case.[13] It has been held: that in a suit by the United States to vacate a patent for an invention, a preliminary injunction will not be granted to restrain the prosecution by the defendant of suits for the infringement of the patent.[14] An injunction in a Federal court in another Circuit, forbidding the collection of a judgment, was followed and held to bind the parties; but not to prevent the collection by the attorneys of one of them of so much thereof as they had a lien upon.[15] It has been said: that a Federal court of equity cannot enter a decree directing the entry of a satisfaction of a judgment at law in the same court; since a court on its common-law side has the power to direct such entry.[16] A District Court of the United States cannot enjoin a party to a judgment at common law therein, from suing out a writ of error from the Circuit Court of Appeals to review the same.[17] A State court has no power to stay, by injunction, a proceeding in a court of the United States.[18]

§ 270. Injunctions to stay proceedings in State courts. The Judicial Code re-enacting a section of the Revised Statutes[1] provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to procedings in bankruptcy." [2] "This prohibi-

[13] Birdsell v. Hagerstown Agr. Imp. Mfg. Co., 1 Hughes, 64, Fed. Cas. No. 1,437; Ide v. Ball Engine Co., 31 Fed. 901; Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 Fed. 642; Lovell-M'Connell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658, 659, 663.

[14] U. S. v. Colgate, 21 Fed. 318.

[15] W. A. Chapman & Co. v. Montgomery W. P. Co., 127 Fed. 839.

[16] Macrum v. U. S., C. C. A., 154 Fed. 653. See Holt v. Dorsey, Fed. Cas. No. 6,647; Medford v. Dorsey, Fed. Cas. Nos. 9,389, 9,390.

[17] Macrum v. U. S., C. C. A., 154 Fed. 653.

[18] McKim v. Voorhies, 7 Cranch, 279, 3 L. ed. 342; Duncan v. Darst, 1 How. 301–306, 11 L. ed. 139, 141; City Bank of N. Y. v. Skelton, 2 Blatchf. 14; Beardslee v. Ingraham, 183 N. Y. 411, 3 L.R.A.(N.S.) 1073.

§ 270. [1] U. S. R. S., § 720.

[2] Jud. Code, § 265, 36 St. at L. 1087. See Slaughter House Cases, 10 Wall. 273, 19 L. ed. 915; Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Rensselaer & S.

tion of the statute extends to all cases over which the State court first obtains jurisdiction, and applies not only to injunctions aimed at the State court itself, but also to injunctions aimed at parties before the court, its officers or litigants therein."[3] Accordingly a Federal court has refused to enjoin: a railway company from taking possession of land upon the termination of condemnation proceedings in a State court, to which the applicant for the injunction was a party;[4] the plaintiff in a foreclosure suit from selling property under a decree of the State court therein, although the Federal complainant is not a party to such suit, and claims a lien upon such property, which is in the hands of a receiver appointed by such court;[5] and a town from selling property to pay an assessment the collection of which has ben ordered by a State court directing the laying out of a highway,[6] a State receiver from issuing receiver's certificates;[7] parties to a suit in a State court from carrying out an agreement sanctioned by it,[8] and an administrator from distributing the estate in his hands.[9] But an injunction has been granted forbidding an ancillary administrator from receiving any portion of the estate under any order of distribution, by either the local probate court or the court of original probate jurisdiction; although the court refused to enjoin him from removing any part of the estate beyond its jurisdiction.[10] It has been held: that the statute forbids an injunction to stay proceedings, in a suit where the State court has no jurisdiction; at least where no Federal right has been

R. Co. v. Bennington & R. R. Co., 18 Fed. 617; M., K. & T. Ry. Co. v. Scott, 13 Fed. 793; s. c., 4 Woods, 386; Hamilton v. Walsh, 23 Fed. 420; Tifft v. Iron Clad Mfg. Co., 16 Blatchf. 48; Yick Wo v. Crowley, 26 Fed. 207; Scruggs & Echols v. Am. Cent. Ins. Co. of St. Louis, C. C. A. 176 Fed. 224; Quinton v. Equitable Inv. Co., C. C. A., 196 Fed. 314; Maxwell v. McDaniels, C. C. A., 184 Fed. 311.

[3] Toulmin, D. J., in Whitney v. Wilder, C. C. A., 54 Fed. 554, 555; Chicago Trust & Sav. Bank v. Bentz, C. C. A., 59 Fed. 645, 647.

[4] Dillon v. Kansas City S. B. Ry. Co., 43 Fed. 109.

[5] Security Trust Co. v. Union Trust Co., 134 Fed. 301.

[6] Fenwick Hall Co. v. Old Saybrook, 66 Fed. 389.

[7] Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33.

[8] Ibid.

[9] Whitney v. Wilder, C. C. A., 54 Fed. 554.

[10] Ingersoll v. Coram, 132 Fed. 168; aff'd, Coram v. Ingersoll, C. C. A., 133 Fed. 126.

invaded.[11] Where a bill prays an injunction or stay of proceedings in a State court, and also other relief which would be useless without such an injunction, the whole bill will be dismissed on demurrer.[12] A county commissioners' court in Texas, when declaring the result of an election,[13] and a public service commission,[14] were said not to be within the statute. So were held to be officers seizing intoxicating liquors under search and seizure warrants.[15] But where an appeal to a State court had been taken from the decision of a board, and the proceeding remanded after affirmance with directions to extend the time for the performance of the order, it was held that the proceedings in the State court were not terminated and that no Federal injunction could be granted.[16] The statute forbids an injunction against the taking of depositions.[17] The statute does not forbid an injunction against the commencement of a criminal,[18] or a civil suit, not already brought.[19] The statute does not forbid a Federal injunction, obtained by a person not a party to a suit in the State court, which enjoins the complainant in the latter from committing acts, which, in the State court, he has enjoined a defendant to the Federal suit from preventing.[20] Nor, it has been held, a suit to enjoin a person from setting up a claim to the right to use a railroad switch, which the court has held that he was entitled to use, where, since the decision, the corporation has sold the switch to the plaintiff to the injunction suit.[21] It has been held that a Federal court

11 Senior v. Pierce, 31 Fed. 625, 631; Phelps v. Mut. Reserve Fund Life Ass'n, C. C. A., 61 L.R.A. 717, 112 Fed. 453. *Contra*, Southern Ry. Co. v. Simon, 153 Fed. 234. See Moran v. Sturges, 154 U. S. 256, 38 L. ed. 981.

12 Molony v. Massachusetts Loan Ass'n, 53 Fed. 209.

13 August Busch & Co. v. Webb, 122 Fed. 655.

14 Central Vermont Ry. Co. v. Redmond, 189 Fed. 683.

15 Danciger v. Stone, 188 Fed. 510.

16 Central Vermont Ry. Co. v. Redmond, 189 Fed. 683.

17 Am. Shipbuilding Co. v. Whitney, 190 Fed. 109.

18 *Infra*, § 271; Minneapolis General E. Co. v. City of Minneapolis, 194 Fed. 215; Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532.

19 Texas & Pac. Ry. Co. v. Kutemen, C. C. A., 54 Fed. 547; Laighton v. City of Carthage, Mo., 175 Fed. 145; Western Union Tel. Co. v. Cooper, 182 Fed. 710; Kansas City Gas Co. v. Kansas City, 198 Fed. 500.

20 New York Cotton Exch. v. Hunt, 144 Fed. 511.

21 Oman v. Bedford-Bowling Green Stone Co., C. C. A., 134 Fed. 64.

can prevent by injunction the levy by a State sheriff under State process against a State judgment-debtor upon the property of a stranger to the suit and process;[22] but not the sale by the sheriff of the property of sureties on a sale bond under the execution of a State court;[23] nor, it seems can it enjoin the sale by the sheriff of property in his possession and in the custody of the State court,[24] although the sale of land, levied upon by the sheriff, but not in the hands of a receiver, was enjoined at the suit of the owner, who was not a party to the judgment.[25] It has been held that a Federal court may enjoin: the entry upon land, under a title acquired by condemnation proceedings in the State court, when the application for the injunction is made by a person claiming an interest in the land, who was not made a party to those proceedings;[26] the use of a judgment of a State court when the validity of the judgment is not thereby impaired;[27] the issue of execution upon a judgment of a State court, entered against a party who was not served with process;[28] may enjoin a defendant from selling, encumbering, or in any way disposing of, lands brought at a sheriff's sale;[29] and from making a wrongful or an inequitable use of an execution on a judgment of a State court;[30] that a Federal court has power to issue an injunction to stay proceedings in a State court which interfere with the enforcement of one of its own judgments, and to stay proceedings which have been instituted or continued after the beginning or removal of the suit in the Federal jurisdiction.[31] "It is now so thoroughly

22 Cropper v. Coburn, 2 Curt. 465.

23 American Ass'n Ld. v. Hurst, 59 Fed. 1.

24 Daly v. Sheriff, 1 Woods, 175, Fed. Cas. No. 3,553; Southern Bank & Tr. Co. v. Folsom, C. C. A., 75 Fed. 929; Watson v. Bondurant, 2 Woods, 166; Perry v. Sharpe, 8 Fed. 23; *supra*, § 52.

25 Julian v. Central Trust Co., C. C. A., 115 Fed. 956.

26 Colorado Eastern R. Co. v. Chicago B. & Q. R. Co., C. C. A., 141 Fed. 898; Schultz v. Highland Gold Mines Co., 158 Fed. 337.

27 Linton v. Mosgrove, 14 Fed. 543, criticised in Am. Ass'n Ld. v. Hurst, 59 Fed. 1, 4, but supported by Provident L. & Tr. Co. v. Mills, 91 Fed. 435; Lehman v. Graham, C. C. A., 135 Fed. 39, see *supra*, § 51.

28 Southern Ry. Co. v. Simon, 153 Fed. 234.

29 Massie v. Buck, C. C. A., 128 Fed. 27. See *supra*, § 51.

30 Linton v. Safe Deposit & Title Guaranty Co., 147 Fed. 824.

31 French v. Hay, 22 Wall. 250, 22 L. ed. 857; Dietzsch v. Huide-

settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a Federal court for other purposes than that of enjoining proceedings in a State court, that the proposition needs no discussion."[32] Such an injunction should rarely be issued.[33] It has been held that where property is in the possession of a receiver of a Federal court, it may enjoin a suit in the State court which attempts to establish an easement thereupon,[34] but not an action *in personam* against the receiver;[35] that where property has been sold under a decree directing that the purchaser pay all claims against the receiver, the court will enjoin a suit against the purchaser[36] in the State court, but that this rule does not apply where property in the possession of a receiver is returned to the original owners on the same conditions;[37] that under the act of Congress limiting the liability of the owners of ships, a District Court of the United States may issue a stay-order restraining proceedings previously begun in State courts;[38]

koper, 103 U. S. 494, 26 L. ed. 497; Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462; s. c., 130 Fed. 794; Fisk v. Union Pac. R. Co., 10 Blatchf. 518; Sharon v. Terry, 1 L.R.A. 572, 36 Fed. 337; Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663, 664, 667; Abeel v. Culberson, 56 Fed. 329; Baltimore & O. R. Co. v. Ford, 85 Fed. 170; Bowdoin College v. Merritt, 59 Fed. 86; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. 385; Central Tr. Co. v. Western N. C. R. Co., 89 Fed. 24; Garner v. Second Nat. Bank, 67 Fed. 833; Lanning v. Osborne, 79 Fed. 657; Stewart v. Wisconsin Cent. Ry. Co., 117 Fed. 782; Massie v. Buck, C. C. A., 128 Fed. 27; Miller & Lux v. Rickey, 146 Fed. 574; Gay v. Hudson River El. Power Co., 182 Fed. 279; Nelson v. Camp, C. C. A., 191 Fed. 712; *supra*, § 52; *infra*, §§ 284, 313. But an injunction was refused where, although a petition for removal with a bond had been filed in the State court, no action had been taken upon them and no copy of the record had been filed in the Federal court. Coeur d'Alene Ry. & Nav. Co. v. Spalding, C. C. A., 93 Fed. 280. See Missouri, K. & T. Ry. Co. v. Scott, 13 Fed. 793.

[32] Gregory v. Pike, 67 Fed. 835, 836, per Putnam, J.

[33] Frishman v. Insurance Co., 41 Fed. 449; Sinclair v. Pierce, 50 Fed. 851.

[34] Holmes v. Dowie, C. C. A., 177 Fed. 182.

[35] Smith v. Jones Lumber & Mercantile Co., 200 Fed. 647.

[36] Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. 663, 664, 667; Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 59 Fed. 385. See § 394, *infra*.

[37] Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81.

[38] In re Long Island, N. S. P. &

that when a creditor of a corporation has begun proceedings in a Federal court to enforce his claim against the corporation, the defendant corporation may be enjoined "from taking proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stockholders and any other persons, and from making any distribution or transfer of any of its effects."[39] Where suits were pending in the State and Federal courts by the same plaintiff against several insurers, whose liability was proportionate to the amount the insurance of each bore to the whole loss, and the same defenses had been interposed on behalf of all, it was held: a Federal court could not grant an injunction to restrain the actions in the State courts, as well as those in the Federal courts, upon a bill seeking an adjustment of their liability in a single suit.[40] It has been held that a judge of a Circuit or District Court has no power to enjoin the enforcement of a judgment in a State court after an appeal to the Supreme Court of the United States and a *supersedeas;*[41] and that can only be done if at all, by a Justice of the Supreme Court.[42] The proper remedy is a contempt proceeding.[43]

§ 271. Injunctions against criminal proceedings. As a general rule, a court of equity cannot grant an injunction to forbid the prosecution in any court, State or Federal, of criminal proceedings, whether then pending,[1] or subsequently begun;[2] nor against a removal from

F. T. Co., 5 Fed. 599. See Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 600, 27 L. ed. 1038, 1046.

39 Fisk v. Railroad Co., 10 Blatchf. 518. But see Kessler v. Continental C. & I. Co., 42 Fed. 258.

40 Rochester German Ins. Co. v. Schmidt, C. C. A., 175 Fed. 720; reversing 126 Fed. 998.

41 Murray v. Overstoltz, 8 Fed. 110.

42 Ibid.

43 Re McKenzie, 180 U. S. 536, 45 L. ed. 657; *infra*, § 428.

§ 271. 1 Lord Montague v. Dudman, 2 Ves. Sr. 396; In re Sawyer, 124 U. S. 200, 31 L. ed. 402; Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399, 406; Fitts v. McGhee, 172 U. S. 516, 517, 43 L. ed. 535, 536; Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; City of Bainbridge v. Reynolds (Georgia), 36 S. E. 935.

2 Harkrader v. Wadley, 172 U. S. 148, 169, 43 L. ed. 399, 406; Fitts v. McGhee, 172 U. S. 516, 517, 43 L. ed. 535, 536; Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362; City of Bainbridge v. Reynolds, 11 Georgia, 758, 36 S. E. 935.

office, State[3] or Federal.[4] The present rule of the Federal courts upon the subject is, that, when a criminal indictment or criminal proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court; the latter court, having first obtained jurisdiction over the subject-matter, has the right, even in a criminal case, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed; and that it may enjoin the State Attorney General, or other prosecuting officer, from instituting a criminal proceeding in such a case, especially when the injunction is necessary to prevent irreparable injury to the complainant's business or property; but that it cannot enjoin any investigation or action by a grand jury, nor restrain a State court from acting in any case brought before it, either of a civil or criminal nature.[5] The same rule applies to criminal proceedings instituted under an invalid municipal ordinance.[6] It has been held: that where no irreparable injury is shown, an injunction may issue against proceedings to impose a fine for the non-payment of a tax, in order to prevent a multiplicity of suits.[7] "A court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of prop-

[3] In re Sawyer, 124 U. S. 200, 31 L. ed. 402; People ex rel. Corscadden v. Howe, 177 N. Y. 499.

[4] White v. Berry, 171 U. S. 366, 43 L. ed. 199; White v. Butler, 171 U. S. 379, 43 L. ed. 204.

[5] McNeill v. Southern Ry. Co., 202 U. S. 543, 50 L. ed. 1142; Mississippi Railroad Commission v. Illinois Cent. R. R. Co., 203 U. S. 335, 51 L. ed. 209; Ex parte Young, 209 U. S. 123, 161–163, 52 L. ed. 714, 729, 730; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747. See also Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169; Pabst Brewing Co. v. Crenshaw, 120 Fed. 144. See § 105, *supra*.

[6] Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177; Hutchinson v. Beckham, C. C. A., 118 Fed. 399; Palatka Water Works v. Palatka, 127 Fed. 161; Glucose Refining Co. v. Chicago, 138 Fed. 209. See §§ 25, 105, *supra*. Injunctions were granted when the enforcement of the ordinance tended to destroy plaintiff's business. Jewel Tea Co. v. Lee's Summit, Mo., 198 Fed. 532. *Contra*. Christian Moerlein Brewing Co. v. Hill, 166 Fed. 140; Moss & Co. v. McCarthy, 191 Fed. 202, a bucket-shop case.

[7] Chicago v. Collins, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224. But see *supra*, §§ 11, 12.

erty by the enforcement of an unconstitutional law."[8] "This court," said Lord Hardwicke, speaking of the Court of Chancery, "has no jurisdiction to stay proceedings on a mandamus; nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of."[9] But it has been held that a Federal court may enjoin a State officer from an act, although an application is then pending for a mandamus to compel him to perform it, and it was said that the injunction would be a defense to the mandamus proceeding.[10]

§ 272. Injunctions to restrain the alienation of property. Injunctions may be obtained to prevent the alienation of property "where it would work irremediable or gross injustice."[1] An injunction will, therefore, issue to prevent the transfer of notes, bills of exchange, and other documents, whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence,[2] when obtained from the plaintiff by the defendant through duress, fraud, or other iniquity; or when forged;[3] or when, though the holder may have properly obtained them, he threatens or is about to use them in an inequitable manner.[4] To restrain a receiver of a national bank, pending a determination of a preferential claim to a fund, from transmitting the same to the treasurer of the United States; whence it could not be recovered by compulsory process.[5] An injunction may be granted to prevent a party from making vexatious alienations of land pending a suit concerning the title to the same.[6] For it was said that, otherwise, the plaintiff might be put to the expense of making each vendee or grantor a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by the new outstanding claims of

[8] Brown, J., in Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 217, 47 L. ed. 778, 780.

[9] Lord Montague v. Dudham, 2 Vesey Sr. 396, 398.

[10] Bank of Kentucky v. Stone, 88 Fed. 383, 398.

§ 272. [1] Story's Eq. Jur., § 953.

[2] Osborn v. U. S. Bank, 9 Wheat. 738, 845, 6 L. ed. 204, 229; Lloyd v. Gurdon, 2 Swanst. 180; Hood v. Aston, 1 Russ. 412; Lord Chedworth v. Edwards, 7 Ves. 46; Reeve v. Perkins, 2 J. & W. 390; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

[3] Esdaile v. LaNauze, 1 Y. & C. 394.

[4] Anon., 6 Madd. 10.

[5] American Can Co. v. Williams, C. C. A., 149 Fed. 200.

[6] Daly v. Kelly, 4 Dow. 417; Echliff v. Baldwin, 16 Ves. 267. But see Turner v. Wight, 4 Beav. 40.

title under the threatened transfer.[7] The sale or transfer,[8] or removal beyond the jurisdiction of the court,[9] of a chattel, the loss of which could not be compensated in damages may also be thus restrained; and so has been the sale of other personal property,[10] including a patent,[11] and ore from a mine [12] pending a suit affecting the same. An injunction was granted forbidding the defendants from buying ore taken from the complainants mines.[13] Injunctions have also been granted at the suit of a part-owner to prevent the sailing of a ship until his share could be ascertained, and a bond given to secure him against loss upon the voyage;[14] to prevent the removal of timber wrongfully cut down;[15] and to prevent the trustees of a dissenting chapel from appointing as a minister a person not duly qualified according to its constitution.[16]

§ 273. **Injunctions to prevent waste.** An injunction will issue to prevent waste, whether legal or purely equitable.[1] Waste is a permanant injury to real estate committed by a person in possession with a limited interest in the same. Legal waste consists of such acts as would be considered waste at common law; equitable waste, of such acts as at law would not, under the circumstances of the case, be considered waste, but which are so esteemed in the view of a court of equity, from their manifest injury to the inheritance, though not inconsistent

7 Daniell's Ch. Pr. (2d Am. ed.) 1873.

8 Gibson v. Lewis, 11 Phila. (Pa.) 476; Lady Arundell v. Phipps, 10 Ves. 139; Daniell's Ch. Pr. (2d Am. ed.) 1872.

9 Green v. Hanberry, 2 Brock. 403; Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137.

10 Bateau v. Bernard, 3 Blatchf. 244; Higgins v. Jenks, 3 Ware, 17; High on Injunctions, (4th ed.) § 1499.

11 United Wireless Tel. Co. v. Nat. El. Signaling Co., C. C. A., 198 Fed. 385.

12 Montana Min. Co. v. St. Louis Min. & Mill. Co. of Montana, C. C. A., 168 Fed. 514.

13 Goldfield Consol. Mines Co. v. Richardson, 194 Fed. 198. But see Daniels v. Portland Mining Co., C. C. A., 202 Fed. 637.

14 Haly v. Goodson, 2 Mer. 77; Christie v. Craig, 2 Mer. 137. But see Wilkinson v. Dobbie, 12 Blatchf. 298.

15 Bradley v. Reed, 2 Pittsb. (Pa.) 519; Anon., 1 Ves. Sr. 93; Daniell's Ch. Pr. (2d Am. ed.) 1874.

16 Milligan v. Mitchell, 1 M. & K. 446.

§ 273. 1 Garth v. Cotton, 1 Dick. 183; Thruston v. Mustin, 3 Cranch, C. C. 335; U. S. v. Gear, 3 How. 120, 11 L. ed. 523; Fletcher v. N. O. N. E. R. Co., 20 Fed. 345; Lanier v. Alison, 31 Fed. 100; Bispham's Eq., §§ 429–432.

with the legal rights of the party committing them.[2] Such is wilful and wanton injury to land committed by a tenant without impeachment for waste.[3] The interference of equity in cases of this kind is justified, not only by the fear of irremediable injury, but also because the tenant for life or years is considered to stand in a trust relation toward the remainderman. So anxious is equity to prevent waste, that it has sustained a bill praying such an injunction filed in behalf of a child in its mother's womb.[4] An injunction will be granted to restrain acts in the nature of waste committed by one in possession of land the title to which is in litigation.[5] It has been held that an applicant for the purchase of government land whose claim is disputed in the land office cannot obtain an injunction to prevent acts of waste by county officers.[6] Upon a bill for an injunction against waste, a dispute as to the title may be decided.[7] A bill for an injunction against waste, which is ancillary to an action for ejectment, should be dismissed upon the entry of judgment in favor of the defendant in the action at common law.[8]

§ 274. Injunctions to prevent the continuance of a nuisance. The interference of equity to enjoin the continuance of a nuisance is not only due to the fact that the acts complained of produce irreparable injury, but also is allowed to prevent the multiplicity of suits that would be necessary were the plaintiff confined to his remedy at common law.[1] Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.[2] The use of this remedy to suppress a public

2 Daniell's Ch. Pr. (2d Am. ed.) 1854, 1855.

3 Vane v. Lord Barnard, 2 Vern. 738; Garth v. Sir John Hind Cotton, 1 Dick. 183; s. c., 1 White & Tudor's Lead. Cas. in Eq. (6th ed.) 806; Bisham's Eq., § 134.

4 Musgrave v. Parry, 2 Vern. 710; Lutterel's Case, cited Prec. Ch. 50; Scatterwood v. Edge, 1 Salk. 229.

5 U. S. v. Parrott, 1 McAll. 271; Lanier v. Alison, 31 Fed. 100.

6 McBride v. Pierce County, 44 Fed. 17.

7 Peck v. Ayers & Lord Tie Co., C. C. A., 116 Fed. 273; Douglas Co. v. Tennessee Lumber Mfg. Co., C. C. A., 118 Fed. 438.

8 West v. East Coast Cedar Co., C. C. A., 113 Fed. 742.

§ 274. 1 Fishmongers' Co. v. East India Co., 1 Dick. 163; Atty. Gen. v. Nichol, 16 Ves. 338, 343.

2 Daniell's Ch. Pr. (2d Am. ed.) 1857.

nuisance is of very ancient date.[3] It was applicable in England, both to nuisances strictly so called and to *purprestures*. "By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, ports, or streets; and the difference betwen *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture,* but where the *jus publicum* is violated it is a *nuisance.* In cases of *purpresture* the remedy is either by information for an intrusion at the common law, or by information in equity at the suit of the attorney-general. The consequence of a judgment at common law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance, whilst upon an information in equity, where the trespass does not produce any public injury, the court may direct an inquiry whether it is most beneficial to the Crown to abate the *purpresture,* or to suffer the erection to remain and be assessed as a part of the legal revenue."[4] Cases of public nuisance may be enjoined at the suit of the attorney-general, who in England sues by information.[5] It has been held that the United States may sue to enjoin acts in pursuance of an unlawful conspiracy forcibly to obstruct interstate commerce and the transport of the mails;[6] and to enjoin a nuisance which threatens injury to works in aid of commerce constructed under the authority of the national government.[7] A public nuisance may be restrained at the suit of any who have suffered by it special damage distinct from that which it causes to the public at large; but not otherwise.[8] A bill, for example, may be filed by a State to enjoin the erection of a bridge across a navigable stream which

[3] Ibid.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1857, citing Atty. Gen. v. Richards, 2 Anst. 603; Atty. Gen. v. Johnson, 2 J. Wil. 87. See also U. S. v. Gear, 3 How. 120, 11 L. ed. 523.

[5] Daniell's Ch. Pr. (2d Am. ed.) 1858.

[6] In re Debs, 158 U. S. 581, 39 L. ed. 1101; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

[7] U. S. v. Miss. & R. R. Boom Co., 3 Fed. 548; s. c., 1 McCrary, 601.

[8] Baines v. Baker, Amb. 158; Miss. & Mo. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Irwin v. Dixion, 9 How. 10, 13 L. ed. 25; Spooner v. McConnell, 1 McLean, 337; Works v. Junction R. Co., 5 McLean, 425.

will injure her commerce;[9] but not by a city for a similar reason,[10] unless its property, for example, a wharf, is thereby injured.[11] A private nuisance is an act, or series of acts, unaccompanied by an act of trespass, which causes a substantial injury to a person's property, health, or comfort. It will always be restrained when it would otherwise cause an irreparable injury or a multiplicity of suits.[12] It includes the blocking of the entrance to a railroad station by hackmen,[13] or of a railroad siding by wagons.[14] "It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. This, however, is not the law now.' [15] Formerly, an injunction was rarely issued to restrain a nuisance until the plaintiff's right of action had been established at law; "but now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy." [16] Formerly, it was a fundamental objection to an order for an injunction to restrain a nuisance to land when the legal title was disputed, that the order contained no provision for putting the question in a course of legal investigation.[17]

9 Pennsylvania v. W. & B. B. Co., 13 How. 518, 14 L. ed. 249.

10 Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012.

11 St. Louis v. Knapp Co., 104 U. S. 658, 26 L. ed. 883. A railroad company cannot have an injunction against the keeping of a saloon where its workmen buy liquors. Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 37 L. ed. 686.

12 Osburne v. Barter & Goddins, anno. 26 Eliz., Choyce Cas. in Ch. (ed. of 1870), p. 176; Parker v. Winnipiseogee Lake C. & W. Co., 2 Black, 545, 17 L. ed. 333; Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753; St. Helen's S. Co. v. Tipping, 11 H. L. C. 642.

13 Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192.

14 Robinson v. Baltimore & O. R. Co., C. C. A., 129 Fed. 753.

15 Byles, J., in Hole v. Barlow, 4 C. B. (N. S.) 334. See St. Helen's S. Co. v. Tipping, 11 H. L. C. 642; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

16 Judge Earl in Campbell v. Seaman, 63 N. Y. 568, 582. See, however, Irwin v. Dixion, 9 How. 10, 13 L. ed. 25; Murtagh v. Philadelphia, 1 Weekly Notes of Cases, 37. But see McBride v. Board of Com'rs of Pierce County, 44 Fed. 17.

17 Harman v. Jones, Cr. & Ph. 299; Saunter v. Foster, Cr. & Ph. 302.

§ 275. Injunctions to restrain trespass. Injunctions to restrain trespass are of comparatively recent origin. The first that is to be found in the books was granted by Lord Thurlow.[1] They are only granted when the trespass is destructive or continuous. The rule upon the subject has been thus stated by Vice-Chancellor Kindersley: "Where, therefore, the plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though, where the acts tend to the destruction of the estate, the court will grant it.[2] But where the party in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate."[3] The destruction of credit by an illegal seizure of one's stock in trade,[4] and the injury to a farm done by the illegal taking of all the stock and tools upon it, have been held instances of such irreparable injury.[5] An attempt by a railroad company to build its road upon private property without payment of compensation, may be thus prevented.[6] It is not

§ 275. [1] Flamang's Case, cited by Lord Eldon in Hanson v. Gardiner, 7 Ves. 305. For injunctions against the collection of an illegal tax, see *supra*, § 79.

[2] See Jerome v. Ross, 7 J. Ch. (N. Y.) 315; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Van Norden v. Morton, 99 U. S. 378, 25 L. ed. 453; Erhart v. Boaro, 113 U. S. 537, 28 L. ed. 1116; St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. 129.

[3] Lowndes v. Bettle, 33 L. J. Ch. 461. An injunction may be granted against the cutting and removal of growing trees regardless of the solvency of the defendant. Bettes v. Brower, 184 Fed. 342. Where an electric railway company was destroying, by its return current, the pipes of a water company by electrolysis; it was *held* that the court had no power to enjoin the use by the former of any particular system of circuit or negative return, although it might be shown that the system in use necessarily resulted in the injury of which complaint was made, but that all which the court could do was to restrain the continuance of the injury, leaving the motions to be adopted to prevent the same entirely to the discretion of the defendant. Peoria Waterworks Co. v. Peoria Ry. Co., 181 Fed. 990. See High on Injunctions, (4th ed.) §§ 697–722b.

[4] Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580; Cropper v. Coburn, 2 Curt. 465; North v. Peters, 138 U. S. 271, 34 L. ed. 936.

[5] Breeden v. Lee, 2 Hughes, 484.

[6] N. P. R. Co. v. Burlington & M.

certain, whether the fact that a person who threatens to commit a wrong is insolvent and unable to pay any damages which could be recovered at law, is in itself a sufficient ground for the interference of equity by injunction; but the weight of authority seems to hold that it is.[7] It was held, where there was a dispute as to the possession and as to right to the possession of a railroad track, that the court would not interfere by injunction to assist in "a scramble for possession."[8] A number of cases decided in the courts of different States hold that an injunction cannot be obtained to restrain an illegal arrest; since it is said that the writ of *habeas corpus* followed by an action for damages always affords an adequate remedy for any injury resulting therefrom;[9] but if the result of the arrests would be an irreparable injury to the business of the complainant, an injunction might perhaps be issued.[10] In one case the court directed: that an injunction to restrain trespass

R. Co., 2 McCrary, 203: s. c., 4 Fed. 298. See also Mo. K. & T. Ry. Co. v. T. & St. L. Ry. Co., 10 Fed. 497. But see D. M. Osborne Co. v. Mo. Pac. R. Co., 147 U. S. 248, 37 L. ed. 155; Burlington G. L. Co. v. Burlington, C. R. & N. Co., 165 U. S. 370, 41 L. ed. 749.

7 Connolly v. Belt, 5 Cranch C. C. 405; M'Elroy v. Kansas City, 21 Fed. 257, 262; Coeur d'Alene Cons. & Mining Co. v. Miners' Union of Wardner, 19 L.R.A. 382, 51 Fed. 260; Agar v. Regent's Canal Co., cited in 1 Swanst. 250; Musselman v. Marquis, 1 Bush (Ky.) 463, 89 Am. Dec. 637; Hicks v. Compton, 18 Cal. 206; Britton v. Hill, 12 C. E. Green (N. J.), 389; Lloyd v. Heath, Busb. Eq. (N. C.) 39; Gause v. Perkins, 3 Jones' Eq. (N. C.) 177, 69 Am. Dec. 728; Ches. & O. R. Co. v. Patton, 5 W. Va. 234; Bisham's Eq., § 436; Caro v. Met. El. Ry. Co., 46 N. Y. Super. Ct. 138. *Contra*, Heilman v. Union Canal Co., 37 Pa. St. 100; Thompson v. Williams, 1 Jones' Eq. (N. C.) 176; Nessle v. Reese, 19 Abb. Pr. (N. Y.) 240; High on Injunctions, § 18.

8 St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691. See Latham v. Northern Pac. R. Co., 45 Fed. 721.

9 Cohen v. Com'rs of Goldsboro, 77 N. C. 2; Burnett v. Craig, 30 Ala. 135, 68 Am. Dec. 115; Burch v. Cavanaugh, 12 Abb. Pr. (N. S.) (N. Y.) 410; Davis v. Am. Soc. for P. of C. to A., 6 Daly (N. Y.), 81; s. c., on appeal, 75 N. Y. 362. See also Yick Wo v. Crowley, 26 Fed. 207; Electric N. & M. T. Co., 75 Fed. 698; Burns v. McAdoo, 113 App. Div. 165; Eden Musee Am. Co. v. Bingham, 125 App. Div. 780.

10 Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169; Ex parte Young, 209 U. S. 123, 52 L. ed. 714; Hunter v. Wood, 209 U. S. 205, 52 L. ed. 747; Louisiana S. L. Co. v. Fitzpatrick, 3 Woods, 222; Dinsmore v. New York B. of P., 12 Abb. N. Cas. (N. Y.) 436; Manhattan I. W. Co. v. French, 12 Abb. N. Cas. (N. Y.) 446; *supra*, § 79.

be dissolved, unless an action of ejectment to try a claim of title by a defendant in possession is begun within ten days, and unless issues raised by defendants are framed for trial by jury within twenty days.[11]

§ 276. Injunctions against strikers. Injunctions have been granted forbidding strikers from trespass[1] and acts of violence,[2] against their employer's property; and from acts of violence,[3] or express or implied threats of violence,[4] against persons employed to take their places; and even forbidding the gathering or marching in procession upon the highway near the employer's premises.[5] The weight of authority denies the right to grant injunctions against picketing, by stationing watchers outside to request travelers on the highway not to buy of the employer or not to enter his service.[6] A few extraordinary

[11] N. J. & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 113 Fed. 395.

§ 276. [1] Illinois Cent. R. Co. v. International Ass'n. of Machinists, 190 Fed. 910.

[2] Consol. S. & W. Co. v. Murray, 80 Fed. 811; Gulf Bag Co. v. Suttner, 124 Fed. 467.

[3] Consol. S. & W. Co. v. Murray, 80 Fed. 811; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622; s. c., 32 S. W. 1106; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Springfield S. Co. v. Riley, L. R. 6 Eq. 551; Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49; Reinecke Coal Min. Co. v. Wood, 112 Fed. 477; Atchison. T. & S. F. Ry. Co. v. Gee, 140 Fed. 153; Master Horseshoers' Protective Ass'n v. Quinlivan, 83 App. Div. (N. Y.), 459. But see Richter v. Journeymen T. Union, 24 Ohio L. Bull. 189.

[4] Ibid.; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Aluminum Castings Co. v. Local No. 84 of International Molders' Union of North America, 197 Fed. 221. See High on "Injunctions," § 1415*d*.

[5] Mackall v. Ratchford, 82 Fed. 41; Consol. S. & W. Co. v. Murray, 80 Fed. 811; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Sherry v. Perkins, 147 Mass. 212, 9 Am. St. Rep. 689; Bruce Bros. v. Evans, 5 Pa. Co. Ct. R. 163; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Aluminum Castings Co. v. Local No. 84 of International Molders' Union of North America, 197 Fed. 221.

[6] Pope Motor Car Co. v. Keegan, 150 Fed. 148; Allis-Chalmers Co. v. Iron Moulder's Union No. 125, C. C. A., 166 Fed. 45, modifying 150 Fed. 155; Atkins v. W. & A. Fletcher Co., 65 N. J. Eq. 658, 55 Atl. 1074; W. & A. Fletcher Co. v. International Association of Machinists, N. J. Eq. 55 Atl. 1077; *cf.* Charnock v. Court, [1899] 2 Ch. 35; Trollupe v. London B. T. Fed'n, 72 Law Times, 342; Lyons v. Wilkins, [1899] 1 Ch. 255. *Contra*, Vegelahn v. Gunther, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443; s. c., 44

decisions have gone so far as to enjoin striking[7] and boycotting.[8] It has been held that a court should not enjoin laborers from striking nor from advising other laborers to join in a

N. E. 1077, with a strong dissent by Field, C. J., and Holmes, J.; Am. S. & W. Co. v. Wire Drawers' & D. M. Unions, 90 Fed. 608; Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49; Union Pac. R. Co. v. Ruef, 120 Fed. 102, 129; Knudson v. Benn, 123 Fed. 636; Goldberg, Bowen & Co. v. Stablemans' Union, 8 L.R.A.(N.S.) 460, 117 Am. St. Rep. 145, 86 Pac. 806. See Allen v. Flood, [1898] Appeal Cases, 1. High on "Injunctions," § 1415c. "Interference by Combinations of Labor with Employer's Business" by Geoffrey Konta of the New York bar in Columbia Law Rev., X., p. 652.

[7] Farmers' L. & Tr. Co. v. N. Pac. R. Co., 25 L.R.A. 414, note, 4 Inters, Com. Rep. 774, note 60 Fed. 803, per Jenkins, J., reversed in Arthur v. Oakes, C. C. A., 63 Fed. 310. In Delaware L. & W. P. Co. v. Switchers' Union, 51 Fed. 260; Wabash R. Co. v. Hannahan, 121 Fed. 563, preliminary injunctions to this effect were dissolved. But see § 283, *infra*, *Cf.* In re Lennoon, 166 U. S. 548, 41 L. ed. 1110; U. S. v. Cassidy, 67 Fed. 698; U. S. v. Weber, 114 Fed. 950, where the strikers were employees of a receiver; Pickett v. Walsh, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 Ann. Cas. 638; *infra*, § 311. That an injunction should not issue against a strike was held in Aluminum Castings Co. v. Local No. 84, I. M. U., 197 Fed. 221.

[8] Casey v. Cincinnati Typ. Union, 45 Fed. 135; Thomas v. Cincinnati, N. O. & T. Ry. Co., 62 Fed. 803; Oxley Stave Co. v. Coopers' I. Union, C. C. A., 72 Fed. 695; s. c., Hopkins v. Oxley Stave Co., 83 Fed. 912, Caldwell, J., dissenting; Barr v. Essex Trades Council, 53 N. J. Eq. 101; s. c., 30 Atl. 881; Beck v. Ry. Teamsters' Pr. Union, 118 Mich. 497; s. c., 43 L.R.A. 406, with note; Carroll v. Ches. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942; Loewe v. California State Federation of Labor, 139 Fed. 71; Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363; Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011; Jensen v. Cooks' & Waiters' Union of Seattle (Wash. 1905), 81 Pac. 1069. *Cf.* Hagan v. Blindell, C. C. A., 56 Fed. 696; Arthur v. Oakes, C. C. A., 63 Fed. 310; Elder v. Whitesides, 72 Fed. 724; Davis v. Zimmerman, 91 Hun (N. Y.), 489; Sinsheimer v. United G. W. of Am., 77 Hun (N. Y.), 215; U. S. v. Cassidy, 67 Fed. 698; Graham v. St. Charles St. R. Co., 47 La. Ann. 215; Quinn v. Leathem [1901], Appeal Cases, 495; Am. Law Review, Nov. 1899. See Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488. *Contra*, Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 633, 1 Ann. Cas. 172; Nat. Protective Ass'n v. Cumming, 53 App. Div. (N. Y.) 227; Marx & Haas Jeans Clothing Co. v. Watson (Mo), 56 L.R.A. 951. *Cf.* Reynolds v. Everett, 144 N. Y. 189; Allen v. Flood, [1898] Appeal Cases, 1; Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598; s. c., [1892] Appeal Cases, 25; Mayer v. Journeymen S. C.

strike;[9] but that it may enjoin them from combining to quit work in order to cripple their employer's property and embarrass his business;[10] and from refusing to handle or operate cars while remaining in the employ of a railroad company.[11] There has been said to be more justification for an injunction against a sympathetic strike or secondary boycott, than against strikers directly injured by the acts which they seek to prevent.[12] An injunction against intimidation by strikers was granted, at the suit of a contractor with the party against whom the strike was instituted, when the citizenship of the latter would not have sustained the jurisdiction;[13] but one was denied in a suit by the trustee of an unmatured mortgage upon the employer's property, when the mortgagor was not joined and had not refused to sue.[14] The importance of this class of injunctions is very great. For the acts forbidden are in most cases offenses punished by the criminal law, those charged with which would, in the absence of an injunction, have the right to a trial by jury; and the object of an injunction is to deprive them of that right.[15] This co-called "government by injunc-

Ass'n, 47 N. J. Eq. 519; Bohn Mfg. Co. v. Hollis, 54 Minn. 223; s. c., 55 N. W. 1119; Sweeny v. Torrence, 11 Pa. Co. Ct. R. 497; Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165; Worthington v. Waring, 157 Mass. 421; Pr. & Pub. Co. v. Howell, 26 Ore. 527; s. c., 28 L.R.A. 464; De Pear v. Cook's Union, 27 Chi. Leg. N. 387; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 55 L. ed. 797. See High on "Injunctions," § 1415*e*.

[9] Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 63 Fed. 310; Del. & W. R. Co. v. Switchman's Union, 158 Fed. 541, *Contra*, A. R. Barnes & Co. v. Berry, 156 Fed. 72.

[10] Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 4 Inters. Com. Rep. 744, 63 Fed. 310, 324, 329, a decision on this point of very doubtful authority; Hitchman Coal & Coke Co. v. Mitchell, 202 Fed. 512. *Cf.* Allen v. Flood [1898], Appeal Cases, 1; *supra*, § 275.

[11] So. Cal. Ry. Co. v. Rutherford, 62 Fed. 796; In re Lennon, 166 U. S. 548, 555, 41 L. ed. 1110, 1113.

[12] See Geoffrey Konta in Columbia Law Rev., X. p. 652, approving Schlan; v. Ladies' Waist Makers' Union, 124 N. Y. Supp. 289; Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, 180 Fed. 896; Tunstall v. Stearns Coal Co., C. C. A., 192 Fed. 808.

[13] Carroll v. Ches. & O. Coal Agency Co., C. C. A., 124 Fed. 305; s. c., as Ches. & O. Coal Agency Co. v. Fire Creek C. & C. Co., 119 Fed. 942.

[14] Illinois Trust & Sav. Bank v. Minton, 120 Fed. 187.

[15] In re Debs, 158 U. S. 564, 581, 582, 39 L. ed. 1092, 1101, 1102; U. S. v. Debs, 64 Fed. 724; Reynolds v. Davis, 198 Mass. 294, 17 L.R.A.

tion" has been sharply criticized. The jurisdiction of courts of equity to entertain a suit for such an injunction has been sustained by the Supreme Court of the United States;[16] but the propriety of those which have been issued has not yet been decided by that tribunal.[17]

§ 277. Injunctions to restrain the infringement of patents. Injunctions to restrain the infringement of patents and copyrights are of ancient use in equity. They are founded upon both the irreparable injury that would otherwise be caused to the complainant, and the desire of the court to prevent a multiplicity of suits.[1] This inherent power of the courts is confirmed in the United States by statute. The provision of the Revised Statutes authorizing injunctions to restrain the infringement of patents is as follows: "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, upon such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase damages found by verdicts in actions in the nature of actions of trespass upon the case."[2] It seems to have been formerly the opinion that courts of equity would not interfere to protect a patent right by injunction, until the right has been established at law; but

(N.S.) 162, 84 N. E. 457. See U. S. v. Cassidy, 67 Fed. 698, 783, for a refusal of a jury to convict in a similar case, upon much stronger evidence than that offered against Debs.

[16] In re Debs., 158 U. S. 564, 581, 39 L. ed. 1092, 1101; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

[17] But see In re Debs, 158 U. S. 564, 581, 592, 597, 39 L. ed. 1092, 1101, 1105, 1107.

§ 277. [1] Eden on Injunctions, chs. xii and xiii; Daniell's Ch. Pr. (5th Am. ed.) 1642–1648; Hogg v. Kirby, 8 Ves. 215; Wilkins v. Aikin, 17 Ves. 422. See High on Injunctions §§ 934–952.

[2] U. S. R. S., § 4921. See *supra*, §§ 146, 175 and 29 St. at L. 695; cited *supra*, § 61.

since Lord Eldon's time their jurisdiction thus to interfere, when the title of a complainant is established by the preponderance of evidence, has been undisputed.[3] Before a preliminary injunction will be granted against the alleged infringement of a patent, it should be shown: that the plaintiff's right to the exclusive use of the invention is clear,[4] and usually that it has been established by a prior adjudication[5] or by public acquiescence;[6] and that there is no room for reasonable doubt as to the infringement.[7] Before the creation of the Circuit Courts of Appeal, the rule was that if previous adjudications in the same or other Circuit Courts had established the validity of the plaintiff's patent, a preliminary injunction would be granted him almost as of course in a subsequent suit, to prevent the infringement of the same by a person not a party to the former proceeding[8] unless the latter could produce new evidence that was con-

[3] Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Hill v. Thompson, 3 Meriv. 622; Pierpont v. Fowle, 2 W. & M. 23; Motte v. Bennett, 2 Fisher, 642; Kerr on Injunctions, 272.

[4] Welsbach Lt. Co. v. Cosmopolitan Inc. G. L. Co., 100 Fed. 648; Bradley & H. Mfg. Co. v. Charles Parker Co., 17 Fed. 240; Consol. S. V. Co. v. Crosby S. G. & L. Co., 7 Fed. 768; Illingworth v. Spalding, 9 Fed. 154. For a case where the complainant's rights were held so clear as to warrant a preliminary injunction without a prior adjudication or public acquiescence, see Wilson v. Consol. S. S. Co., C. C. A., 88 Fed. 286.

[5] Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Richmond Milk Co v. DeClyne, 90 Fed. 661.

[6] Palmer P. T. Co. v. Newton R. Works, 73 Fed. 218; Duff Mfg. Co. v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Silver & Co. v. J. P. Eustis Mfg. Co., 130 Fed. 348. Eight months of public acquiescence were held to be enough. Wilson v. Jefferson, 78 Fed. 366. *Cf.* Johnston R. Co. v. Avery Mach. Co., 28 Fed. 193; Stahl v. Williams, 52 Fed. 645. Five years of public acquiescence were held sufficient. McDowell v. Kurtz, C. C. A., 77 Fed. 206. So of six years. White v. Hunter, 47 Fed. 819; Nat. Typ. Co. v. N. Y. Typ. Co., 46 Fed. 144.

[7] Whippany Mfg. Co. v. United I. F. Co., C. C. A., 87 Fed. 215; Duff v. Kalamazoo Ry. Sig. Co., 100 Fed. 357; Richmond Mica Co. v. De Clyne, 90 Fed. 661; Standard Paint Co. v. Reynolds, 43 Fed. 304; Johnson R. R. S. Co. v. Union S. & S. Co., C. C. A., 55 Fed. 487; Hatch S. Ry. Co. v. El. Storage Ry. Co., C. C. A., 100 Fed. 975; Jefferson Electric Light, Heat & Power Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 134 Fed. 392. *Cf.* Sawyer Sp. Co. v. Turner, 55 Fed. 979.

[8] Orr v. Littlefield, 1 W. & M. 13; Thayer v. Wales, 9 Blatchf. 170; s. c., 5 Fisher, 130; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; but see Many v. Sizer, 1 Fish. Pat. Cas. 31.

clusive,[9] or show that such judgments were obtained by consent, collusion or fraud,[10] or without any substantial contest.[11] This is still the rule in the same circuit,[12] and has been applied when the previous adjudication was a judgment at law rendered upon a verdict, as well as when an interlocutory decree in equity.[13] It has special force when the Supreme Court of the United States,[14] or the Circuit Court of Appeals for that circuit,[15] has established the validity of the patent. It is usually followed when the decision was by the Circuit Court of Appeals,[16]

9 Page v. Holmes B. A. Tel. Co., 2 Fed. 300; s. c., 18 Blatchf. 118; Bragg v. Mayor etc. of N. Y., 141 Fed. 118. But see Motion Picture Patents Co. v. Laemmle, 178 Fed. 104.

10 Am. Nic. P. Co. v. Elizabeth, 4 Fish. 189; Page v. H. B. A. Tel. Co., 2 Fed. 330; American M. Purifier Co. v. Vail, 15 Blatchf. 315; but see Orr v. Littlefield, 1 W. & M. 13. Where, after proofs had been taken, the defendant made default, the court merely examined the case sufficiently to dispose of the actual controversy and refused to pass upon the questions arising in detail so as to enable the decision to be used in case of a subsequent infringement. Victor Talking Mach. Co. v. Leed & Catlin Co., 180 Fed. 778.

11 N. Y. Button Works v. Crescent Button Co., 185 Fed. 820.

12 Elite Pottery Co. v. Dececo Co., C. C. A., 150 Fed. 581; Cohen v. Stephenson & Co., C. C. A., 142 Fed. 467; A. B. Dick Co. v. Pomeroy Duplicator Co., 117 Fed. 154; Walker Patent Pivoted Bin Co. v. Miller & England, 132 Fed. 823; Warren Bros Co. v. City of Montgomery, 172 Fed. 414; Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co., C. C. A., 186 Fed. 166; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Mine & Smelter Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897.

13 Panoulias v. Hawley, 178 Fed. 101.

14 Am. Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; Westinghouse Air-Brake Co. v. Christensen Eng. Co., 113 Fed. 594; Cutler-Hammer Mfg. Co. v. Hammer, 124 Fed. 222.

15 Armat Moving Picture Co. v. Edison Manufacturing Co., 121 Fed. 559; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Victor Talking Mach. Co. v. Sonora Phonograph Co., 188 Fed. 330; Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., 188 Fed. 435.

16 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. Rep. 495, 53 L. ed. 805; Cohen v. Stephenson & Co., C. C. A., 142 Fed. 467; Thomson-Houston Electric Co. v. Holland, 143 Fed. 903; Calculagraph Co. v. Automatic Time Stamp Co., 149 Fed. 436; Badische Anilin & Soda Fabrik v. A. Klipstein & Co., 125 Fed. 543; Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York, C. C. A., 157 Fed. 677; Timolat v. Phila. Pneumatic Tool Co., 123 Fed. 899; Westinghouse Electric & Mfg.

or by a District Court,[17] of another circuit. When a preliminary injunction has been granted upon the faith of such an adjudication, the appellate court should ordinarily affirm the same upon an interlocutory appeal, without passing upon the validity of the patent or the merits;[18] but it has been said that the doctrine depends upon comity,[19] and is not a rule of law, but one of practice, convenience and expedience.[20] When a judge is clear in his conviction that a previous decision, made in another circuit against another defendant, has been wrongfully decided, he is not bound to follow it.[21] A final decree, at least, will not be reversed by the Supreme Court merely because

Co. v. Condit Electrical Mfg. Co., 159 Fed. 144; Gormley & Jeffrey Tire Co. v. U. S. Agency, C. C. A., 177 Fed. 691; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A., 298; Calculagraph Co. v. Automatic Time Stamp Co., C. C. A., 187 Fed. 276; Parsons Non-Skid Co. v. E. J. Willis Co., 190 Fed. 333; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A. 192 Fed. 321.

17 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. ed. 805; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A. 298; Schmeiser Mfg. Co. v. Lilly, 189 Fed. 631; Acme Acetylene Applicance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co., C. C. A., 198 Fed. 650. See Westinghouse Electric & Mfg. Co. v. Sutter, 194 Fed. 888; Hammond Buckle Co. v. Weld, C. C. A., 72 Fed. 171; Westinghouse El. & Mfg. Co. v. Royal Weaving Co., 115 Fed. 733; Western El. Co. v. Keystone Tel. Co., 15 Fed. 809; Brunswick-Balke-Colender Co. v. Koehler & Hinrichs, 115 Fed. 648; U. S. Gramaphone Co. v. Seaman, C. C. A., 113 Fed. 745; Brill v. Peckham Mfg. Co., 129 Fed. 139

18 Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 312, 29 Sup. Ct. 495, 53 L. ed. 805; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A. 298.

19 See, however, Mine & Smelter Supply Co. v. Braeckel Concentrator Co., 197 Fed. 897.

20 Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858.

21 Welsbach Lt. Co. v. Cosmopolitan Inc. El. Co., 100 Fed. 648; Horn & Br. Mfg. Co. v. Pelzer, 91 Fed. 665; Nat. Cash Reg. Co. v. Amer. C. R. Co., C. C. A., 53 Fed. 367; Wanamaker v. Enterprise Mfg. Co., C. C. A., 53 Fed. 791; Cimiotti U. Co. v. Am. Fur. Ref. Co., 120 Fed. 672; Diamond Match Co. v. Union Match Co., 129 Fed. 602; Westinghouse El. & Mfg. Co. v. Condit El. Mfg. Co., 159 Fed. 144; Underwood Typewriter Co. v. Fox Typewriter Co., 181 Fed. 530. See also Hatch S. B. Co. v. El. St. Ry. Co., C. C. A., 100 Fed. 975; Consol. El. S. C. v.

insufficient weight was given below to the doctrine of comity.[22] When the only disputed question was the priority of invention, similar weight has been given to the decisions of the Supreme Court of the District of Columbia or Court of Appeals of that District upon appeals from the decisions of the Patent Office in interference proceedings,[23] and to the decisions of the Commissioner of Patents in such proceedings;[24] but not in controversies concerning the patentability or novelty of the patent, or other disputed points.[25] Decisions of the Canadian courts are also entitled to great consideration upon such a motion.[26] The rule has been applied to adjudications, that a given state of facts does or does not constitute an infringement, as well as to those upon the construction and validity of a patent.[27] It does not include a case where an entirely new defense is pleaded, although then that defense alone will be considered upon the decision of a motion.[28] Where there has been no adjudication, a preliminary injunction will never be granted if there is a fair

Accumulator Co., C. C. A., 55 Fed. 485; Am. Paper P. & B. Co. v. Nat. F. B. & P. Co., C. C. A., 51 Fed. 259; N. Y. Filter Mfg. Co. v. Niagara Falls W. W. Co., C. C. A., 80 Fed. 924; Adams v. Tannage P. Co., C. C. A., 81 Fed. 178; Electric Mfg. Co. v. Edison El. L. Co., C. C. A., 61 Fed. 834; Overman Wheel Co. v. Curtis, 53 Fed. 247; N. Y. Filter Mfg. Co. v. Jackson, 112 Fed. 678. *Infra*, § 377.

[22] Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 489, 44 L. ed. 856, 858. See Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co., C. C. A., 101 Fed. 282, 41 C. C. A. 351; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166, 170, 108 C. C. A. 298.

[23] Scott v. Laas, C. C. A., 150 Fed. 764; White Dental Mfg. Co. v. Johnson, 56 Fed. R. 262.

[24] Smith v. Halkyard, 16 Fed. 414; Celluloid Mfg. Co. v. Chrowlithian C. & C. Co., 24 Fed. 275; Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195; Weston El. Instrument Co. v. Am. Instrument Co., 169 Fed. 659; Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120. *Contra*, Wilson v. Consolidated Store-Service Co., C. C. A., 88 Fed. 286, 288. See Fenton Met. Mfg. Co. v. Chase, 73 Fed. 831.

[25] Dickerson v. De La Vergne Refrigerating Mach. Co., 35 Fed. 143, 146; Turner Brass Works v. Appliance Mfg. Co., 164 Fed. 195; Perfection Cooler Co. v. Rose Mfg. Co., 175 Fed. 120.

[26] Carter & Co. v. Wollschlaeger, 53 Fed. 573.

[27] Byerley v. Ellis Co., 190 Fed. 772.

[28] General El. Co. v. Condit El. Mfg. Co., 191 Fed. 511; Gamewell Fire Alarm Tel. Co. v. Hackensack Improvement Commission, 199 Fed. 182; Bragg v. Mayor, etc. of N. Y., 141 Fed. 118.

doubt as to invention, anticipation, obstruction or infringement.[29] Where there is no prior patent or publication submitted, nor any room for doubt as to the infringement, it has been held that the presumption arising from the grant of the patent is sufficient to warrant the issue of an injunction.[30] This has been described as "the Second Circuit Rule," but a recent case states that it rests upon "a slender foundation."[31] It was there said, that the phrase "fair doubt" refers to something more than the effect produced on the judicial mind by the direct evidence submitted on the motion, but includes "a belief that other reachable testimony exists which, by reasonable effort, the party may adduce."[32] If, upon a motion for a preliminary injunction, the parties are willing to rest their case for a final hearing upon the papers then presented, without oral testimony, the court is more inclined to decide the question upon the merits.[33] Because of the weight which the decision has as a precedent, proof that the defendant will not be seriously injured by the injunction, does not justify its issue,[34] although when there is evidence that the complainant cannot suffer serious loss it may af-

[29] Newhall v. McCabe Hanger Mfg. Co., C. C. A., 125 Fed. 919, 60 C. C. A. 629; Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865. See Hildreth v. Norton, C. C. A., 159 Fed. 428; Motion Picture Patents Co. v. N. Y. Motion Picture Co., 174 Fed. 51; Meyers v. Skinner, 179 Fed. 860; Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co., 190 Fed. 323; Lovell-McConnell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658; Gamewell Fire Alarm Tel. Co. v. Star El. Co., 199 Fed. 185.

[30] Pelzer v. City of Binghamton, C. C. A., 95 Fed. 823, 37 C. C. A. 288, which has been said to be the only case in which a motion for a preliminary injunction, lost in the court below, prevailed in the Circuit Court of Appeals; Seidenberg v. Davidson, 112 Fed. 431, 432, Lacombe, J.; Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 866. See, also, Fuller v. Gilmore, 121 Fed. 129.

[31] Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 866, per Hough, J.: "The function of the appellate court has more frequently been directed to discovering doubt, and thus delaying decision, than to adjudicating matters far more fully and elaborately presented to the lower court than it was the practice in equity to do when so vital a litigation as that over the Morse electric telegraph reached the Supreme Court. The record of that case, compared with modern records, is an instructive example of deterioration in procedure."

[32] Ibid.

[33] Crown Cork & Steel Co. v. Brooklyn Bottle Stopper Co., 190 Fed. 323.

[34] See Victor Talking Mach. Co. v. Leed & Catlin Co., 180 Fed. 778.

ford a reason for denying the writ.[35] Laches by the plaintiff before the suit,[36] and after the suit has begun,[37] is a reason for denying the motion. A delay pending litigation with other infringers is not laches.[38] If serious public inconvenience would result from a preliminary injunction, the application may be denied.[39] Where some of the claims in the patent were sustained and found to have been infringed and others held to be invalid, the complainant has been required to disclaim the latter before the injunction issues.[40] But the better practice is not to require a disclaimer until the entry of the final decree after any accounting that may be ordered has been terminated, in order that the complainant may have the right to have so much of the adjudication as is against him reviewed upon appeal.[41] The combination of the complainant with other patentees, so as to create a monopoly,[42] the absolute refusal of the owner of the patent to use the same, which had deprived the public of the benefit of the invention,[43] and the fact that the principal use of the invention was in connection with gambling, when it might be used for other purposes;[44] were held to be no

35 Meyers v. Skinner, 179 Fed. 860.

36 United Nickel Co. v. New H. S. M. Co., 17 Fed. 528; Waite v. Chichester Chair Co., 45 Fed. 258; Keyes v. Pueblo Sm. & Ref. Co., 31 Fed. 560; Byerley v. Standard Asphalt & Rubber Co., 189 Fed. 759. In one case a delay of two months was held such laches as to defeat the application. Ney Mfg. Co. v. Superior Drill Co. (C. C. Ohio), 56 Fed. 152. But see Brush El. Co. v. El. Imp. Co., 45 Fed. 241; Nat. Heeling Mach. Co. v. Abbott, 77 Fed. 462; Collingnon v. Hayes, 8 Fed. 912; N. Y. G. S. Co. v. Buffalo G. S. Co., 18 Fed. 638.

37 Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co., 198 Fed. 865, 867, where, with proper diligence, the case would have been ready for final submission.

38 Timolat v. Franklin Boiler Works, C. C. A., 122 Fed. 69; (a delay of three years).

39 S. W. Brush El. & P. Co. v. La. El. L. Co., 45 Fed. 893; Bliss v. Brooklyn, 4 Fisher's Pat. Cas. 596; Am. Ordinance Co. v. Driggs-Seebury Co., 87 Fed. 947; Hoe v. Boston Adv. Corp., 14 Fed. 914; Robinson on Patents, § 1200. But see Pelzer v. Binghamton, C. C. A., 95 Fed. 823; N. Y. Filter Mfg. Co. v. Niagara Falls W. Co., C. C. A., 77 Fed. 900; Westinghouse A. B. Co. v. Great N. Ry. Co., 86 Fed. 132

40 F. D. Cummer & Son Co. v. Atlas Dryer Co., C. C. A., 193 Fed. 993.

41 Page Mach. Co. v. Dow, Jones & Co., C. C. A., 168 Fed. 703.

42 Lanyon Zinc Co. v. Brown, C. C. A., 115 Fed. 150; Edison El. L. Co. v. Sawyer-Man El. Co., C. C. A., 53 Fed. 592.

43 General El. Co. v. Wise, 119 Fed. 922; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 52 L. ed. 1122.

44 Fuller v. Berger, C. C. A., 65

reasons for denying an injunction. Where the defendant is pecuniarily responsible,[45] especially where the complainants have established a regular license fee,[46] or where the defendant offers a bond or undertaking with a sufficient surety that he will pay whatever may be awarded against him for damages or profits, the injunction will usually be denied, unless there has been a previous adjudication sustaining the plaintiff's patent.[47] Sometimes even where there had been such an adjudication.[48] It has been said: that the existence and use of an unpatented anticipating device prior to the invention covered by the patent, may be established by oral testimony only when sufficient to prove the facts beyond a reasonable doubt;[49] and that evidence that defendant had an infringing device in his possession, without proof that it made, used, or sold the same, does not make out a case of infringement.[50] After a defendant has once infringed a patent owned by the plaintiff, it seems that the court will usually enjoin him from doing so in the

L.R.A. 381, 120 Fed. 274. But see *infra*, § 284.

[45] N. Y. Grape Sugar Co. v. American Grape Sugar Co., 10 Fed. 835; Westinghouse A. B. Co. v. Burton S. C. Co., 70 Fed. 619; Nilsson v. Jefferson, 78 Fed. 366; Huntington D. P. Co. v. Alpha P. C. Co., 91 Fed. 534; Karfiol v. Bothner, 151 Fed. 777; Byerley v. Standard Asphalt & Rubber Co., 189 Fed. 759; Gamewell Fire Alarm Tel. Co. v. Star El. Co., 199 Fed. 185. *Contra*, General El. Co. v. Wise, 119 Fed. 922. In some cases, the defendant is then required to keep an account. See *infra*, § 297.

[46] Overweight C. El. Co. v. Cahill & H. El. Co., 86 Fed. 338; Overweight C. El. Co. v. Improved O. of R. M. H. Ass'n. C. C. A., 94 Fed. 155; Nat. Heeling Mach. Co. v. Abbott, 77 Fed. 462. See Nat. Cash Reg. Co. v. Navy C. R. Co., 99 Fed. 565; Eastern P. B. Co. v. Nixon, 35 Fed. 752; McMillan v. Conrad, 16 Fed. 128; Eagle Mfg. Co. v. Chamberlain Plow Co., 36 Fed. 905; Hoe v. Knap, 27 Fed. 204; Geo. A. Macbeth Co. v. Lippincott Glass Co., 54 Fed. 167; Washburn & M Mfg. Co. v. H. B. Scott & Co., 22 Fed. 710; Edison El. Lt. Co. v. Columbia Inc. L. Co., 56 Fed. 496; N. Y. Belting & P. Co. v. Magowan, 23 Fed. 596; Greenwood v. Bracher, 1 Fed. 856. *Contra*, Warren Bros. Co. v. City of Montgomery, 172 Fed. 414.

[47] McWilliams Mfg. Co. v. Blundell, 11 Fed. 419; Campbell Pr. Press Co. v. Prieth, 77 Fed. 976; Carter & Co. v. Wollschlaeger, 53 Fed. 573.

[48] Westinghouse A. B. Co. v. Burton S. Car Co., C. C. A., 77 Fed. 301; Norton v. Eagle Auto Can. Co., 61 Fed. 293.

[49] De Laval Separator Co. v. Iowa Dairy Separator Co., C. C. A., 194 Fed. 423.

[50] Sheffield Car Co. v. Buda Foundry & Mfg. Co., 177 Fed. 713.

future, even though he swears that he has no intention of doing so again, unless he further proves that he has paid all damages occasioned by his infringement, and has desisted from it;[51] but not where it clearly appears that the infringement ceased before the suit was brought and was made without knowledge of the complainant's rights,[52] especially when the complainant knew of the cessation before the suit was brought.[53] An injunction may be dissolved where the plaintiff has sent a false or misleading description of the same to the trade.[54] An *ex parte* application for an injunction to restrain the infringement of a patent should, it seems, be supported by an affidavit, or an allegation in a bill verified by affidavit of the plaintiff, stating that he believes that the person to whom the patent was issued was the original inventor thereof, or that the invention was new, or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued.[55] It has been held that after the expiration of a patent an injunction may issue to prevent the use of a machine made while the patent was in force; and it has been said that an injunction previously issued will, until dissolved by order, remain in force so far as still to forbid such a use.[56] But a bill praying for such an injunction must allege either that the defendant is using machines manufactured during the term of the patent and in violation of it, or that the plaintiff has cause to fear such a use.[57] An injunction against the manufacture or sale of articles in violation of a patent right is violated by their sale or manufacture within the United States,

51 Jenkins v. Greenwald, 1 Bond, 126; s. c., 2 Fisher, 37; Sickels v. Mitchell, 3 Blatchf. 548; Poppenhusen v. N. Y. G. P. C. Co., 4 Blatchf. 184; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. 324; Morton Tr. Co. v. Standard Steel Car Co., C. C. A., 177 Fed. 931.

52 General El. Co. v. Pittsburg-Buffalo Co., 144 Fed. 439. See Home Ins. Co. v. Nobles, 63 Fed. 642.

53 Kennicott Water Softener Co. v. Bain, C. C. A., 185 Fed. 520.

54 Meyers v. Skinner, 186 Fed. 347. See *infra*, §§ 284, 296.

55 Hill v. Thompson, 3 Meriv. 622; Sturz v. De La Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441; U. S. R. S., §§ 4886, 4887.

56 Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 355. But see Am. Cable Ry. Co. v. Chicago City Ry. Co., 41 Fed. 522; Westinghouse v. Carpenter, C. C. A., 43 Fed. 894. See *infra*, §§ 287, 296.

57 Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 355.

but beyond the jurisdiction of the court.[58] After an injunction against the infringement of a patent, the defendant or his trustee in bankruptcy may be enjoined from selling the infringing apparatus pending his appeal from the decree.[59] It has been held, that, after an interlocutory decree granting an injunction, the complainants cannot sue in another district for the sole purpose of obtaining an adjudication that other parties therein located have been the real parties in interest in the prior suit and are bound by the injunction.[60]

§ 278. Injunctions to restrain the infringements of copyrights. The Act of March 4, 1909, provides: "That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (a) To an injunction restraining such infringement."[1] "That any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this Act may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative throughout the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants."[2] This statute is, however, merely declaratory of the previous rule in equity which, it is said by Lord Eldon, was "founded upon this; that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. This court, therefore, interposes by injunction;

58 Macaulay v. White S. M. Co., 9 Fed. 698.

59 United Wireless Tel. Co. v. Nat. El. Signaling Co., C. C. A., 198 Fed. 385.

60 Kehoe v. Bradford & Lasher, 175 Fed. 800.

§ 278. 1 35 St. at L. 1075, § 25, Pierce Fed. Code (Supp.), § 1587.

2 Ibid., § 36, Pierce Fed. Code (Supp.), § 1589.

but not in cases where an action cannot be maintained."[3] The rules regulating the issue of injunctions to prevent the infringement of copyrights are in general similar to those regulating the issue of injunctions restraining the infringement of patents; but decisions which relate to patent cases are not absolutely controlling in cases arising under the copyright law.[4] The plaintiff must show a clear title to his copyright, and an infringement or threatened infringement by the defendant.[5] It has been held that an injunction is void when obtained and served before two copies of the work, of which a copyright is sought, have been deposited in the copyright office or mailed addressed to the register.[6] A preliminary injunction will not be granted where the validity of the copyright and the infringement are denied and not clearly established.[7] The injunction will be denied if the defendant shows that the plaintiff has consented to his infringement, or has been guilty of unreasonable delay after he learned that it had occurred or was threatened.[8] How long a time must have elapsed to bar the plaintiff's right to an injunction has not been definitely settled. It has been held in England, however, that an injunction may be obtained after the copyright has been infringed to the plaintiff's knowledge during four years.[9] Moreover, delay will not prejudice him, if solely caused by his waiting until the result of litigation, whether prosecuted by himself or others, to settle a doubtful question of law involving the validity of his title.[10] As has been said, an injunction will not be granted unless the plaintiff shows a plain title to the copyright which he claims;

3 Lawrence v. Smith, Jacob, 471, 472.

4 Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 345, 52 L. ed. 1086, 1091; Park & Sons v. Hartman, 12 L.R.A. (N.S.) 135, 153 Fed. 24. *Contra,* Scribner v. Straus, 130 Fed. 389.

5 Chase v. Sanborn, 6 Off. Gaz. 932; Parkinson v. Laselle, 3 Saw. 330; Lawrence v. Dana, 4 Cliff. 1; Yuengling v. Schile, 12 Fed. 97; Drone on Copyright, ch. xi, pp. 496–543.

6 N. Y. Times Co. v. Star Co., 195 Fed. 110.

7 Nixon v. Doran, 168 Fed. 575.

8 Rundell v. Murray, Jacob, 311; Saunders v. Smith, 3 Myl. & Cr. 711; Chappell v. Sheard, 1 Jur. (N. S.) 996; Tinsley v. Lacy, 1 Hem. & M. 747; Keene v. Clarke, 5 Robertson (N. Y.), 38, 66, 67; Miller v. M'Elroy, 1 Am. Law Reg. 198.

9 Hogg v. Scott, L. R. 18 Eq. 444, 454; Drone on Copyright, 504, 512.

10 Buxton v. James, 5 De G. & Sm. 80; Rumford Chem. Works v. Vice, 14 Blatchf. 179.

but "the copyright is *prima facie* evidence that he is the author, and the burden of proof is upon the defendant to show the contrary,"[11] or that, for some other reason, there is a defect in the title claimed.[12] And the court will protect an equitable title against infringement unless the defendant possesses superior equities to those of the complainant.[13] The complainant is not obliged to prove damage from the breach of copyright.[14] Ordinarily, the injunction forbids the publication of only so much of the defendant's work as infringes upon the copyright of the plaintiff.[15] Where the defendant's publication intermingles matter infringing the complainant's copyright with other matter which does not, the entire publication may be enjoined, with permission to the defendant to apply for a modification of the injunction after he has eliminated the objectionable matter;[16] but where the piratical matter is insignificant in amount and value when compared with the rest of the defendant's publication, an injunction should be refused and the plaintiff's right limited to a trial by jury of the damages actually sustained.[17] If there is any doubt concerning the infringement, and its ascertainment will necessitate the examination of a great deal of matter, the court, in this country, usually directs a reference to a master to hear testimony and state the facts, together with his opinion for its consideration, before granting an injunction.[18] Such a reference is usually ordered before the final hearing, but may be at the decree.[19] In England, however, laborious examinations have frequently been made by the judges themselves, unassisted, except by counsel.[20]

11 Taney, C. J., in Reed v. Carusi, Taney, 72, 74.

12 Drone on Copyright, 499; Story's Eq. Jur., § 936, note 6.

13 Little v. Gould, 2 Blatchf. 165.

14 Reed v. Holliday, 19 Fed. 325, 327.

15 Webb v. Powers, 2 W. & M. 497; Story v. Holcombe, 4 McLean, 306; Farmer v. Elstner, 33 Fed. 494.

16 Park & Pollard Co. v. Kellerstrass, 181 Fed. 431.

17 Dun v. Lumbermen's Credit Ass'n., 209 U. S. 20, 52 L. ed. 663.

18 Folsom v. Marsh, 2 Story, 100; Webb v. Powers, 2 W. & M. 497; Story v. Derby, 4 McLean, 160; Greene v. Bishop, 1 Cliff. 186; Lawrence v. Dana, 4 Cliff. 1; West Pub. Co. v. Lawyers' Co-operative Pub. Co., 25 L.R.A. 441; 64 Fed. 360; s. c., C. C. A., 35 L.R.A. 400, 79 Fed. 756; Drone on Copyright, 513. But see Smith v. Johnson, 4 Blatchf. 252.

19 Lawrence v. Dana, 4 Cliff. 1; Drone on Copyright, 513.

20 Lewis v. Fullarton, 2 Beav. 6; Murray v. Bogue, 1 Drew, 353; Jarrold v. Houlston, 3 Kay & J.

Instead of a reference, an issue at law may be directed.[21] The plaintiff need not specify in either his bill or his affidavit the parts of the defendant's publication which he thinks have been taken from his work. A general allegation of infringement accompanied by a verification by affidavit of the two works is sufficient.[22] The practice has been that, "when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy."[23] Clearer proof and a stronger case than would be sufficient to entitle a plaintiff to an injunction after the hearing is often required before he can obtain an interlocutory injunction.[24] Where there is doubt about the infringement, an injunction may be withheld upon the filing of a bond by the defendant.[25] The difficulty of accurately determining the damages resulting from an unauthorized publication of his work will often have weight in leading the court to grant a preliminary injunction, when otherwise it might refuse one.[26] But, on the other hand, the court will often refuse an injunction before the hearing, when it is plain that the defendant would suffer more injury from being obliged to discontinue the publication than can result to the plaintiff from his continuing.[27] It has been held in England that if a work be libelous, immoral, or blasphemous, which last named term would include one "which impugned the doctrines of the immateriality and immortality of the soul,"[28] there can be no copyright therein, and a piratical edition thereof will not be enjoined.[29] These decisions, however, one of which stigmatized

708; Pike v. Nicholas, L. R. 5 Ch. 251; Drone on Copyright, 513.

[21] Jollie v. Jaques, 1 Blatchf. 618.

[22] Farmer v. Calvert L. Co., 1 Flip. 228, 235; Sweet v. Maugham, 11 Sim. 51; Drone on Copyright, 513.

[23] Sweet v. Maugham, 11 Sim. 51, 53.

[24] Johnson v. Wyatt, 2 De G., J. & S. 18; Drone on Copyright, 517, 518.

[25] Louis De Jonge & Co. v. Breuker & Kessler Co., 147 Fed. 763. See *supra*, § 277.

[26] Matthewson v. Stockdale, 12 Ves. 270; Wilson v. Luke, 1 Vict. Law R. 127; Prince Albert v. Strange, 1 Mac. & G. 25, 46; Little v. Gould, 2 Blatchf. 165; Drone on Copyright, 516–519.

[27] Spottiswoode v. Clarke, 2 Phil. 154; Cox v. Land & W. J. Co., L. R. 9 Eq. 324; Lodge v. Stoddart, 9 Rep. 137. But see Emerson v. Davies, 3 Story, 768.

[28] Lawrence v. Smith, Jacob, 471.

[29] Walcot v. Walker, 7 Ves. 1; Stockdale v. Onwhyn, 5 Barn. & Cr. 173; Murray v. Benbow, 6 Petersd.

as unworthy of protection Byron's "Cain,"[30] have been severely criticised,[31] and it is not likely that they would be fully sustained if the question should be raised in the United States; although in a case in the Federal courts Judge Deady assigned as one among several reasons for refusing to enjoin an unauthorized representation of "The Black Crook," that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."[32] It has been held: that the fact that a complainant is a member of an illegal combination, formed to restrain interstate commerce, is no defense to a suit for the infringement of a copyright.[33] Injunctions to enjoin the performance of dramatic or musical compositions may be served and enforced by contempt proceedings, anywhere in the United States; and the defendant may move to dissolve the same in any Circuit in which he is engaged in such performance;[34] and suits for such injunctions may be instituted in any district where the defendant or his agent may be found.[35]

§ 279. Injunctions to restrain the unlawful use of trade-marks. Injunctions to restrain the use of trade-marks by others than their owners are granted by courts of equity, it has been said, partly to prevent the fraud upon the public which would otherwise be perpetrated, and partly on account of the difficulty of estimating the injury which would be caused the owner of a trade-mark from its improper use.[1] The former ground of the interference of the court has, however, been expressly repudiated by a great judge, Lord Westbury, who said, when Lord

Abr. 559; Lawrence v. Smith, Jacob, 471; Southey v. Sherwood, 2 Meriv. 435. But see Burnett v. Chetwood, 2 Meriv. 441.

30 Murray v. Benbow, 6 Petersd. Abr. 559.

31 Campbell's Lives of the Lord Chancellors, ch. ccxiii; Drone on Copyright, 181–196.

32 Martinetti v. Maguire, 1 Deady, 216, 223.

33 Scribner v. Straus, 130 Fed. 389.

34 35 St. at L. 1075, § 25, Pierce's Fed. Code Supp. § 1587.

35 Ibid. § 35, Pierce Supp. § 1589.

§ 279. 1 Perry v. Truefit, 6 Beav. 66, 73; Croft v. Day, 7 Beav. 84; Leather C. Co. v. American L. C. Co., 10 Jur. (N. S.) 81; Walton v. Crowley, 3 Blatchf. 440; Shaw Stocking Co. v. Mack, 12 Fed. 707. See High on Injunctions, (4th ed.) §§ 1063–1084.

It was *held* that Vassar College had no such property right in its name and seal as to prevent the use of the same in advertisements of candy. Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982.

Chancellor, in delivering the judgment in a leading case: "Imposition upon the public becomes the test of the property in the trade-mark having been invaded and injured, but not the ground on which the court rests its jurisdiction."[2] "Trade-marks are of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in."[3] "Where the trade-mark consists of a picture or symbol, or in any peculiarity in its appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not intterfere."[4] "But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or in any form of label, and its use by another is unlawful. The statute" of New York "requires only that the imitation should be either the same to the eye, or in sound to the ear, as the genuine trade-mark, and this accords with the authorities."[5] "To make an exclusive right to use a name or symbol as a trade-mark, such use must be new; if ever before used as applicable to a like article, it cannot be exclusively appropriated. If the article is known to commerce in general, by the term claimed, as a trade-mark, the claim is ill-founded. If the term employed indicates the nature, kind, or quality of the article, instead of showing its origin, an exclusive right to its use is not maintainable."[6] In accordance with the maxim that he who seeks equity must come with clean hands, it is well established that, if the trade-mark for which protection is sought contains representations

[2] Leather C. Co. v. American L. C. Co., 10 Jur (N. S.) 81. But see the language of Coxe, J., in Shaw Stocking Co. v. Mack, 12 Fed. 707, 710.

[3] Judge Rapallo in Hier v. Abrahams, 82 N. Y. 519, 523, 37 Am. Rep. 589.

[4] Ibid.

[5] Ibid.

[6] Van Beil v. Prescott (The Rye & Rock Case), 82 N. Y. 630.

calculated to deceive the public, an injunction will be denied the plaintiff.[7] An act of Congress allowing suits to enjoin the use of trade-marks to be brought in a Federal court against a citizen of the same State as the complainant, was held unconstitutional.[8] The Act of March 2, 1907, gives the Federal courts jurisdiction of such a suit when the plaintiff has registered his trade-mark for use in commerce with foreign nations, or among the several States, or with Indian tribes; provided he is domiciled within the territory of the United States, or resides in, or is located in, any foreign country which affords similar privileges to the citizens of the United States; and provided, at least, that the defendant has followed the trade-mark in the course of commerce among the several States, or with a foreign nation, or with the Indian tribes.[9] The constitutionality of this act is an open question.[10] This statute does not give the Federal courts jurisdiction of a suit between citizens of the same State to enjoin unfair competition in trade, where the complainant has no valid and exclusive trade-mark.[11] A delay of eighteen months before an application for a preliminary injunction against unfair competition was held sufficient laches to defeat the motion.[12] A disuse of complainant's trade-mark before suit will not defeat the complainant's right to an injunction, when the defendant continued to use the trade-mark sometime after notice to desist, and in the suit contest the complainant's exclusive right to the same.[13] The writ may contain, in addition to an injunction against the infringement of a trade-mark, a prohibition of the use of any mark "so similar to complainant's as to be likely to deceive purchasers."[14]

[7] Leather C. Co. v. American L. C. Co., 11 H. L. C. 523; s. c. in a lower court, 10 Jur. (N. S.) 81; Fowle v. Spear, 7 Penn. L. J. 176; Heath v. Wright, 3 Wall. Jr. 141; Ginter v. Kinney Tobacco Co., 12 Fed. 782. See *supra*, § 79.

[8] Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550.

[9] 34 St. at L. 168, §§ 1, 16, 17; Pierce Fed. Code, §§ 8804, 8822, 8823; *supra*, § 87.

[10] Elgin Nat. Watch Co. v. Illinois Tr. C. Co., 179 U. S. 665, 45 L. ed. 365.

[11] Ibid.

[12] C. O. Burns Co. v. W. F. Burns Co., 118 Fed. 944.

[13] Thomas G. Plant Co. v. May Mercantile Co., 153 Fed. 229.

[14] Capewell Horse Nail Co. v. Green, C. C. A., 188 Fed. 20.

§ 280. Injunctions to prevent the opening of letters. Injunctions may be granted to restrain the opening of business letters.[1]

§ 281. Injunctions to compel the performance or prevent the breach of contracts not affecting land. The performance of a contract not affecting lands will be enforced in equity by means of an injunction when, and only when, a judgment for damages would be no adequate remedy for its breach;[1] and it does not require a purely personal act which it would be impossible for the court to enforce,[2] or continue acts for an indeterminate term, which will require the constant supervision by the court subsequent to the decree.[3] The inadequacy of the remedy at law which will entitle one to specific performance of a contract may, it has been held, be proved by the fact that the damages in money cannot be ascertained,[4] In some cases an injunction may be obtained to restrain a defendant from violating a negative promise contained in a contract, although the court has no power specifically to enforce the affirmative promises contained therein.[5] Thus, when opera singers of extraordinary talent had contracted to sing,[6] or dancers of extraordinary character had contracted to dance,[7] at the plaintiff's theatre and nowhere else, or a ball player had contracted to give his

§ 280. [1] Schelle v. Brackell, 11 W. R. 796; David Kennedy Corp. v. Kennedy, 165 N. Y. 353, 359.

§ 281. [1] Buxton v. Lister, 3 Atk. 383; Robinson v. Catheart, 2 Cranch C. C. 590; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. ed. 187; Very v. Levy, 13 How. 345. 14 L. ed. 173.

[2] Clarke v. Price, 2 Wilson Ch. Cas. 157; Mair v. Himalaya T. Co., L. R. 1 Eq. 411.

[3] Sewerage and Water Board v. Howard. C. C. A., 175 Fed. 555.

[4] Adderley v. Dixon, 1 Sim. & Stu. 607; Sullivan v. Tuck, 1 Md. Ch. 59; Finley v. Aiken, 1 Grant's Cases (Pa.) 83; Bispham's Eq., § 369.

[5] Montgomery Light & Power Co. v. Montgomery Traction Co., 191 Fed. 657, where a street railway company was enjoined from refusing to perform a contract binding itself to take from the plaintiff, at an agreed price, all the electric power which it required for a term of years.

[6] Lumley v. Wagner, 1 De G., M. & G. 604; McCaull v. Braham, 16 Fed. 37. It is not a prerequisite to the injunction that the defendants are the stars of complainant's entertainment or that the entertainment would be stopped because of their withdrawal. Comstock v. Lopokowa, 190 Fed. 599. See High on Injunctions, (4th ed.) §§ 1163–1164c.

[7] Comstock v. Lopokowa, 190 Fed. 599. See High on Injunctions, (4th ed.) §§ 1163–1164c.

exclusive services to a baseball club;[8] injunctions have been granted to restrain them from performing in rival establishments, although they could not be compelled to sing, dance, or play for the plaintiffs. An injunction, however, will not issue to prevent a similar breach of his contract of employment by a person whose abilities are not so extraordinary that his place cannot be filled,[9] nor when the contract is not mutual;[10] nor when the complaint shows that the damages for the breach of contract might easily be liquidated.[11] The rule has been thus stated by Judge Lowell: "I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."[12] But where the affirmative promise cannot be specifically enforced, the court will not import into it a negative covenant, neither expressly nor by a fair implication contained therein.[13] So an employee may be enjoined from carrying away documents containing trade secrets,[14] or from

8 Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973.

9 Ibid.; Metropolitan Ex. Co. v. Ewing, 42 Fed. 198; Burney v. Ryle, 91 S. E. 701, 17 S. E. 986 (an insurance agent); Johnston v. Hunt, 66 Hun, (N. Y.), 504; Strowbridge L. Co. v. Crane, 35 N. Y. State Rep. 473 (a designer of Lithographs); Cort v. Lassard, 18 Or. 221, 6 L.R.A. 653 (an acrobat). §§ 143, 191, *supra*.

10 Lerner v. Tetrazzini, 71 Misc. (N. Y.) 182; High on Injunctions, (4th ed.) § 1109a.

11 Sewerage and Water Board v. Howard, C. C. A., 175 Fed. 555.

12 Singer Co. v. Union Co., 1 Holmes, 253, 258. See also Goddard v. Wilde, 17 Fed. 845; W. U. Tel. Co. v. Union Pac. Ry. Co., 3 Fed. 423; W. U. Tel. Co. v. St. Joseph & W. Ry. Co., 3 Fed. 430; Met. El. Supply Co. v. Ginder (1901), L. R. 2 Ch. 799; Harrison v. Glucose Sugar Ref. Co., C. C. A., 58 L.R.A. 915, 116 Fed. 304. Delaware L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541.

13 Clarke v. Price, 2 Wilson Ch. C. 157; Pickering v. Bishop of Ely, 2 Y. & C. Ch. C. 249; Johnson v. S. & B. Ry. Co., 3 De G., M. & G. 914; Bispham's Eq., § 464; Kerr on Injunctions, 524.

14 Union Switch & Signal Co. v. Sperry, 169 Fed. 926.

disclosing to others the trade secrets of his master.[15] Where irreparable injury would be otherwise caused, an injunction may be granted to prevent a stranger from inducing a party to a contract to violate the same.[16]

§ 282. Injunctions to compel the delivery of personal property tortiously withheld. Under very extraordinary circumstances, equity will interfere to compel by injunction the delivery or return of letters, documents, or other articles of such a unique character that it would be impossible to replace them, when they are tortiously withheld from their rightful owners.[1]

§ 283. Injunctions authorized by statute. The statutes of the United States also authorize an injunction in the following cases, amongst others, besides those arising from infringements of patents and copyrights: "Any person who considers himself aggrieved by any warrant of distress issued under the provisions of the statutes authorizing one to be issued by the Solicitor of the Treasury against an officer in default for not accounting for and paying over public money received by him, "may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had in such injunction as in other cases, except that no answer shall be nec-

[15] Ibid.; High on Injunctions, (4th ed.) §§ 19, 984, 1108.

[16] Beekman v. Marsters, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 Ann. Cas. 332; Am. Law Book Co. v. Edward Thompson Co., Bishoff, J., N. Y. Special Term, 1907. The Lloyd Sabaudo v. Cubicciotti, 159 Fed. 191. See § 276, *supra*.

§ 282. [1] Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Clarke v. White, 12 Pet. 178, 9 L. ed. 1046; Prince Albert v. Strange, 1 Macn. & G. 25, 42; McGowin v. Remington, 12 Pa. St. 56.

essary on the part of the United States; and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court."[1] "When the district judge refuses to grant an injunction to stay proceedings on a distress warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceedings had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it.[2] "Whenever an association against which proceedings have been instituted, on account of an alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven" of the Revised Statutes of the United States, "apply to the nearest District, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal."[3] A district attorney of the United States acting under the direction of the Attorney-General may upon a petition obtain an injunction to restrain a contract, combination in the form of a trust or otherwise, or a conspiracy in restraint of trade or com-

§ 283. [1] U. S. R. S., § 3636.
[2] U. S. R. S., § 3637.
[3] U. S. R. S., § 5237.

merce, or a monopoly of any part of trade or commerce among the several States or with foreign nations.[4] Compliance with the interstate commerce act may also, in certain cases, be compelled by an injunction.[5]

§ 284. When injunctions will not issue. As a general rule, it may be stated that an injunction will not issue at the prayer of one who will suffer no pecuniary injury from the act which he wishes to prevent.[1] Thus, one will not be granted at the suit of a State to prevent the invasion of a purely political right;[2] or of adjacent property owners and church members to prevent a railroad from outraging their religious feelings by running cars upon Sunday;[3] nor at the suit of a minister of the gospel to prevent the use of his building for theatrical purposes, under a lease the validity of which he disputes.[4] The Emperor of Austria and King of Hungary, however, was allowed an injunction to prevent Kossuth and his associates from manufacturing in England paper currency not purporting to be issued by imperial authority, intended for circulation in Hungary, upon the ground that his property rights were thereby injured,[5] and a bill was sustained when filed by the consul of Austria and Hungary, to restrain a beneficial association from using the name of the Emperor of those countries as a part of its corporate name, and from the use of that Emperor's portrait as a part of its advertising literature, in order fraudulently to

[4] 26 St. at L., ch. 647, p. 209; 28 St. at L., p. 570; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. ed. 259; Addyston P. & S. Co. v. U. S., 175 U. S. 211, 44 L. ed. 136; U. S. v. Alger, 62 Fed. 824. It has been held that this statute applies to a strike intended to prevent the operation of a railroad used for interstate commerce. Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, 821; U. S. v. Alger, 62 Fed. 824; U. S. v. Elliott, 62 Fed. 801; U. S. v. Workingmen's A. C. of N. O., 26 L.R.A. 158, 54 Fed. 994; In re Lennon, 166 U. S. 548, 41 L. ed. 1110. But see U. S. v. Patterson, 55 Fed. 605, § 276, *supra*. It was held that an injunction will not issue to compel obedience to § 3 of this Act. Central Stockyards Co. v. Louisville & N. R. Co., 112 Fed. 823.

[5] 24 St. at L., 380.

§ 284. [1] High on Injunctions, § 20.

[2] Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721.

[3] Sparhawk v. Union P. R. Co., 54 Pa. St. 401.

[4] Bodwell v. Crawford, 26 Kan. 292, 40 Am. Rep. 306.

[5] Emperor of Austria v. Day, 2 Giff. 628; s. c. on appeal, 3 De G., F. & J. 217.

induce his subjects who resided in the United States, to believe that the association was conducted under the customs of their own country, and that their Emperor was identified with the same and a patron thereof.[6] An injunction will not issue to prevent an injury which is not actually threatened to the complainant.[7] Thus an injunction will not be granted to prevent an injury to a navigable stream, at the suit of an individual who is not engaged in navigating the same;[8] nor, at the suit of a coupon holder who is not liable to the payment of taxes to a State, to prevent the State officers from refusing to receive his coupons, when tendered by others to whom he has agreed to assign them for the payment of their taxes, in pursuance of a contract made by the State with its creditors and their successors.[9] "No court sits to determine questions of law *in thesi*."[10] A threat of irreparable injury to a right actually enjoyed and exercised by the complainant, or acts indicating a preparation to commit such a wrong, are, however, always a ground for the issue of an injunction.[11] The Circuit Court of the Southern District of New York has refused to grant a preliminary injunction to restrain an obstruction to navigation in a navigable channel coming up from the Bay of New York, caused by a structure projecting from the New Jersey shore.[12] An injunction cannot be issued against the United States;[13] nor against an officer to interfere with the exercise of his discretion;[14] nor against an

[6] Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 Fed. 911.

[7] Slessinger v. Buckingham, 17 Fed. 454.

[8] Spooner v. McConnell, 1 McLean, 337. See also Mason v. Rollins, 2 Biss. 99. *Cf.* Works v. Junction R. Co., 5 McLean, 425.

[9] Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325, 29 L. ed. 205.

[10] Matthews, J., in Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325, 330, 29 L. ed. 205, 206. An injunction against the enforcement of an order of a Railroad Commission was denied where the Commission had suspended the operation of the order. Grand Trunk Ry. Co. v. Michigan R. R. Com., 198 Fed. 1009.

[11] St. Louis v. Knapp Co., 104 U. S. 658, 26 L. ed. 883; Sherman v. Nutt, 35 Fed. 149; Butz Thermo-El. Reg. Co. v. Jacobs El. Co., 36 Fed. 191; McArthur v. Kelly, 5 Ohio, 139; Frearson v. Loe, L. R. 9 Ch. D. 48. See also Pick v. C. & N. W. Ry. Co., 6 Biss. 177.

[12] Atlantic D. Co. v. Bergen Neck Ry. Co., 44 Fed. 208.

[13] U. S. v. McLemore, 4 How. 286, 11 L. ed. 977; Hill v. U. S., 9 How. 386, 13 L. ed. 185.

[14] Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Walker v. Smith,

officer of the United States to prevent the infringement of a patent by him while in the exercise of his official duties.[15] The Revised Statutes provide that "No suit for the purpose of restraining the assessment or collection of any tax" imposed by the United States for purposes of internal revenue," shall be maintained in any court."[16] Under this provision, it has been held that wherever a tax is imposed by a person in office having authority over the assessment of taxes for the United States, and acting under color of a statute, no injunction will be issued to restrain its collection, no matter how erroneous the assessment may be, and although the person against whom the assessment is made does not own the property taxed.[17] "It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation; that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it."[18] It seems that the unconstitutionality of the statute imposing the tax will not authorize the issue of an injunction;[19] but it has

21 How. 579, 16 L. ed. 223; McElrath v. McIntosh, 1 Law R. (N. S.) 399; Warner V. S. Co. v. Smith, 165 U. S. 28, 41 L. ed. 621; Smith v. Reynolds, 9 D. C. App. 287, 166 U. S. 717, 41 L. ed. 1186. An injunction has been issued to restrain the Secretary of the Interior from the commission of an act beyond his jurisdiction which would cause an irreparable injury to the plaintiff. Noble v. Union R. L. R. Co., 147 U. S. 165, 37 L. ed. 123; *Cf.* U. S. v. Nourse, 9 Pet. 8, 9 L. ed. 31; Kirwan v. Murphy, C. C. A., 83 Fed. 275, s. c., 49 U. S. App. 659. It has been held that a State court has no power to enjoin an officer of the United States. People ex rel. Brewer v. Kidd, 23 Mich. 440. It has been held that an injunction will not issue to restrain the Commissioner of Patents from issuing letters-patent. See *supra*, §§ 95, 100; Illingworth v. Atha, 42 Fed. 141.

[15] James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 67, 28 L. ed. 901, 903; Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599; *supra*, § 95; *infra*, § 670.

[16] U. S. R. S., § 3224. It has been held that a mandatory injunction requiring a collector of internal revenue to accept an export bond for spirits in a warehouse and to allow their withdrawal for export, without payment of taxes, is in effect a bill to restrain the collection of internal revenue and cannot be granted. Miles v. Johnston, 59 Fed. 38.

[17] Kensett v. Stivers, 10 Fed. 517; Pullan v. Kinsinger, 2 Abb. U. S. 94; Howland v. Soule, Deady, 413; Delaware R. Co. v. Prettyman, 17 Int. Rev. Rec. 99; Alkan v. Bean, 23 Int. Rev. Rec. 351; Kissinger v. Bean, 7 Biss. 60; U. S. v. Black, 11 Blatchf. 538. But see Frayser v. Russell, 3 Hughes, 227.

[18] Emmons, J., in Pullan v. Kinsinger, 2 Abb. U. S. 94, 99.

[19] Robbins v. Freeland, 14 Int.

been held that a bill to restrain a trustee from voluntarily making a return of his income and from paying an unconstitutional income tax is not within the prohibition of the statute.[20] An injunction cannot issue against a State at the suit of a citizen of another State or of a foreign State.[21] Nor can a mandatory injunction issue against an officer of a State so as to compel the action of the State against its expressed will.[22] But an officer of a State may be enjoined from an invasion of private rights which would cause irreparable injury, when about to act under an unconstitutional State statute.[23] As has been said before, an injunction will not ordinarily be granted to stay proceedings in a State court.[24] In England, a person may be restrained from petitioning or applying to the legislature in order to procure the passage of an act relating solely to private interests, provided he be under an express or implied agreement not to do so, or his doing so would amount to a breach of trust.[25] This doctrine has, however, never been upheld in the United States and in a well-considered case in New Jersey was expressly repudiated.[26] The early English cases held that an injunction would not issue to restrain the publication of a slander or libel, no matter how injurious it might be to the complainant.[27]

Rev. Rec. 28; Moore v. Miller, 5 D. C. App. 413.

[20] Pollock v. Farmers' L. & Tr. Co., 157 U. S. 429, 454, 653, 39 L. ed. 759, 844.

[21] Eleventh Amendment of the Constitution, *supra*, § 105.

[22] Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448; Antoni v. Greenhow, 107 U. S. 769, 782–784, 27 L. ed. 468, 474, 475; Cunningham v. M. & B. R. Co., 109 U. S. 446, 27 L. ed. 992; *supra*, § 37. But see McCauley v. Kellog, 2 Woods, 13.

[23] Osborn v. Bank of U. S., 9 Wheat. 738, 6 L. ed. 204; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Board of L. v. McComb, 92 U. S. 531, 23 L. ed. 623; Virginia Coupon Cases, 114 U. S. 269, 29 L. ed. 185; Louisiana v. Layarde, 60 Fed. 186; Ex parte, Young, 209 U. S. 123, 52 L. ed. 714. See, however, In re Ayers, 123 U. S. 443, 31 L. ed. 216; *supra*, § 105.

[24] U. S. R. S., § 720; *supra*, § 268; *infra*, § 554.

[25] Ware v. Grand J. W. W. Co., 2 Russ. & M. 470; Stockton & H. Ry. Co. v. Leeds & Th. Ry. Co., 2 Phil. 666; Heathcote v. N. S. Ry. Co., 2 Mac. & G. 100.

[26] Story v. J. C. & B. P. P. R. Co., 1 C. E. Green (16 N. J. Eq.), 13, 84 Am. Dec. 134.

[27] Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142; Clark v. Freeman, 11 Beav. 112. See also Brandreth v. Lance, 8 Paige (N. Y.), 24, 34 Am. Dec. 368; Mauger v. Dick, 55 How. Pr. (N. Y.) 132; Singer Mfg. Co. v. Domestic S. M. Co., 49 Ga. 70, 15 Am. Rep. 674; Boston D. Co. v. Florence Mfg. Co., 114 Mass. 69,

Since the passage of the Judicature Act, however, such injunctions have been granted there in order to protect rights of property.[28] An injunction was denied when sought to prevent a defendant from advertising that a patent was void, and it appeared that he honestly believed it to be so, and published the statement for the sole purpose of protecting what he believed to be his rights,[29] but after the decree adjudging that a patent was void, the patentee was enjoined from threatening complainant's customers with suits for an infringement thereof.[30] A patentee was enjoined from continuing similar threats, which it had made for two years, without beginning a suit for an infringement;[31] and an injunction was granted against a trade circular, issued by the defendant to a pending suit for infringement, which asserted that its device was not an infringement, that complainant's patent was invalid, and contained cuts of prior devices which it claimed anticipated such patent.[32] Whether a Federal court will grant an injunction against the publication of an exaggerated report of a decision in a patent case is uncertain,[33] but this may be a reason for dissolving the injunction against infringement.[34] Whether a Federal court will in any case grant an injunction against the publication of a libel is a disputed question.[35] It has been held that an in-

19 Am. Rep. 310; Whitehead v. Kitson, 119 Mass. 484; Smith v. Hutchinson S. B. Co., 110 Mo. 492, 16 L.R.A. 243, 33 Am. St. Rep. 476.

28 Thorley's C. F. Co. v. Massam, L. R. 6 Ch. D. 582; Saxby v. Easterbrook, L. R. 3 C. P. D. 339; Wren v. Weild, L. R. 4 Q. B. 730. See also Grand Rapids S. F. Co. v. Haney S. F. Co., 92 Mich. 558, 16 L.R.A. 721, 31 Am. St. Rep. 611, s. c., 52 N. W. 1009. *Contra*, Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 59 L.R.A. 310; Boston Diatite Co. v. Florence, etc., Co., 114 Mass. 69, 19 Am. Rep. 310. See Harv. Law Review, XVI, 67.

29 Halsey v. Brotherhood, 45 L. T. (N. S.) 640; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375; Pentlarge v. Pentlarge, 14 Repr. 579; N. F. Filter Co. v. Schwartzwalder, 58 Fed. 577.

30 Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., C. C. A., 183 Fed. 978.

31 Electric Renovater Mfg. Co. v. Vacuum Cleaner Co., 189 Fed. 754.

32 Lovell-McConnell Mfg. Co. v. Automobile S. Mfg. Co., 193 Fed. 658.

33 Hobbs Mfg. Co. v. Gooding, C. C. A., 113 Fed. 615. It has been held that this may be done by a motion in the original case. Asbestos Shingle, S. & S. Co. v. H. W. Johns-Manville Co., 189 Fed. 611.

34 Meyers v. Skinner, 186 Fed. 347.

35 Held that it can, in Ide v. Ball Engine Co., 31 Fed. 901, U. S. C. C., S. D. Illinois, by Allen, J.;

junction may issue against the publication and circulation of posters and handbills in aid of a boycott,[36] and of threats to commit an unlawful act.[37] An injunction will not issue in the maintenance of a monopoly injurious to public policy;[38] nor in any other case when its operation would be repugnant to public policy.[39] An injunction will not issue when the removing party has a plain, adequate, and complete remedy at law.[40] The Revised Statutes of the United States provide that "no attachment, injunction or execution shall be issued against a 'national bank' association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court."[41] An injunction will never be issued merely because it will do no harm.[42]

§ 285. Distinction between the judicial writ and the writ remedial. Injunctions were formerly either judicial writs or

Emack v. Kane, 34 Fed. 46; U. S. C. C., N. D. Illinois, by Blodgett, J.; Home Ins. Co. v. Nobles, 63 Fed. 642. *Cf.* Palmer v. Travers, 20 Fed. 501, U. S. C. C., S. D. N. Y., by Wheeler J.; Celluloid Mfg. Co. v. Goodyear D. V. Co., 13 Blatchf. 375, U. S. C. C., S. D. N. Y., by Hunt J.; Lewin v. Welsbach Light Co., 81 Fed. 904, E. D. Pa.; A. B. Farquhar Co. v. National Harrow Co., C. C. A., Third Circuit., 49 L.R.A. 755, 102 Fed. 714. See Shoemaker v. South, etc. Co., 135 Ind. 471, 22 L.R.A. 332. Held that it *cannot*, in Kidd v. Horry, 28 Fed. 773, U. S. C. C., E. D. Pa., by Bradley and McKennan, JJ.; Baltimore C. W. Co. v. Bemis, 29 Fed. 95, U. S. C. C., D. Mass., by Colt and Carpenter, JJ.; Fougeres v. Murbarger, 44 Fed. 292, U. S. C. C., D. Indiana, by Woods, J.; International T. C. Co. v. Carmichael, 44 Fed. 350, 351, U. S. C. C., E. D. Wis., by Jenkins, J.; Davison v. National Harrow Co., 103 Fed. 360, N. D. N. Y.; Edison v. Thomas A. Edison, Jr., Chemical Co., 128 Fed. 957. See Francis v. Flinn, 118 U. S. 385, 30 L. ed. 165; Kelley v. Ypsilanti, D. S. M. Co. 10 L.R.A. 686, 44 Fed. 19, 23.

[36] Casey v. Cincinnati Typ. Union No. 3, 12 L.R.A. 193, 45 Fed. 135; Coeur d'Alene Cons. & Min. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 260; High, Injunctions, § 1415*a*.

[37] Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. 310.

[38] Pullman P. C. Co. v. Texas & Pac. Ry. Co., 11 Fed. 625; s. c., 4 Woods, 317; Foll's Appeal, 91 Pa. St. 434, 438, 36 Am. Rep. 671. But see Edison El. Lt. Co. v. Sangerman El. Co., C. C. A., 53 Fed. 592; *supra*, § 276.

[39] Bryant v. W. U. Tel. Co., 17 Fed. 825; Blake v. Greenwood Cem., 14 Blatchf. 342; Denehey v. Harrisburg, 2 Pearson (Pa.), 330, 334.

[40] U. S. R. S., § 723; High, Injunctions, § 28.

[41] U. S. R. S., § 5242.

[42] Teller v. U. S., C. C. A., 113 Fed. 463.

writs remedial. A judicial writ was a direction to yield up, to quiet, or to continue the possession of lands, and is said to be in the nature of a writ of execution.[1] It was issued in aid of, and only after a final decree in equity; and, in extraordinary circumstances, in aid of a judgment at law.[2] Under the equity rules, however, it is never necessary; and it had previously fallen into disuse in England. All other injunctions are writs remedial.

§ 286. Distinction between mandatory and prohibitory injunctions. Injunctions are either mandatory of prohibitory. A mandatory injunction is one that commands a defendant to perform a certain act or acts; a prohibitory injunction, one that forbids a defendant's doing a certain act or acts. Mandatory are far less common than are prohibitory injunctions. Those most frequently issued have been such as commanded a defendant to abate a nuisance,[1] or to deliver the possession of land.[2] They also have been granted to compel the return of letters and other documents,[3] the delivery of personal property whose loss could not be compensated in damages,[4] the giving of collateral

§ 285. [1] Eden on Injunctions, chs. i and xvii, pp. 1, 2, 261, 262; Beamers' Orders, 8, 16.

[2] Boult v. Blunt, Cary, 72; Eden on Injunctions, 262.

§ 286. [1] Lane v. Newdigate, 10 Ves. 192; Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 K. & J. 389; Rankin v. Huskisson, 4 Sim. 13; Bickett v. Morris, L. R. 1 H. L. Sc. 47; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

[2] Hepburn v. Auld, 5 Cranch, 262, 3 L. ed. 96; Hepburn v. Dunlop, 1 Wheat. 179, 4 L. ed. 65; Findlay v. Hinde, 1 Pet. 241, 7 L. ed. 128; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Co., 86 Fed. 528.

[3] Evitt v. Price, 1 Sim. 483; Seton on Decrees (4th ed.), 179. See also Clarke v. White, 12 Pet. 178, 9 L. ed. 1046.

[4] Pusey v. Pusey, 1 Vern. 273; Duke of Somerset v. Cookson, 3 P. Wms. 389; Greatrex v. Greatrex, 1 De G. & Sm. 692; McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584; Dinsmore v. L. C. & L. Ry. Co., 2 Fed. 465; Dinsmore v. L., N. A. & C. R. Co., 3 Fed. 593; Coe v. L. & N. R. Co., 3 Fed. 775; Ormsby v. Union Pac. R. Co., 4 Fed. 706; Texas Exp. Co. v. Texas & P. Ry. Co., 6 Fed. 426; Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. 516; C. S. M. Co. v. V. & G. H. W. Co., 1 Saw. 685; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Southern Pac. R. Co. v. City of Oakland, 58 Fed. 50; In re Lennon, 166 U. S. 548, 41 L. ed. 1110; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Ry. Co., 86 Fed. 528; Fairfield Floral Co. v. Bradbury, 87 Fed. 415; Motley v. Southern Ry. Co., 184 Fed. 956, stock in a corporation; High on

security in obedience to a contract,[5] the making of a policy of insurance,[6] the stopping and receiving freight by a railroad company at a particular place,[7] the performance of a contract by one railroad company to send freight over the lines of another railroad,[8] the receipt of freight cars and passengers from one railroad company by another, and the transportation of the same,[9] the furnishing of equal facilities by a railroad company to another railroad company,[10] or to a shipper,[11] and the rescission of an order for the boycott of a railway company,[12] and to enjoin a reduction of charges for the transportation of freight and passengers, which deprived the complainant of its property without due compensation.[13] In a case involving the constitutionality of certain Kentucky statutes, the court refused a mandatory injunction compelling a distribution of the money raised by a tax upon white people partly among public schools for colored children, in the absence of any contract right or legislative authority for such a distribution; but granted "a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend, one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the act of 1871 and its amendments."[14] Mandatory injunctions are usually issued in a negative form, restraining

Injunctions, (4th ed.) §§ 2, 5a, 358, 708, &c. See Mandatory Injunctions, by Judge Jacob Klein, 12 Harv. Law Rev. 95.

5 Robinson v. Catheart, 2 Cranch C. C. 590.

6 Union M. Ins. Co. v. Commercial Mut. M. Ins. Co., 2 Curt. 524.

7 Coe v. Louisville & N. R. Co., 3 Fed. 775; McCoy v. Cincinnati, I., St. L. & C. R. Co., 13 Fed. 3.

8 Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. 516.

9 Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed 730; In re Lennon, 166 U. S. 548, 41 L. ed. 1110.

10 Ibid.

11 Butchers & D. St. Co. v. Louisville, S. & N. R. Co., C. C. A., 67 Fed. 35; Wells, F. & Co. v. N. Pac. Ry. Co., 23 Fed. 469.

12 Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 54 Fed. 730; In re Lennon, 166 U. S. 548, 41 L. ed. 1110. See So. Cal. Ry. Co. v. Rutherford, 62 Fed. 796.

13 Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321.

14 Barr, J., in Claybrook v. Owensboro, 23 Fed. 634, 636.

a defendant from desisting or refusing to do an act.[15] They are very rarely granted upon interlocutory motions.[16]

§ 287. Distinction between provisional and perpetual injunctions. Provisional, also called preliminary or interlocutory, injunctions are such as are to continue until a certain time usually specified therein; for example, until the coming in of the defendant's answer, the hearing of the cause, the master's report, or the further order of the court.[1] Perpetual also called final, injunctions are those which, as their name denotes, perpetually restrain the defendant from the same act or acts. Provisional injunctions may be granted at any time during the progress of a suit. Perpetual injunctions can never be granted except at the time of the entry of the decree.[2] The setting up of outstanding terms can, it has been said, only be restrained by a perpetual injunction.[3] Mandatory injunctions also will very rarely be granted before a decree.[4] "It is a rule of practice in the Circuit Courts of the United States not to allow an injunc-

[15] Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. 210, 869; Smith v. Smith, L. R. 20 Eq. 500, 504; Cole S. M. Co. v. Virginia & G. H. W. Co., 1 Saw. 470.

[16] Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 13 Fed. 546; McCauley v. Kellogg, 2 Woods, 13; Camblos v. Phil. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brews. (Pa.) 563; Rogers L. Works v. Erie Ry. Co., 5 C. E. Green (20 N. J. Eq.), 379; Miles v. Johnston, 59 Fed. 38; Am. Lead Pencil Co. v. Schneegass, 178 Fed. 735; Winton Motor Carriage Co. v. Curtis Pub. Co., 196 Fed. 906. But see Bachman v. Harrington, 184 N. Y. 458, *infra*, § 291. But see Dinsmore v. L. C. & L. Ry. Co., 2 Fed. 465; Dinsmore v. L., N. A. & C. R. Co., 3 Fed. 593; Coe v. L. & N. R. Co., 3 Fed. 775; Ormsby v. Union Pac. R. Co., 4 Fed. 706; Texas Exp. Co. v. Texas & P. Ry. Co., 6 Fed. 426; Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. 516; C. S. M. Co. v. V. & G. H. W. Co., 1 Saw. 685; Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481; Southern Pac. R. Co. v. City of Oakland, 58 Fed. 50; In re Lennon, 166 U. S. 548, 41 L. ed. 1110; Pokegama S. P. L. Co. v. Klamoth R. L. & I. Ry. Co., 86 Fed. 528; Fairfield Floral Co. v. Bradbury, 87 Fed. 415. See Mandatory Injunctions, by Judge Jacob Klein, 12 Harv. Law Rev. 95.

§ 287. [1] Daniell's Ch. Pr. (2d Am. ed.) 1810; High. Injunctions, § 3; Eden, Injunctions, ch. xv.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1903; Adams v. Crittenden, 17 Fed. 42.

[3] Hylton v. Morgan, 6 Ves. 293; Byrne v. Byrne, 2 Sch. & Lef. 537; Barney v. Luckett, 1 Sim. & S. 419; Northey v. Pearce, 1 Sim. & S. 420.

[4] Camblos v. Phila. & R. R. Co., 9 Phila. (Pa.) 411; s. c., 4 Brewst. (Pa.) 563; Rogers L. M. Works v. Erie Ry. Co., 5 C. E. Green (N. J.), 379. But see Dinsmore v. L., C. &

tion to stay an ejectment suit until it can be investigated in equity, unless a judgment be entered therein." [5]

§ 288. Distinction between common and special injunctions. Injunctions were formerly of two kinds, common and special. Common injunctions were granted, as of course, upon the defendant's default either in appearing or answering, and were only applicable to restrain proceedings at common law.[1] Special injunctions were those granted, not as a matter of course, but upon the special circumstances of the case as disclosed by the answer of the defendant or upon affidavits.[2] Common injunctions have been abolished by the Revised Statutes.[3] The learning upon the subject, which is very technical, seems now, therefore, useless, and will not be repeated here.[4]

§ 289. Time and place of applications for interlocutory injunctions. An injunction may be obtained, at any time, as well in vacation as in term, and whether the court be sitting or not, at any place within which the judge granting it has jurisdiction and at almost any stage of the cause.[1] "But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district."[2] In England it has been held, that, in a very extraordinary case, an injunction may be granted upon petition before the filing of a bill or the service of a subpœna.[3] In a court of the United States an injunction has been issued upon the filing of the bill and before service of the sub-

L. Ry. Co., 2 Fed. 465; Coe v. L. & N. R. Co., 3 Fed. 775, and other cases cited under § 225.

[5] Billings, J., in Heirs of Szywanski v. Zunts, 20 Fed. 361, 363, citing Turner v. Am. B. M. Union, 5 McLean, 344.

§ 288. [1] Daniell's Ch. Pr. (2d Am. ed.) 1877.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1833.

[3] Perry v. Parker, 1 W. & M. 280; Lawrence v. Bowman, 1 McAll. 419.

[4] See Daniell's Ch. Pr. (2d Am. ed.) 1811–1833.

§ 289. [1] Daniell's Ch. Pr. (5th Am. ed.) 1663; Kerr on Injunctions, 543, 545; Bacon v. Jones, 4 Myl. & Cr. 433.

[2] Jud. Code, § 264, 36 St. at L. 1087.

[3] Mayor of London v. Bolt, 5 Ves. 129.

pœna;[4] and a restraining order was granted upon the presentment of a bill to the court before its filing, when a notice of an application for leave to file the same had previously been given to the defendants.[5] It has been held that a non-resident defendant who cannot be served with process may be enjoined from infringing a patent within the district.[6] An injunction will ordinarily be refused while a demurrer or plea to the bill is pending.[7] But in cases of emergency, the court may order the sufficiency of such a pleading to be argued before the regular time for such a proceeding, together with the motion for the injunction;[8] or even grant a restraining order without waiting for the argument.[9] Should a motion be heard while a demurrer is on the file and undisposed of, it seems that upon the hearing of the motion the allegations in the bill will be considered as admitted. An application for an injunction has been refused because the bill had been referred for scandal.[11]

§ 290. Injunctions not prayed for in the bill. The English rule was that an injunction would not issue against a person not made a party to a bill specifically praying an injunction against him;[1] and the injunction had to be prayed for not only in the prayer for relief, but also in the prayer for process.[2] To this, however, there were four exceptional classes of cases. If the court had by its decree taken the distribution or control of property into its own hands, it would prevent injury thereto either by the parties litigant or others, although no injunction had been prayed by the bill.[3] Thus, in a foreclosure suit, it would restrain waste by the mortgagor after a decree for an account;[4] and after a decree for the administra-

[4] Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

[5] St. Louis & S. F. R. Co. v. Hadley, 155 Fed. 220. *Cf.* U. S. R. S., § 718; *infra*, § 291.

[6] Kennedy v. Penn. I. & Coal Co., 67 Fed. 339.

[7] Cousins v. Smith, 13 Ves. 164; Ketchum v. Driggs, 6 McLean, 13.

[8] Anon. v. Bridgewater C. Co., 9 Sim. 378; Daniell's Ch. Pr. (5th Am. ed.) 1671.

[9] Frowd v. Lawrence, 1 J. & W. Maltby v. Bobo, 14 Blatchf. 53; Fremont v. Merced M. Co., 1 McAll. 267.

[10] Bayerque v. Cohen, McAll. 113.

[11] Davenport v. Davenport, 6 Madd. 251.

§ 290. [1] Daniell's Ch. Pr. (5th Am. ed.) 1614–1617.

[2] Wood v. Beadell, 3 Sim. 273.

[3] Daniell's Ch. Pr. (5th Am. ed.) 1614.

[4] Wright v. Atkyns, 1 V. & B. 313.

tion of the assets of a dead man, it would enjoin a creditor not a party to the suit from proceeding at law against the testator's or intestate's estate to satisfy his individual claim, provided that the executor made an affidavit stating what assets he had in his hands, or had previously admitted their amount.[5] If the suit were brought by a legatee, such a statement or admission was not indispensable.[6] Secondly, an injunction was granted without a bill being filed, for the express purpose of preventing a plaintiff from suing both at law and in equity at the same time and for the same matter, and to compel him to make an election.[7] Thirdly, an injunction could always be obtained to compel respect and enforce obedience to the decrees and orders of the court: Thus, publications which were disrespectful to the court, or which unfairly reported its proceedings, could be enjoined.[8] So, too, an injunction could issue to restrain an action at law to recover damages for false imprisonment under process of contempt improperly issued;[9] to compel compliance with the terms and spirit of a decree by one who had bought land under it;[10] to compel compliance with his lease by the tenant of a receiver;[11] and to prevent an unauthorized action against a receiver.[12] And fourthly, there seems to be a class of cases not clearly defined in which the court granted an injunction, when without it "the whole object of the proceedings would be defeated," although it was not prayed for in the bill.[13]

§ 291. **Special practice of the Federal courts in the issue of injunctions.** The Equity Rules provide: that a bill in equity shall contain "a statement of any prayer for any special relief pending the suit or on final hearing, which may be stated

[5] Daniell's Ch. Pr. (5th Am. ed.) 1617; Paxton v. Douglas, 8 Ves. 520; Thompson v. Brown, 4 J. Ch. (N. Y.) 619.

[6] Ratcliffe v. Winch, 16 Beav. 576; Daniell's Ch. Pr. 5th Am. ed.) 1617.

[7] Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

[8] Anon., 2 Ves. Sen. 520; Brook v. Evans, 29 L. J. Ch. 616; Coleman v. West H. Ry. Co., 8 W. R. 734; Mackett v. Com'rs of Herne Bay, 24 W. R. 845. But see U. S. R. S., § 725; Hobbs Mfg. Co. v. Gooding, C. C. A., 113 Fed. 615.

[9] Frowd v. Lawrence, 1 J. & W. 655; Ex parte Clarke, 1 R. & M. 563; Daniell's Ch. Pr. 511.

[10] Casamajor v. Strode, 1 Sim. & Stu. 381; Kerr on Injunctions, 543.

[11] Walton v. Johnson, 15 Sim. 352.

[12] Angel v. Smith, 9 Ves. 335.

[13] Blomfield v. Eyre, 8 Beav. 250. See Shainwald v. Lewis, 6 Fed. 766.

and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."[1] The Judicial Code: "Whenever notice is given of a motion for an injunction out of a District Court, the court or judge thereof may, if there appears to be danger or irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."[2] The Equity Rules provide: "No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expenditures as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."[3] It has been held: that such a restraining order may be mandatory and require affirmative action;[4] but the usual practice is to grant such orders only to pre-

§ 291. [1] Eq. Rule 25.

[2] Jud. Code, § 263, 36 St. at L. 1087, re-enacting U. S. R. S., § 718. See Yuengling v. Johnson, 1 Hughes, 607; C., B. & Q. Ry. Co. v. B., C. R. & N. Ry. Co., 34 Fed. 481; Payne v. Kansas & A. V. R. Co., 46 Fed. 546; United Railroads of San Francisco v. City and County of San Francisco et al., 180 Fed. 948.

[3] Eq. Rule 73.

[4] Pokegama S. R. L. Co. v. Kla-

serve the *status quo*.[5] An injunction suspending or restraining the enforcement, operation, or execution of any statute of a State or order made by an administrative board or commission created by an act under the statute of a State, or restraining the action of an officer of a State in the enforcement or execution of such statute or order, cannot be issued unless the application for the same is presented to a Justice of the Supreme Court or to a circuit or district judge and is heard and determined by three judges, of whom at least one must be a Justice of the Supreme Court or a circuit judge, and a majority of such three judges must concur in the grant of such an application.[6] The cases construing the statute are previously discussed.[7] It has been held, that the statute forbids a single judge to deny a motion for such an injunction and even to vacate such a restraining order previously issued by himself.[8] The statutory provisions concerning copyright[9] and trademark[10] cases are previously quoted.

§ 292. Notice of application for interlocutory injunction. As a general rule, notice of an application for an injunction must always be given to the person against whom the injunction is desired; but in very pressing cases, where the mischief sought to be prevented was serious, imminent, and irremediable, or where the mere act of giving notice to the defendant of the intention to make the application might have been of itself productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be complete before the time for making the application should have arrived, the courts have from the earliest time awarded injunctions without notice.[1] Under the peculiar practice of the Federal courts, a temporary restraining order is the sole relief that can be

math R. L. & I. Co., 86 Fed. 528. *Cf. supra*, § 225.

[5] Cumberland Telephone & Telegraph Co. v. Railroad Commission of Louisiana, 156 Fed. 834.

[6] Jud. Code, § 266, 36 St. at L. 1087, as amended by Public Law 445, 62nd Cong., Third Sess.

[7] See § 105, *supra*.

[8] *Ex parte* Metropolitan Water Co., 220 U. S. 539, 55 L. ed. 575.

[9] §§ 156, 278, *supra*.

[10] §§ 148, 279, *supra*.

§ 292. [1] Daniell's Ch. Pr. (5th Am. ed.) 1664; High, Injunctions, § 1578; Kerr, Injunctions, 545; Wing v. Fairhaven, 8 Cush. (Mass.) 363; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415; Yuengling v. Johnson, 1 Hughes, 607.

granted in such a case.[2] On an application for an injunction without notice, the plaintiff should state in his affidavit the time when he first learned of the threatened mischief,[3] if the injunction desired be to restrain the infringement of a patent that he believes that the person to whom the patent was issued was the original inventor thereof, or that the thing or process patented was new or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued,[4] and every material circumstance connected with the case, whether the same bears for or against his application.[5] If his affidavit be defective in any of these particulars, according to the English practice, an injunction would not be issued, or if issued the order for it would be discharged.[6] In the absence of any local rule upon the subject, the practice in giving notice of an application for an injunction, and of proceeding at the time when the application is made, are the same when an injunction is asked for as upon any other interlocutory application. It has been said that an application for an interlocutory special injunction, during term and after the beginning of a suit and before answer, can only be made by motion; but that in vacation a judge may

2 U. S. R. S., § 718; *supra*, §§ 289, 291.

3 Calvert v. Gray, 2 Cooper's Ch. 171, n.

4 Hill v. Thompson, 3 Meriv. 622; Sturz v. De la Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441. See also U. S. R. S., §§ 4886, 4887.

5 Dalglish v. Jarvie, 2 Macn. & G. 231.

6 Dalglish v. Jarvie, 2 Macn. & G. 231, 243, 244, per Baron Rolfe: "The application for a special injunction is very much governed upon the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant."

grant such an application upon petition.[7] The usual practice is, however, to apply by motion. It has been held that a mandatory injunction can only be granted upon notice.[8] It has been further held that the evidence which would prevent the issue of an interlocutory injunction will be sufficient to induce the court to dissolve one previously granted.[9] A temporary injunction may be granted after a final hearing and submission of the case on the merits.[10]

§ 293. Affidavits upon an application for an injunction. The affidavits upon which an injunction is sought are usually sworn to by the plaintiffs or one of them,[1] but may be sworn to by any person acquainted with the facts,[2] in which latter case the affidavit should, it seems, state a good reason for its not being sworn to by one of the plaintiffs.[3] Except in extraordinary cases, the allegations must be sworn to positively and not upon information and belief, unless the sources of the information are stated and some excuse given for the absence of the affidavit of the informant.[4] It is in general necessary that a plaintiff should swear positively to his title.[5] An injunction has been refused when a plaintiff merely swore upon information and belief that he was a remainderman under a settlement.[6] Upon an application for an injunction to stay waste,

7 Daniell's Ch. Pr. (5th Am. ed.) 1666; Smith v. Clarke, 2 Dick. 455; Nichols v. Kearsly, 2 Dick. 645.

8 Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co., 34 Fed. 481.

9 Cary v. Domestic S. Co., 26 Fed. 38. *Contra*, Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 19 L.R.A. 387, 54 Fed. 730; s. c., 19 L.R.A. 395, 54 Fed. 746, *supra*, § 286.

10 Cimiotti Unhairing Co. v. American Fur Ref. Co., 117 Fed. 623.

§ 293. 1 Daniell's Ch. Pr. (5th Am. ed.) 1669.

2 Lord Byron v. Johnston, 2 Meriv. 29; Brooks & Hardy v. O'Hara Bros., 8 Fed. 529.

2 U. S. R. S., § 718; *supra*, §§ 289, 291.

3 Lord Byron v. Johnston, 2 Meriv. 29; Spaulding v. Keely, 7 Sim. 377; Scotson v. Gaury, 1 Hare, 99; Kerr on Inj. 548.

4 Lake S. & N. Ry. Co. v. Felton, C. C. A., 103 Fed. 227; Murphy v. Jack, 142 N. Y. 215, 218; Rosevelt v. Edson, 51 N. Y. Super. Ct. 227. In Re Debs, 158 U. S. 564, 573, the bill filed by a railroad company was verified only by the affidavit of a person not shown to be connected with it, stating that he had read the bill and believed the statements therein contained to be true.

5 Daniell's Ch. Pr. (5th Am. ed.) 1669.

6 Davis v. Leo, 6 Ves. 784.

he must set out his title with particularity. A statement "that the plaintiff was entitled to the fee simple of the estate" has been held insufficient.[7] It has been said that if fraud is relied upon as a basis for an injunction, it must be sworn to positively, and not merely upon information and belief.[8] The plaintiff should also in the affidavits show some actual violation of his rights, or a sufficient ground to apprehend it. A verified bill may take the place of an affidavit.[10] An injunction may be granted though the bill is not sworn to, provided that the accompanying affidavits show a proper case for it;[11] but not unless a proper case is made out by the bill itself.[12] If the defendant in his opposing affidavits set up as a defense new matter in avoidance of the case shown by the plaintiff, the latter may have leave to file further affidavits in rebuttal; but generally no subsequent affidavits can be filed by the defendant.[13] Rebutting affidavits may also be used to support any allegations of the bill denied in the answer except such as state the plaintiff's title to property affected by the litigation.[14] Affidavits in rebuttal cannot be filed without leave of the court, which, it has been said, should only be granted under special circumstances.[15] The authorities are conflicting as to whether or not the plaintiff's title, if denied in the answer, can be supported by rebutting affidavits.[16] The court has permitted the use of affidavits which were not entitled and which were made and signed before the bill was filed, when it appeared from their contents that they

7 Whitelegg v. Whitelegg, 1 Brown, Ch. C. 57.

8 Brooks & Hardy v. O'Hara Bros., 8 Fed. 529.

9 Gibson v. Smith, 2 Atk. 182; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 305.

10 City of Kankakee v. Am. Water Supply Co., C. C. A., 199 Fed. 757.

11 Smith v. Schwed, 6 Fed. 455.

12 Cooper v. Mattheys, 8 Law R. 413; Wilson v. Stolley, 4 McLean, 272; Leo v. Union Pac. Ry. Co., 17 Fed. 273; Land Co. v. Elkins, 20 Fed. 545; St. Louis T. F. v. Carter & G. P. Co., 31 Fed. 524.

13 Day v. New Eng. C. S. Co., 3 Blatchf. 154. See Rule 107 and Rule of May, 1846, of U. S. C., S. D. N. Y., quoted *supra*, § 291.

14 Brooks v. Bicknell, 3 McLean, 250; Farmer v. Calvert Lith. Co., 1 Flip. 228. See Rule 113 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

15 Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 Fed. 614.

16 Compare Poor v. Carleton, 3 Sumn. 70; Goodyear v. Mullee, 3 Fisher, 420, with Farmer v. Calvert Lith. Co., 1 Flip. 228; Parker v. Sears, 1 Fish. Pat. Cas. 93; U. S. v. Parrott, 1 McAll. 271. See Rule

were made for the purpose of being used in a suit between the parties.[17] Where an allegation in the bill is not denied in the answer, it is taken as admitted for the purposes of a motion for a preliminary injunction.[18] Documentary proof, if of equal force with affidavits, can also be used in support or in opposition to a motion for an injunction.[19] Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause; and consequently decrees entered in suits between strangers affecting the validity of a patent in question may be offered in evidence, in support of an application for a preliminary injunction, but not in support of an application for one that is to be perpetual.[20] Hearsay evidence may also be used.[21] In one case statements in a proclamation by the Governor of the State were treated as evidence upon such a motion.[22] In another, campaign speeches by the Governor of the State were treated as evidence of the proper construction of a law.[23]

§ 294. Rules of decision upon applications for interlocutory injunctions. The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be enjoined,[1] or that his own claims of right have been acquiesced in without question for a long period of time,[2]

107 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

17 Modox Co. v. Moxie Nerve Food Co., C. C. A., 162 Fed. 649.

18 Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149. See § 146.

19 Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415.

20 Buck v. Hermance, 1 Blatchf. 322; Matthews v. Ironclad Mfg. Co., 19 Fed. 321.

21 Casey v. Cincinnati Typ. Union No. 3, 12 L.R.A. 193, 45 Fed. 135, 147, where Judge Sage quotes this passage with approval. See Merritt v. Thompson, 3 E. D. Smith (N. Y.) 283.

22 Coeur d' Alene Cons. & M. Co. v. Miners' Union, 19 L.R.A. 382, 51 Fed. 260.

23 Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 542.

§ 294. 1 Minturn v. Larue, 1 McAll. 370; Buchanan v. Howland, 2 Fish. 341; Doughty v. West, 2 Fish. 553; Irving v. Joint Dist. Council, U. B. of Carpenters, &c., 180 Fed. 896. See Owsley v. Yerkes, 185 Fed. 686.

2 Varick v. Mayor of N. Y., 4 J. Ch. (N. Y.) 53; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; McKay v. Dibert, 5 Fed. 587; W. U. Tel. Co. v. Union Pac. R. Co., 3 Fed. 721; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. 745; Cumber-

or that the injury which will result to himself from a refusal of the injunction will be very great, and that to the defendant from the issue thereof very slight.[3] Otherwise, an interlocutory injunction will be denied him.[4] Where no great financial loss is threatened no injunction will be issued to restrain the execution of an act of Congress, unless the invalidity of the statute is clear beyond a rational doubt.[5] The citation of a railway company to show cause before a city council why its franchise should not be forfeited, was held to be a sufficient threat to justify the issue of a preliminary injunction.[6] An interlocutory injunction may be granted upon evidence not suffi-

land Tel. & Tel. Co. v. Railroad Commission of La., 156 Fed. 823; Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission, 182 Fed. 189.

[3] W. U. Tel. Co. v. St. J. & W. Ry. Co., 3 Fed. 430; W. U. Tel. Co. v. Burlington & S. W. Ry. Co., 11 Fed. 1; Am. U. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 188; Atlantic & Pac. Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 541; Allison v. Corson, C. C. A., 88 Fed. 581; Dimick v. Shaw, C. C. A., 94 Fed. 266; Cartersville Light & Power Co. v. Mayor, etc., of Cartersville, 114 Fed. 699; Copper King v. Wabash Min. Co., 114 Fed. 991; Denver & R. G. R. Co. v. U. S., C. C. A., 124 Fed. 156; W. U. Tel. Co. v. Philadelphia, B. & W. R. Co., 124 Fed. 974; Mercantile Tr. & D. Co. v. Columbus, Waterworks, 130 Fed. 180; Jones v. Dimes, 130 Fed. 638; Sampson & Murdock Co. v. Seaver-Radford Co., 129 Fed. 761; Gring v. Chesapeake & Delaware Canal Co., 129 Fed. 996; Harriman et al. v. Northern Securities Co., 132 Fed. 464; Seaboard Air Line Ry. Co. v. Railroad Commission, 155 Fed. 792; Colgate v. James T. White & Co., 169 Fed. 887; Arlington Heights Fruit Co. v. Southern Pac. Co., 175 Fed. 141; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245, 246, per Baker, J.: "It is settled that upon a preliminary application for a temporary restraining order all that the judge should, as a general rule, require is a case of probable right, and of probable danger to that right without the interference of the court, and its discretion should then be regulated by the balance of inconvenience or injury to the one party or the other." Citing New Memphis G. & L. Co. v. Memphis, 72 Fed. 952; High, Injunctions, § 13.

[4] Coffeen v. Brunton, 5 McLean, 256; Kryptok Co. v. Stead Lens Co., C. C. A., 190 Fed. 767; Mackey Tel. & Cable Co. v. City of Texarkana, Ark., 199 Fed. 347; Smith v. Cummings, 1 Fish. Pat. Cas. 152; French v. Brewer, 3 Wall. Jr. 346; Pentlarge v. Beeston, 1 Fed. 862; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; Texas & Pac. Ry. Co. v. Interstate Tr. Co., 45 Fed. 5.

[5] International Mercantile Marine Co. v. Stranahan, 155 Fed. 428.

[6] Knickerbocker Tr. Co. v. City of Kalamaoo, 182 Fed. 865, where the complaint charged, and the answer

ciently strong to justify a permanent injunction upon the final hearing,[7] but it should usually be denied when the proofs are equally balanced.[8] It has been said to be no objection to the grant of a preliminary injunction, that it involves the decision of an issue of law which virtually determines the case.[9] An injunction was granted against an illegal ordinance regulating water rates for one year, although an appeal from the order could not be determined before the end of the year.[10] In a suit under the act to protect trade and commerce against unlawful monopolies, a preliminary injunction was refused when doubtful questions of law and fact were involved, partly upon the ground that as the United States tendered no bond, more injury would result to the defendant from the issue than to the plaintiff from the refusal of the writ. Unless the validity of a patent has been adjudicated in another case, a preliminary injunction to restrain its infringement will nearly always be refused, if the defendant has ample pecuniary responsibility, or gives security against loss to the plaintiff, and is willing to keep an account of his manufacture, use, and sale of the article claimed to be patented, and the damages which the plaintiff will suffer can be readily reckoned in money.[11] Danger of inconvenience to the public is a ground for refusing a pre-

did not deny, the intention of the city to declare the forfeiture.

[7] Ford v. Taylor, 140 Fed. 356; McCarthy v. Bunker Hill & S. Min. & C. Co., et al., 147 Fed. 981; Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 Fed. 500; Central of Georgia Ry. Co. v. Railroad Com. of Ala., 161 Fed. 925; Andrae v. Redfield, 12 Blatchf. 407, Fed. Cas. No. 367. *Contra*, Henry Gas Co. v. U. S., C. C. A., 191 Fed. 132.

[8] Woodside v. Tonopah & G. R. Co., 184 Fed. 358; Mackay Tel. & Cable Co. v. City of Texarkana, Ark., 199 Fed. 347. See Corcoran v. Nat. Tel. Co. of West Virginia, C. C. A., 175 Fed. 761; Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113.

[9] Minneapolis General El. Co. v. City of Minneapolis, 194 Fed. 215.

[10] Los Angeles C. W. Co. v. Los Angeles, 88 Fed. 720; U. S. v. Jellico M. C. & C. Co., 43 Fed. 898.

[11] Foster v. Moore, 1 Curt. 279; Morris v. Shelbourne, 8 Blatchf. 266; Gilbert & B. Mfg. Co. v. Bussing, 12 Blatchf. 426; Swift v. Jenks, 19 Fed. 641; Hoe v. Boston D. Adv. Co., 14 Fed. 914; U. S. Annunciator Co. v. Sanderson, 3 Blatchf. 384. But see Gibson v. Van Dresar, 1 Blatchf. 532; Tracy v. Torrey, 2 Blatchf. 275; Parkhurst v. Kinsman, 2 Blatchf. 78; McWilliams Mfg. Co. v. Blundell, 11 Fed. 419. The rules of decision upon motions for injunctions in patent suits are explained in § 277, *supra*.

liminary injunction.[12] A preliminary injunction may also be refused when the plaintiff has been guilty of laches in applying for it; even though his delay has not been such as to disentitle him to a perpetual injunction after the hearing.[13] If an injunction has been obtained by an interlocutory order, and it is desired to continue it provisionally after a hearing, a direction to that effect should be inserted in the interlocutory decree then entered.[14] The court may refuse to continue an injunction when the cause for which it was granted has been removed before the hearing.[15] In such a case, the decree should usually declare that the injunction has properly been issued and award the complainants costs.[16] Upon the argument of a motion for an injunction the defendant can raise any defense to the substance of the bill that would be set up by a demurrer.[17] Upon an interlocutory application a decision of a Federal court in another circuit will usually be followed,[18] but not necessarily the decision of a State court which was made after the controversy between the parties to the suit in the Federal court had arisen.[19] The court may refuse to grant an injunction although all parties consent that one shall issue.[20]

§ 295. The writ of injunction. Immediately upon the entry of an order for an injunction, the party who obtained it is entitled to have the writ issued from the clerk's office and served.[1] He should attend to this within a reasonable time. Where the writ was tested six weeks after the entry of the

[12] Southwestern B. El. L. & P. Co. v. Louisiana El. L. Co., 45 Fed. 893; *supra*, § 277.

[13] Gordon v. Cheltenham Ry. Co., 5 Beav. 229; Mundy v. Kendall, 23 Fed. 591; Kerr on Inj. 22, 23. A delay of several months while the railway company was testing the effect of a reduction of rates, is not such laches. Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321.

[14] Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14.

[15] Lewis Pub. Co. v. Wyman, 168 Fed. 756.

[16] Smith v. Ingersoll Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 377; Williams v. United Wireless Teleg. Co., 1 N. Y. Sup. Ct.; Bischoff, J., N. Y. L. J. April 24, 1912, in which the author was counsel.

[17] Ladd v. Oxnard, 75 Fed. 703.

[18] Daly v. Ga. & A. Ry., 112 Fed. 838; *supra*, § 277.

[19] Jackson Co. v. Gardiner Inv. Co., C. C. A., 200 Fed. 113.

[20] Nat. Phonograph Co. v. Schlegel, 117 Fed. 624.

§ 295. [1] Daniell's Ch. Pr. (2d Am. ed.) 1816, 1817, 1964.

order granting it and was not served till nearly a year afterwards, the court refused to punish the defendant for disobedience, saying that, after the lapse of so much time, the plaintiff should have applied for leave to use the writ.[2] Like all other writs and process issuing from the courts of the United States, writs of injunction must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court must bear teste, from the date of such issue, of the Chief Justice of the United States, or, when that office is vacant, of the associate Justice next in precedence, and those issuing from a District Court must bear teste of the judge, or, when that office is vacant, of the clerk thereof.[3] "The orders pronounced by the court in cases of special injunctions before answer, have varied at different periods. The form most frequently adopted enjoined the party '*till further order.*' In some cases the injunction has been till '*appearance* and further order;' in other till '*answer* and further order.' But the form at present used, and which is established by a rule laid down by Lord Eldon, is 'till answer *or* further order.' This has been adopted as giving defendant the liberty to move, if necessary, to dissolve upon affidavit, before he has answered the bill."[4] The writ should contain a concise description of the particular acts or things in respect to which the defendant is enjoined;[5] and should conform to the directions of the order granting the injunction.[6] If, however, the writ is broader than the order warrants, the defendant should apply to the court for an order setting it aside or modifying it.[7] It seems that he is not justified in disobeying it and raising the objection when a motion is made for an attachment against him.[8] "The defendants ought to be informed as accurately as the case permits what they are forbidden to do."[9] It seems

[2] McCormick v. Jerome, 3 Blatchf. 486.

[3] U. S. R. S., §§ 911, 912.

[4] Daniell's Ch. Pr. (2d Am. ed.) 1895; Read v. Consequa, 4 Wash. 174. See Bolton v. London School Board, 7 Ch. D. 766, 771; Gardner v. Gardner, 87 N. Y. 14; State v. Wakeley, 28 Neb. 431, 437.

[5] Whipple v. Hutchinson, 4 Blatch. 190.

[6] Sickles v. Borden, 4 Blatchf. 14.

[7] Ibid.

[8] Ibid.

[9] Swift & Co. v. U. S., 196 U. S. 375, 401, 49 L. ed. 518, 526.

that a writ is insufficient, which designates the acts sought to be enjoined, by a reference to the bill, without describing them.[10] When a carrier has been adjudged to have violated the interstate commerce law, the court should only enjoin certain specific violations. An injunction should not be granted commanding the carrier, in general terms, not to violate the act in the future in any particular.[11] The injunction should not include a direction, after specific inhibitions, forbidding the defendant to act by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid."[12] The English practice was to mention in the writ a money penalty to be incurred by the defendant if he disobeyed it; but that does not seem to be necessary here.[13] The writ should be addressed to the persons whom it is desired to enjoin.[14] If the injunction is against waste, or forbids the continuance of a nuisance, or some other similarly inequitable act, it is usually addressed to the defendant, his servants, workmen, and agents.[15] No restraint is laid upon the agent, servant or employee personally, but merely as the agent, servant or employee of the enjoined defendant.[16] Notwithstanding the injunction, upon ceasing to

[10] Whipple v. Hutchinson, 4 Blatchf. 190; Sullivan v. Judah, 4 Paige (N. Y.), 444.

[11] N. Y., N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526.

[12] Swift & Co. v. U. S., 196 U. S. 375, 401, 49 L. ed. 518, 526.

[13] Low v. Hanel, 1 Wall. Jr. 345.

[14] Daniell's Ch. Pr. (2d Am. ed.) 1817.

[15] Kerr on Injunctions, 559; Daniell's Ch. Pr. (5th Am. ed.) 1673; Humphreys v. Roberts, Seton's Decrees (4th ed.), 173; in re Lennon, 166 U. S. 548, 41 L. ed. 1110. In Dadirrian v. Gullian, 79 Fed. 784: "The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employees. The object of this generaliation is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employee do it for him, nor shall the defendant do it as the agent, servant or employee of another. Potter v. Muller, 1 Bond, 601, Fed. Cas. No. 11,333." See People ex rel. Stearns v. Marr, 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431, 3 Ann. Cas. 25; *infra*, § 428.

[16] Dadirrian v. Gullian, 79 Fed. 784; Slater v. Merritt, 75 N. Y. 268; Wellesley v. Mornington, 17 Beav. 181.

be the agent, servant or employee of the defendant, a person not named in the injunction is free to act for himself in the protection of his own rights, although it involves his doing the very thing forbidden him when in the employ of his former master.[17] He may avoid obedience to a mandatory injunction, which does not name him, by actually ceasing to be an employee of the defendant.[18] He may enter the service of another master, who is a stranger to the suit, and then be as free as the latter from the obligation to obey the court's decree.[19] It has been said: that "those who are followers or companions of defendants, who are strikers, are and will be bound by the writ of injunction issued herein, to the same extent and as fully as if named in the writ."[20] Where an injunction restrained the defendants, "and all other persons having knowledge of this injunction order;" it was held: that it affected only the agents or servants of the defendants, or those acting in combination or collusion with them, or in assertion of their rights or claims; and that persons not in any way connected with them were not restrained, and could not be punished for contempt because they committed the forbidden act.[21] In a suit to restrain proceedings in another court, the injunction usually is directed against the defendants, his attorneys and agents, even though the bill prays for an injunction against the defendant alone.[22] But the

17 Mexican Ore Co. v. Mexican G. M. Co., 47 Fed. 351; Dadirrian v. Gullian, 79 Fed. 784.

18 Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 19 L.R.A. 395, 54 Fed. 746; Dadirrian v. Gullian, 76 Fed. 784.

19 Dadirrian v. Gullian, 79 Fed. 784; People v. Randall, 73 N. Y. 416; Slater v. Merritt, 75 N. Y. 268.

20 Union Pac. R. Co. v. Ruef, 120 Fed. 102, 106. In Anderson v. Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277, it was held that pickets for a labor union, although not made defendants in an injunction suit, are amenable to the injunction restraining the union, and all persons confederated or conspiring with it, from obstructing the business of plaintiff and its employes, where they have actual notice of such injunction.

21 Rigas v. Livingston, 178 N. Y. 20. In State v. Porter, 76 Kan. 411, 13 L.R.A.(N.S.) 462, 91 Pac. 1073, held: that the purchaser of land, with knowledge of an injunction enjoining his grantor and the former's agents, successors, assigns, and all persons whomsoever from maintaining a liquor saloon on such land could be punished for contempt of the injunction. This case was criticised in XXI Harv. Law Rev. 220. See *infra*, § 428.

22 Daniell's Ch. Pr. (5th Am. ed.) 1673.

latter's tenants cannot be thus enjoined, unless they have become such after the commencement of the suit or have been made parties to it.[23] In one case an injunction was granted against all persons acting in concert with the defendants named and under their direction and control.[24] The writ should be indorsed or subscribed with the name and office address of the plaintiff's solicitor, or with the name and residence of the plaintiff if he appears in person.[25]

§ 296. Dissolution and modification of interlocutory injunctions. The common injunction was dissolved as of course upon the defendant's putting in a sufficient answer to the bill. The practice in such a case was for him to obtain an order *nisi*, upon the return of which the injunction was always dissolved, unless the plaintiff could show that the answer was insufficient for the purpose either of defense or of discovery.[1] A special injunction can only be dissolved by a special motion, either in open court or at a special hearing appointed elsewhere for that purpose by a judge of the court.[2] The motion may be made at any time before decree,[3] even, it seems, before the defendant has been served with process,[4] and before he has appeared.[5] When a special injunction has been granted against several defendants, any of them may move to dissolve it as against himself; but he should in that case serve the others as well as the plaintiff with a notice of his motion.[6] In one case after answer, a notice left at the office of the solicitor for the plaintiff during his absence from the city three days before the motion was held sufficient.[7] If the motion to dissolve is made before answer, it

23 Hudson v. Coppard, 29 Beav. 4; Kerr on Inj. 543.

24 U. S. v. Elliott, 64 Fed. 27, 35.

25 Kerr on Inj. 559; Daniell's Ch. Pr. (5th Am. ed.) 1674.

§ 296. 1 Daniell's Ch. Pr. (2d Am. ed.) 1820–1829; Poor v. Carleton, 3 Sumn. 70; New York v. Connecticut, 4 Dall. 1, 3, note 1, 1 L. ed. 715, 716, per Washington, J.

2 Kerr on Inj. 561; Daniell's Ch. Pr. 1675; Wilkins v. Jordan, 3 Wash. C. C. 226; Caldwell v. Walters, 4 Cranch, C. C. 577.

3 Kerr on Inj. 560; Daniell's Ch. Pr. (5th Am. ed.) 1675; Met. G. & S. Exch. v. Chicago B. of T., 15 Fed. 847.

4 Shields v. McClung, 6 W. Va. 79.

5 Menzies v. Rodrigues, 1 Price, 92.

6 Thompson v. Geary, 5 Beav. 131; Kerr on Inj. 564. But see Daniell's Ch. Pr. (5th Am. ed.) 1676, note 1.

7 Caldwell v. Walters, 4 Cranch, C. C. 577.

must be supported by affidavits or documentary proof contradicting the statements upon which the injunction was obtained,[8] unless the defendant can show that it is plain upon the face of the plaintiff's bill and affidavits that he was not entitled to the injunction, when the motion will be granted.[9] When the injunction has been irregularly issued, the defendant should move to discharge the order granting it.[10] If he should move to dissolve it, he might be held to have by so doing recognized its regularity.[11] It was held that after a demurrer put in by him to the bill had been overruled a defendant could only move to dissolve by leave of the court; which was, in one case, only granted upon his affidavit that the demurrer was not interposed for delay, and his giving security to pay all damage to the plaintiff thereby caused.[12] Where the application for dissolution was made after answer, it was originally thought that the plaintiff could not show that any of the allegations therein contained were false;[13] but that doctrine has been, in this country at least, exploded,[14] and it is well settled that the plaintiff not only may dispute the truth of such allegations, whether they are positive or negative, but is at liberty to file counter affidavits in reply to new matter contained in the defendant's affidavits or answer.[15] It has been held: that a preliminary injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance.[16] When a stay-order has been made, and simultaneous applications, by the defendant to discharge the stay-order, and by the plaintiff for an injunction, are heard together the plaintiff has

8 Daniell's Cr. Pr. (5th Am. ed.) 1676; Young v. Grundy, 6 Cranch, 51, 3 L. ed. 149.

9 Hudson v. Maddison, 12 Sim. 416; Kidwell v. Masterson, 3 Cranch, C. C. 52; Fenwick Hall Co. v. Town of Old Saybrook, 66 Fed. 389.

10 Angier v. May, 3 W. R. 330; Daniell's Ch. Pr. (5th Am. ed.) 1676; Kerr on Inj. 564.

11 Vipan v. Mortlock, 2 Meriv. 476; Kerr on Inj. 564.

12 Woodworth v. Edwards, 3 W. & M. 120.

13 Daniell's Ch. Pr. (5th Am. ed.) 1676, note 4.

14 Poor v. Carleton, 3 Sumn. 70; U. S. v. Parrott, 1 McAll. 271; Orr v. Littlefield, 1 W. & M. 13; Orr v. Merrill, 1 W. & M. 376; Clum v. Brewer, 2 Curt. 506.

15 Day v. New Eng. C. S. Co., 3 Blatchf. 154; Daniell's Ch. Pr. (5th Am. ed.) 1676; Shoemaker v. Nat. Mech. Bank, 1 Hughes, 101.

16 Pere Marquette R. Co. v. Bradford, 149 Fed. 492.

the right to open and close the argument.[17] If upon the application to dissolve an injunction the court is not satisfied that the plaintiff is entitled to retain it, it will dissolve the injunction, and may then direct an issue, an action at law, or a reference before the hearing.[18] If, however, it is satisfied that the plaintiff is entitled to the writ, the court will direct the injunction to be continued until the hearing.[19] Formerly where the court dissolved the injunction upon the ground that it appeared upon the face of the bill that the plaintiff was not entitled thereto, and that was the only relief prayed for by him, it could at the same time dismiss the bill; for the plaintiff had still the right to bring the suit to a hearing.[20] If the question is left in doubt upon the motion to dissolve, it seems that the motion will be denied.[21] A modification of an injunction may be refused in a case, where if asked before the injunction was issued it might have been allowed but equities have since arisen.[22] The ambiguity of the order granting the injunction is sufficient ground for its dissolution or modification.[23] The defendant's delay in moving to dissolve the injunction may deprive him of his right to have it dissolved.[24] When a special injunction has been granted after a full hearing, it will not be dissolved except on new evidence.[25] It has been held that a preliminary injunction will not be dissolved after answer upon grounds shown by affidavits, which, from their not having been set up in the answer, cannot be used at the hear-

17 Fraser v. Whalley, 2 Hem. & M. 10.

18 Daniell's Ch. Pr. (2d Am. ed.) 1897.

19 Packington v. Packington, 1 Dick. 101; Daniell's Ch. Pr. (5th Am. ed.) 1678.

20 Brooke v. Clarke, 1 Swanst. 550; Blow v. Taylor, 4 Hen. & Munf. (Va.) 159. But see *infra*, § 300.

21 Cooper v. Mattheys, 5 Penn. L. J. 38; s. c., Law R. 413; Fisher v. Lord, 6 West L. J. 137; Woodworth v. Hall, 1 W. & M. 389; Woodworth v. Rogers, 3 W. & M. 135; Sparkman v. Higgins, 1 Blatchf. 205. But see Edison El. L. Co. v. Westinghouse El. & Mfg. Co., 54 Fed. 504.

22 Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 128 Fed. 1015. It has been said that a modification of the order will usually be refused when its effect would be to change the position of the property affected by the suit. Ulman v. Ritter, 72 Fed. 1000.

23 Dalglish v. Jarvie, 2 Macn. & G. 231.

24 Florence S. M. Co. v. Grover & Baker S. M. Co., 110 Mass. 1; Kerr on Inj. 565; Antisdel v. Chicago H. C. Co., 89 Fed. 308, 311.

25 Woodworth v. Hall, 1 W. & M. 389.

ing of the whole case.[26] A judge will very rarely dissolve an injunction granted by one of his judicial brethren.[27] It has been said that, in case of the death of the judge who made the order, the motion to dissolve it should be made before two judges.[28] A temporary injunction may be modified or dissolved by a District Court after it has been affirmed upon appeal.[29] It has been said that a Court of first instance has no power to modify or dissolve a perpetual injunction contained in an interlocutory decree which has been affirmed upon appeal.[30] It is the safer practice for the defendant to obtain a clause in the order of affirmance granting leave to the District Court to modify the injunction order.[31] After an injunction has been dissolved, if evidence subsequently taken shows that it was properly issued, it may be issued anew.[32] The dissolution of an *ex parte* injunction on account of a suppression of material facts does not preclude the plaintiff from applying for another injunction on the merits.[33]

An injunction may also be dissolved if the plaintiff is guilty of gross and inexcusable delay in taking testimony or in bringing the cause to a hearing;[34] or by inequitable conduct, such as a misrepresentation concerning the contents of the injunction made to the trade,[35] and in general if from a change of circumstances its continuance would no longer serve any useful purpose.[36] The subsequent passage of an act of Congress legalizing

[26] Union P. B. M. Co. v. Newell, 11 Blatchf. 549.

[27] Cole S. Min. Co. v. Virginia & G. H. W. Co., 1 Saw. 685; Preston v. Walsh, 10 Fed. 315; Reynolds v. Iron S. Min. Co., 33 Fed. 354; Klein v. Fleetford, 35 Fed. 98.

[28] Westerly Waterworks v. Town of Westerly, 77 Fed. 783.

[29] Edison El. L. Co. v. U. S. El. L. Co., C. C. A., 59 Fed. 501; Andrews v. National F. & P. Works, 61 Fed. 782, 790; s. c., 10 C. C. A., 60, 68; s. c., 24 U. S. App. 81. *Cf.* Standard El. Co. v. Crane El. Co., C. C. A., 76 Fed. 767, 794.

[30] Bissell C. S. Co. v. Goshen S. Co., 72 Fed. 545.

[31] Hadden v. Dooley, C. C. A., 74 Fed. 429.

[32] Tucker v. Carpenter, Hempst. 440.

[33] Fitch v. Rochfort, 18 L. J. Ch. 458; High, Injunctions, § 1474.

[34] Read v. Consequa, 4 Wash. C. C. 174; Bradley v. Reed, 12 Pitts. L. J. 65; Schermerhorn v. L'Espenasse, 2 Dall. 360, 1 L. ed. 415; In re Matter of Schwarz, 14 Fed. 787.

[35] Meyers v. Skinner, 186 Fed. 347. See *supra*, § 284.

[36] In re Jackson, 9 Fed. 493; Re Pitts, 9 Fed. 542.

a structure which has been enjoined as a nuisance is a reason for the dissolution of an injunction.[37] It has been held that an injunction staying proceedings at law against a bankrupt is dissolved *ipso facto* by his discharge;[38] but remains unaffected by his delay in applying for his discharge.[39] It has been held that at the expiration of a patent the court will dissolve an injunction against its infringement, and leave the complainant no remedy except his claim for damages against the subsequent sale and use of articles manufactured while the patent was alive in infringement thereof.[40] An injunction is not dissolved by an amendment of the bill[41] unless the amendment substantially changes the cause of action.[42] or abandons the prayer for the injunction.[43] But it is customary to include in the order allowing an amendment a direction that it be "without prejudice to the injunction." The allowance of a demurrer to the whole bill put an end to an injunction which has previously been obtained;[44] but leave was usually given to amend without prejudice to the injunction, when the demurrer was allowed on account of a defect in form,[45] such as multifariousness;[46] or for the omission of an allegation that could readily be supplied even if the same were essential to the jurisdiction.[47] The allowance of a plea did not dissolve an injunction. "There may be some equity shown to continue it. An order for its dissolution must be obtained."[48] An injunction is not dissolved by an abatement or by a defect in the suit, but the defendant must, if he wishes

[37] Baird v. Shore L. Ry Co., 6 Blatchf. 461; Hadden v. Dooley, C. C. A., 74 Fed. 429.

[38] In re Thomas, 3 N. B. R. 7.

[39] In re Schwartz, 14 Fed. 787, 789.

[40] Westinghouse v. Carpenter, 43 Fed. 894, Miller and Love, JJ.; Am. C. Ry. Co. v. Chicago C. Ry. Co., 41 Fed. 522. But see Am. D. R. B. Co. v. Rutland M. Co., 2 Fed. 356; *supra*, §§ 79, 277.

[41] Reed v. Consequa, 4 Wash. C. C. 174; Warburton v. L. & B. Ry. Co., 2 Beav. 253. But see Sharp v. Ashton, 3 Y. & B. 144.

[42] Atty. Gen. v. Marsh, 16 Sim. 572; Kerr on Inj. 566.

[43] Westcott v. Mulvane, 58 Fed. 305.

[44] Schneider v. Lizardi, 9 Beav. 461, 468; Frye & Bruhn v. Carstens, C. C. A., 130 Fed. 766.

[45] Riverside & A. Ry. Co., v. Riverside, 118 Fed. 736, 746.

[46] Rawlings v. Lambert, 1 J. & H. 458; Kerr on Inj. 565, 566; Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 550.

[47] Lehigh Z. & I. Co. v. N. J. Z. & I. Co., 43 Fed. 545, 550.

[48] Kerr on Inj. 566; Phillips v.

to be freed from the restraint thereby imposed, move that the plaintiff or his representatives be required to revive or take such other steps as may be necessary within a limited time, and that if he fail to do so the injunction may be dissolved.[49] Generally an interlocutory injunction is dissolved by the entry of a final decree which does not continue the same.[50]

§ 297. The imposition of terms upon the issue, denial, dissolution, or continuance of an injunction. As the issue of a special injunction is in its discretion, the court may impose terms upon the plaintiff or defendant when granting or refusing the issue, dissolution, or continuance of the same.[1] The usual terms are the giving of a bond or undertaking with good security to indemnify the other party against all loss that may result from the issue or withholding of the injunction.[2] These undertakings were invented by Vice-Chancellor Knight Bruce, and originally they were required only upon *ex parte* injunctions, being designed to protect the court as well as the defendant from improper *ex parte* applications. Later the practice was extended to interlocutory injunctions granted upon notice to the defendant, first in special cases, then generally; and now they are usually required as a matter of course in England and in most of the United States, although in some of

Langhorn, Dick. 148; Ferrand v. Hamer, 4 M. & C. 143.

49 Chowick v. Dimes, 3 Beav. 200; Lee v. Lee, 1 Hare, 622; Chester v. Life Ass'n of Am., 4 Fed. 487.

50 Sweeney v. Hanley, C. C. A., 126 Fed. 97, 99; Gardner v. Gardner, 87 N. Y. 14. For a case where an injunction was not dissolved by the dismissal of the bill, see Indianapolis & N. W. Tr. Co. v. Consol. Tr. Co. 125 Fed. 247.

§ 297. 1 Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; N. J. & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 113 Fed. 395; Marvel Co. v. Pearl, 114 Fed. 946; Carpenter v. Knollwood Cemetery, 195 Fed. 96, 100; Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153, a trade-mark case where the complainant was required to give a bond.

2 Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; Kirby Bung Mfg. Co. v. White, 1 Fed. 604; Northern Pac. R. Co. v. St. P., M. & M. R. Co., 2 McCrary, 260; s. c., 4 Fed. 688. In a suit by a minority stockholder to enjoin a sale of the corporation's assets, where it appeared that the complainant's damage, if any, was purely pecuniary: it was held to be proper for the court to authorize the substitution of a bond by the defendant, instead of a preliminary injunction. Jackson Co. v. Gardiner Inv. Co, C. C. A., 200 Fed. 113. See *supra*, § 145; and cases arising under "Bills to enjoin the infringement of patents," *supra*, §§ 146, 277.

the circuits the Federal judges are accustomed to grant injunctions without such a requirement. The reason for the requirement is that upon an interlocutory application but a short time is allowed for the preparation of the case, and it is impossible for the court to obtain a complete knowledge of the facts. Moreover these applications are heard upon affidavits, so that it is impossible to say which side will ultimately prove to be right. Consequently the court reserves the right to indemnify the defendant in case it should have been induced, upon an incomplete state of facts, to make a wrong order.[3] It is not usual to require security from the United States when a preliminary injunction is granted at their request in a suit in which they are plaintiffs.[4] It has been said that a bond should not be required unless the court is not reasonably satisfied of the right to the relief prayed and is satisfied that the granting of the injunction may cause irreparable injury to the defendant.[5] This doctrine has been the source of great injustice and is not usually followed in the State courts.[6] It has been held that, where there is proof that the defendant has been guilty of bad faith in connection with the subject of the suit, no bond should be required.[7] The court, instead of requiring a bond from the complainant, may impose, as a condition of the injunction order, that he pay any damages sustained by the defendant in case it should be determined that the injunction should not have issued. In such a case, if complainant avails himself of the writ, he is bound by the condition; and, upon the dissolution of the injunction, he may be directed to pay the defendant's damages.[8] In one case, where no such condition was reserved, upon the dissolution of a restraining order the court directed the complainant to pay the defendant's damages, which it then assessed.[9] Where the defendant to an action at law obtained, after verdict, an injunction staying the proceedings, upon his giving a bond for the payment of the amount

3 Smith v. Day, 21 Ch. D. 421. See Lowenfeld v. Curtis, 72 Fed. 105.

4 U. S. v. Jellico, M. C. & C. Co., 43 Fed. 898.

5 Carpenter v. Knollwood Cemetery, 195 Fed. 96.

6 See High on Injunctions, (4th ed.) §§ 1619–1634a.

7 Pasteur C. F. Co. v. Funk, 52 Fed. 146, 147.

8 Mica Insulator Co. v. Commercial Mica Co., 157 Fed. 92.

9 National Phonograph Co. v American Graphophone Co., 136 Fed. 231.

of the verdict with interest should the injunction finally be dissolved and judgment entered thereupon; it was held, that he thereby waived any errors in the action at law previous to the grant of the injunction, and that he could not, after its dissolution, prosecute a writ of error to review the judgment at law for alleged errors at the trial.[10] The court often withholds an injunction to restrain the infringement of a patent,[11] copyright,[12] upon the filing of a bond by the defendant; and even upon his merely undertaking to keep an account of his sales during the pendency of this suit.[13] In England, injunctions have been withheld in other cases upon the defendants giving undertakings to abide by the further order of the court.[14] The court has power, when dissolving the injunction, to absolve the bondsman from liability.[15] An injunction will never be issued to restrain the collection of State taxes, unless the plaintiff first pays "what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavit, whether conceded or not."[16] Interlocutory injunctions to restrain the execution of a statute or order reducing the price of gas have been accompanied with the provision that the excess over the rate fixed by statute,[17] or order,[18] should be deposited in court to abide the event of the suit. Interlocutory injunctions against the enforcement of statutes reducing the charges for freight or passengers have been accompanied by the provision that the railway company should execute a bond, conditioned to pay into the registry of the court, at such times as ordered, money equal to the

[10] Leigh v. Kewanee Mfg. Co., C C. A., 147 Fed. 693.

[11] *Supra*, § 277.

[12] *Supra*, § 278.

[13] Furbush v. Bradford, 1 Fish. Pat. Cas. 317; McCrary v. Penn. C. Co., 5 Fed. 367; McIntyre v. W. U. Tel. Co., 113 Fed. 1022, *supra*, § 277.

[14] Atty. Gen. v. M. & L. Ry. Co., 1 (Eng.) Ry. Cas. 436; Jones v. G. W. Ry. Co., 1 (Eng.) Ry. Cas. 684.

[15] Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060. *Cf.* Allen v. Jones, 79 Fed. 698.

[16] State Railroad Tax Cases, 92 U. S. 575, 617, 23 L. ed. 663, 674; National Bank v. Kimball, 103 U. S. 732, 26 L. ed. 469; Albuquerque Nat. Bank v. Perea, 147 U. S. 87, 37 L. ed. 91; Parmley v. Railroad Cos., 3 Dill. 25; Huntington v. Palmer, 8 Fed. 449; *supra*, § 153.

[17] Consolidated Gas Co. v. Mayer, 146 Fed. 150.

[18] Buffalo Gas Co. v. Buffalo, 156 Fed. 370; Lincoln Gas Co v. Lincoln, 223 U. S. 349, 56 L. ed. 466; San Francisco Gas & El. Co. v. City and County of San Francisco, 164 Fed. 884; Pacific Tel. & Tel. Co. v. City of Los Angeles, 192 Fed. 1009.

difference between the amount collected and that which would have been received had the statute been obeyed; and that each ticket buyer should receive a coupon for the payment by the registry clerk of the court of the excess stated, if the act should be finally sustained.[19]

§ 298. Collection of injunction bonds. It has been held at Circuit, that when the court upon the final hearing dissolves an injunction previously granted, or grants an injunction previously denied upon the giving of a bond or undertaking, the successful party can have his damages assessed and the bond or undertaking enforced by the court in the same suit, without being required to bring a new action at law.[1] Where the amount of the recovery is uncertain, the sureties should have notice of the application to enforce the bond.[2] A District Court has jurisdiction of an action at law upon the bond where it exceeds $3,000, irrespective of the citizenship of the parties, because the suit arises under the laws of the United States.[3] The validity of the injunction bond is not affected by the fact, that it was dated prior to the order, where the sureties justified and the bond was filed after the order was made.[4] The bond or undertaking inures to the benefit of the defendant who suffers injuries, irrespective of the exact time when he has knowledge of the pendency of the action or appears therein.[5] The fact that the defendant is a woman, and that the undertaking is to make good to the defendant "all

[19] Hunter v. Wood, 209 U. S. 205, 207, 52 L. ed. 747, 748.

§ 298. [1] Lea v. Deakin, 13 Fed. 514; Coosaw Min. Co. v. Farmers' Min. Co., 51 Fed. 107; Lamb v. Ewing, C. C. A., 54 Fed. 269; *supra*, § 51. See also Russell v. Farley, 105 U. S. 433, 26 L. ed. 1060; Leslie v. Brown, C. C. A., 90 Fed. 171; Deakin v. Stanton, 3 Fed. 435; Grundy v. Young, 2 Cranch. C. C. 114; Bentley v. Joslin, Hempst. 218; Moore v. Moore, 25 Beav. 8; Sugden v. Hull, 28 Beav. 263. *Contra*, Curtis, J., in Merryfield v. Jones, 2 Curt. 306; West v. East Coast Cedar Co., C. C. A., 113 Fed. 742. See also Bein v. Heath, 12 How. 168, 13 L. ed. 939; Cimiotti Unhairing Co. v. Am. Fur Refining Co., 158 Fed. 171; aff'd. C. C. A. 168 Fed. 529, where the bond provided that the damage should be "ascertained as the court shall direct."

[2] Coosaw M. Co. v. Carolina M. Co., 74 Fed. 860; Leslie v. Brown, C. C. A., 90 Fed. 171.

[3] Leslie v. Brown, 90 Fed. 171.

[4] Sailors' Union of the Pacific v. Hammond Lumber Co., C. C. A., 156 Fed. 450.

[5] Hutchins v. Munn, 299 U. S. 246, 52 L. ed. 776.

damages by *him* suffered," does not debar her from recovering upon the same.[6] An undertaking given to secure a restraining order is superseded by an order or decree granting an injunction, which does not provide for the continuance of the liability of the sureties; and the parties to the same are not liable for any damages subsequently accruing, although the injunction order or decree is afterwards reversed.[7] The liability on the bond is not fixed until the final decree.[8] No action can be maintained upon the bond until that time,[9] and until then the court has power to modify or relax the condition of the bond or to discharge the same when the equities require it.[10] Only direct and proximate damages can be recovered upon the bond or undertaking. Remote, conjectural and speculative damages, are disallowed.[11] When the injunction enjoined a house owner

6 Hutchins v. Munn, 209 U. S. 246, 52 L. ed. 776.

7 Houghton v. Meyer, 208 U. S. 149, 52 L. ed. 432.

8 Nashville, C. & St. L. Ry. v. Railroad Commission of Alabama, 171 Fed. 223; Southern Ry. Co. v. Railroad Commission of Alabama, 196 Fed. 558.

9 Nashville, C. & St. L. Ry. v. Railroad Commission of Alabama, 171 Fed. 223.

10 Southern Ry. Co. v. Railroad Commission of Alabama, 196 Fed. 558.

11 Smith v. Day, 21 Ch. D. 421; Chicago C. R. Co. v. Howison, 86 Ill. 215; Hotchkiss v. Platt, 8 Hun (N. Y.), 46; Livingston v. Exum, 19 S. C. 223. See Swift & Co. v. Kortrecht, C. C. A., 112 Fed. 709; Baer v. Fidelity & D. Co., 130 Fed. 94. Where the injunction forbade interference with the possession of personal property, it was held that the defendant upon the dissolution could recover all damages caused by his delay in obtaining possession of the property, including any loss caused by a fall in the market price, if it had a market price and could have been sold at once on the market for a sum nearly equal to its value, but not if it had no market price and could not have been sold immediately for a sum "anything like its value:" and that the price which the defendant might have made by the use of the property in his business was too remote and speculative to be recovered. Lehman v. McQuown, 31 Fed. 138. It has been held: that "an injunction bond in an action in the District Court of the United States for the District of Louisiana, conditioned that the obligors 'will well and truly pay the' obligee, 'defendant in said injunction, all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued,' which bond was made under an order of the court 'that the injunction be maintained on the complaining creditor's giving bond and security to save the parties harmless from the effects of said injunction,' is a sufficient compliance with the order of the court, and when construed

from completing alterations, without which the house was only partly habitable, she was allowed to recover on the undertaking the reasonable rental value of the house for the season.[12] When an order restrained the Postmaster General from refusing to transmit mail at second-class rates, the liability on the undertaking was the difference in postage on the matter mailed, while the restraining order was in force.[13] It has been held by the Supreme Court that the fees of counsel in procuring the dissolution of the injunction cannot be included in the damages upon the bond.[14] This decision is, however, in conflict with the weight of authority in the United States.[15] The liability of the complainant is limited to the amount of the bond.[16] It has been held that no further damages, interest, nor costs, can be awarded against him.[17] The court might direct the insertion of a clause in the bond providing that counsel fees should be included in the damages. It has been held: that where no security is given, the defendant has no remedy to recover damages caused by an injunction improperly issued, unless, perhaps, where the facts will support an action for malicious prosecution.[18] It seems to be doubtful in England, whether the undertaking can be enforced upon the dissolution of the injunction on the ground that the court erred as to the law.[19] An in-

with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the State courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond." Meyers v. Block, 120 U. S. 206, 30 L. ed. 642.

[12] Hutchins v. Munn, 209 U. S. 246, 52 L. ed. 776.

[13] Houghton v. Meyer, 208 U. S. 149, 52 L. ed. 432.

[14] Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43. This rule has been applied to an action upon an injunction bond, given in a court in the territory of Alaska. Lindeberg v. Howard, C. C. A., 146 Fed. 467.

[15] See High on Injunctions, § 1685, and cases cited.

[16] Cimiotti Unhairing Co. v. Am. Fur Refining Co., C. C. A., 168 Fed. 529; affirming 158 Fed. 171.

[17] Ibid.

[18] Scheck v. Kelly, 95 Fed. 941; City of St. Louis v. St. Louis Gaslight Co., 82 Mo. 354. *Contra*, National Phonograph Co. v. Am. Graphophone Co., 136 Fed. 231. See *supra*, § 297.

[19] Smith v. Day, 21 Ch. D. 421, 424, 426, 428, 429, 431. But see Novello v. James, 5 De G., M. & G. 876.

junction bond, which is expressed to be for the benefit of the defendant, imposes no liability upon the surety for damages caused by the injunction to a person not a party to the suit.[20] The surety cannot, pending an appeal from a decree for the defendant to the injunction suit, maintain a bill of *quia timet* to obtain indemnity from the principal before the bond has been paid or the amount of the liability upon the same has been adjudicated.[21]

§ 299. **Perpetual injunctions.** Perpetual injunctions can only be granted at the entry of a decree.[1] It is irregular to grant one upon affidavits.[2] In patent, trade-mark and copyright cases, however, injunctions that are permanent until the expiration of the plaintiff's monopoly are often granted by an interlocutory decree which also directs a reference to a master for an accounting;[3] but the court has the power to suspend the injunction until an appeal can be had.[4] A perpetual injunction is either originally granted, or continued. They may be granted originally in all cases in which temporary injunctions might have been granted, and also to restrain the setting up of outstanding terms when it would be inequitable to do so.[5] In order to obtain a perpetual injunction, it is not necessary that a provisional injunction should have been asked for.[6] For after the commencement of a suit asking to prevent an act upon the defendant's part, he is said to proceed at his peril, and if the court finally decides in favor of the plaintiff it may order him to undo the result of his acts since he first had notice of the suit.[7] A perpetual injunction may be obtained in a case where a

[20] Hays v. Fidelity & D. Co., C. C. A., 112 Fed. 872.

[21] Am. B. & Tr. Co. v. Logansport & M. G. Co., 95 Fed. 49.

§ 299. [1] Daniell's Ch. Pr. (2d Am. ed.) 1903.

[2] Adams v. Crittenden, 17 Fed. 42.

[3] Rumford Chem. Works v. Hecker, 11 Off. Gaz. 330; Brown v. Deere, 6 Fed. 484; s. c., 2 McCrary, 425.

[4] Barnard v. Gibson, 7 How. 650, 658, 12 L. ed. 857, 860; Potter v. Mack, 3 Fish. 428; Brown v. Deere, 6 Fed. 487; Munson v. Mayor, 19 Fed. 313.

[5] Askew v. Poulterers' Co., 2 Ves. Sen. 89; Duke of Buckingham v. Duchess of Buckingham, 2 Eq. Cas. Abr. 527.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1900. See also Bailey v. Taylor, 1 R. & M. 73.

[7] Charles River Bridge v. Warren Bridge, 6 Pick. (Mass.) 376; Wing v. Fairhaven, 8 Cush. (Mass.) 363; Winslow v. Nayson, 113 Mass. 411; Smith v. Day, L. R. 13 Ch. D. 651.

preliminary injunction has been asked for and refused, or obtained and dissolved.[8] If, however, the plaintiff has not previously obtained a preliminary injunction, and at the hearing fails to make out a clear title, he usually will not be allowed to use the facts proved by him, as evidence of a *prima facie* case, entitling him then to a temporary injunction till he can establish his case beyond a doubt;[9] unless indeed, the injunction sought be one that is never granted before a hearing.[10] Perpetual injunctions may continue or extend and make perpetual preliminary injunctions at the hearing. This can only be done by inserting a direction to that effect in the decree.[11] In order to support a decree for a perpetual injunction, it has been said that the court requires that there should be nothing like a doubt in the case.[12] The granting of such an injunction is in the discretion of the court, and, like a provisional injunction, it may be allowed [13] or refused [14] upon terms. On account of the weight as a precedent given to a decree for a permanent injunction in a patent case, the court may refuse to grant one when the case has been compromised and the defendant abandons it at the hearing.[15]

§ 300. Appeals from injunction orders. "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting,

[8] Daniell's Ch. Pr. (2d Am. ed.) 1900; Bailey v. Taylor, 1 R. & M. 73; Bacon v. Spottiswoode, 1 Beav. 382; Bacon v. Jones, 4 M. & C. 433; Tucker v. Carpenter, Hempst. 440.

[9] Bacon v. Spottiswoode, 1 Beav. 382; s. c. on appeal *sub nom.* Bacon v. Jones, 4 M. & C. 433, 438; Daniell's Ch. Pr. (2d Am. ed.) 1901. BIGGAR Foster Comp. 3-24

[10] Daniell's Ch. Pr. (2d Am. ed.) 1901. See *supra*, § 287.

[11] Daniell's Ch. Pr. (2d Am. ed.) 1902; Gardner v. Gardner, 87 N. Y. 14. *Supra*, § 296.

[12] Whittingham v. Woler, 2 Swanst. 428, n.; Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co., 86 N. Y. 107; Daniell's Ch. Pr. (2d Am. ed.) 1900.

[13] Southern Exp. Co. v. St. Louis, I. M. & S. Ry. Co., 10 Fed. 210; s. c., 10 Fed. 869.

[14] McCrary v. Penn. Canal Co., 5 Fed. 367; Brown v. Deere, M. & Co., 6 Fed. 487.

[15] Hayes v. Leton, 5 Fed. 521.

continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond."[1] In the case of an injunction, the appeal will lie from any order granting, continuing, refusing, dissolving, or refusing to dissolve the same.[2] There is no appeal to the Supreme Court of the United States from any of such orders;[3] but the Circuit Court of Appeals can certify to the Supreme Court any question

§ 300. [1] Jud. Code, § 129, 36 St. at L. 1087. Under the former statute, which only authorized appeals "from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver," it was held that orders were not appealable which denied motions to dissolve an injunction without specifically providing for the continuance of the same. Pioneer Lace Mfg. Co. v. Dodd, C. C. A., 181 Fed. 688; Lewis v. Hitchman Coal & Coke Co., C. C. A., 176 Fed. 549. But that appeals would lie from an order which expressly continued the injunction upon a motion for a rehearing, Armat Moving Picture Co. v. Edison Mfg. Co., C. C. A., 125 Fed. 939, from an order repeating an outstanding injunction without reference to the same, Louis Metzger & Co. v. Berlin, C. C. A., 194 Fed. 426; and from a final order which when dissolving an injunction determined that the complainant had no right to any relief in the suit although it did not in terms dismiss the bill. Bailey v. Willeford, C. C. A., 131 Fed. 242. It was also held that the complainant could not appeal from an order modifying an injunction which it had obtained. Vicksburg Waterworks Co. v. Mayor, etc., of Vicksburg, C. C. A., 153 Fed. 116.

[2] The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit of an appeal from an interlocutory order granting or dissolving an injunction, or refusing to grant or dissolve an injunction, under Code Alaska, § 507, giving the right of appeal from such orders without limitations as to the amount involved, is not limited by the provision of section 504 of such Code respecting appeals from final judgments or orders, and which limits such appeals to cases in which the amount or value involved exceeds $500. J. P. Jorgenson Co. v. Rapp, 157 Fed. 732.

[3] Kirwan v. Murphy, 170 U. S. 205, 42 L. ed. 1009.

involved upon said appeal, even a question of jurisdiction;[4] and the Supreme Court may by certiorari bring the decision of the Circuit Court of Appeals before it for review.[5] A Circuit Court of Appeals has jurisdiction of such an appeal, when the only question in dispute is one of jurisdiction[6] and when the construction of the Constitution of the United States, or when the validity or construction of a treaty made by the United States, is the sole question involved.[7] It seems that where such a question is combined with other questions of a different character, a Circuit Court of Appeals may, if the constitutional or treaty question is controlling, decline to take jurisdiction of the appeal, or may certify the constitutional or treaty question to the Supreme Court, and after that question is there decided proceed to judgment upon the appeal, or may decide the whole case in the first instance.[8] Under this act the Circuit Courts of Appeals have jurisdiction to review, not only orders granting preliminary injunctions, but also interlocutory decrees made after a hearing upon the merits which grant perpetual injunctions and refer the cases to a master to ascertain profits and damages.[9] And such appeals are entitled to a preference upon the calendar.[10] It was held that a docket entry in a suit to enjoin the infringement of a patent, "Opinion—decree for

[4] In re Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589.

[5] Harriman v. Northern Securities Co., 196 U. S. 641, 49 L. ed. 631.

[6] In re Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1. But see Carson v. Combe, C. C. A., 86 Fed. 202; Lake Street El. R. Co. v. Farmers' L. & Tr. Co., C. C. A., 77 Fed. 769.

[7] Westerly v. Westerly Water Works, 76 Fed. 467; s. c., 22 C. C. A., 278; Mayor, etc., of Macon v. Ga. P. Co., C. C. A., 60 Fed. 781; Hastings v. Ames, C. C. A., 68 Fed. 726; Central Tr. Co. v. Citizens' St. Ry. Co., 82 Fed. 1; Indianapolis v. Central Tr. Co., C. C. A., 83 Fed. 529; Illinois Cent. R. Co. v. Adams, C. C. A., 93 Fed. 852; Seattle Electric Co. v. Seattle, R. & S. Ry. Co., 185 Fed. 365.

[8] Carter v. Roberts, 177 U. S. 496, 500, 44 L. ed. 861, 863; Cincinnati, H. & D. R. Co. v. Thiebard, 177 U. S. 615–620, 44 L. ed. 911–913; Pike's P. P. Co. v. Colorado Springs, C. C. A., 105 Fed. 1, 7.

[9] Lockwood v. Wickes, C. C. A., 75 Fed. 118; Raymond v. Royal B. P. Co., C. C. A., 76 Fed. 465. But see Standard El. Co. v. Crane El. Co., C. C. A., 76 Fed. 767.

[10] Star Brass Works v. General Elec. Co., C. C. A., 129 Fed. 102.

complainants," did not constitute a decree for an injunction, although the opinion filed directed that an injunction be granted; and that no appeal could be taken until a decree was entered.[11] It has been held that an appeal will not lie from an order granting an injunction in the alternative unless the defendant gives a bond, which has been given.[12] In such a case, where no bond was filed by the defendant and the complainant filed one required as a condition to the writ, an appeal was entertained by the Circuit Court of Appeals, although the order was affirmed.[13] The phrase "upon a hearing in equity," is not used in its technical meaning of the trial of the cause.[14] As originally used in the statutes, it related to injunctions only. The words seem to have been designed to distinguish a temporary restraining order from an injunction granted upon notice.[15] Such a restraining order, when granted without notice, is not appealable.[16] If the defendant wishes to bring its pro-

11 Herrick v. Cutcheon, C. C. A., 55 Fed. 6; s. c., 5 C. C. A. 21.

12 United Blue Flame Oil Stove Co. v. Silver & Co., C. C. A., 128 Fed. 925.

13 City of Grand Rapids v. Warren Bros. Co., C. C. A., 196 Fed. 892.

14 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760, 763; Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1; Root v. Mills, C. C. A., 168 Fed. 688; Pressed Steel Car Co. v. Chicago & A. R. Co., C. C. A., 192 Fed. 517.

15 Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760, 763.

16 Pressed Steel Car Co. v. Chicago & A. R. Co., C. C. A., 192 Fed. 517. There, an appeal was dismissed from an order providing as follows (518): "This cause having heretofore come on before the court for argument upon the demurrer of defendant to complainant's bill of complaint herein, and the said demurrer having been overruled by the court on the 25th day of May, A. D. 1911, and the defendant having been given 30 days from said date within which to answer said bill of complaint, now comes the defendant, by Isaac M. Jordan and Russell H. Wiles, its solicitors, and suggests to the court that heretofore, by oral agreement of counsel in open court, the defendant has refrained from prosecuting its suit at law against the complainant pending on the law side of this court and referred to and described in said bill of complaint, but that it does not wish to be further bound by said agreement of its counsel. Thereupon, in consideration of the premises and upon reading the bill of complaint, it is hereby ordered that the defendant, Pressed Steel Car Company, its agents and attorneys, be and it is hereby enjoined and restrained from further proceedings in said suit against the complainant described in the bill of complaint herein, being No. 30,039 on the law side of this court, until the further order of this court."

priety before a court of review, he must move to set the same aside. But an interlocutory order staying proceedings in an action at law is equivalent to an injunction, and if granted after hearing is appealable.[17] Whenever proof, by affidavits or otherwise, is submitted to the court and counsel on both sides are heard, the order granting an injunction or appointing a receiver, after a consideration of the same, is appealable.[18] An appeal was entertained in such a case, although counsel for the defendant appeared specially to object to the jurisdiction and were heard upon the merits as *amici curiæ*.[19] It seems that in every case where counsel appears in opposition to a motion for an injunction or receiver, there is a hearing and the order is appealable.[20] It has been held that an *ex parte* order appointing a receiver is appealable.[21] The fact that the order or decree which grants an injunction also gives other relief, such as an accounting, which, if granted alone, could not be reviewed until the final decree; does not prevent a review of the entire order.[22] The Circuit Court of Appeals can in every case reverse the whole order and dismiss the bill or grant such other final relief on the merits as the case before it may justify.[23] Such final disposition of the case will not, however, ordinarily

17 Griesa v. Mutual Life Ins. Co., C. C. A., 165 Fed. 48.

18 Shubert v. Woodward, C. C. A., 167 Fed. 47; Root v. Mills, C. C. A., 168 Fed. 688.

19 Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n, C. C. A., 165 Fed. 1.

20 Shubert v. Woodward, C. C. A., 167 Fed. 47.

21 Joseph Dry Goods Co. v. Heeht, C. C. A., 120 Fed. 760. *Contra*, Root v. Mills, C. C. A., 168 Fed. 688; where it was held that, by moving to modify such an *ex parte* order, the defendant acquiesced in the same, and that such application constituted a hearing, and that upon the denial of the latter motion the time to appeal began to run.

22 Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810; *Re* Tampa S. R. Co., 168 U. S. 583, 42 L. ed. 589; Highland Glass Co. v. Schmertz Wire Glass Co., C. C. A., 178 Fed. 944; Sheffield Car Co. v. D'Arcy, C. C. A., 194 Fed. 686.

23 Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810; *Re* Tampa Suburban R. R. Co., 168 U. S. 583, 42 L. ed. 589; Metropolitan Co. v. Kaw Valley District, 223 U. S. 519, 56 L. ed. 533; Highland Glass Co. v. Schmertz Wire Glass Co., C. C. A., 178 Fed. 944; La Hogue Drainage Dist. No. 1 of Iroquois County, Ill. v. Watts, C. C. A., 179 Fed. 690; Henry Gas Co. v. U. S., C. C. A., 191 Fed. 132; Sheffield Car Co. v. D'Arcy, C. C. A., 194 Fed. 686; Texas Traction Co. v. Barron G. Collier, C. C. A., 195 Fed. 65.

be made where the evidence has not been taken by deposition, unless the pleadings or the undisputed facts show that there can either be no right to relief or no defense to the bill.[24] The fact that previously to the granting of an injunction a demurrer to the equity of the bill had been overruled and an answer filed, does not prevent the consideration of that question by the appellate court in such a case.[25] It has been held that a party who has not been enjoined cannot take such an appeal.[26] Upon an appeal from an order granting or continuing an injunction the Circuit Court of Appeals will ordinarily not review disputed questions of fact arising from contradicting affidavits when there has been no cross-examination, especially before issue is joined.[27] But is has been held that this rule does not apply to an appeal from an order granting an injunction restraining the enforcement of a statute regulating railroad rates.[28] Upon an appeal from an order enjoining the infringement of a patent which had been adjudged valid in a previous suit, where the record contained only the affidavits used upon the motion below, it was held that the question of infringement was pre-

24 Highland Ave. & B. R. Co. v. Columbian Eq. Co., 168 U. S. 627, 42 L. ed. 605; Lake Nat. Bank v. Wolfeborough Sav. Bank, C. C. A., 78 Fed. 517; U. S. Rubber Co. v. Am. O. L. Co., C. C. A., 82 Fed. 248; Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939. But see Fidelity I. T. & S. D. Co. v. Dixon, C. C. A., 78 Fed. 205. Nor in a suit to enjoin the infringement of a patent which contains a large number of claims not previously adjudicated. Nat. El. Signaling Co. v. Telefunken Wireless Tel. Co., C. C. A., 200 Fed. 591. Where the injunction was granted by the District Court because of a prior adjudication between other parties, without considering the questions upon the merits, the appellate court will usually make the same disposition of the matter upon an appeal. Fireball Gas Tank & I. Co. v. Commercial Acetylene Co., C. C. A., 198 Fed. 650. See § 364, *infra*.

25 Henry Gas Co. v. U. S., C. C. A., 191 Fed. 132.

26 Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939, 942.

27 Kerr v. New Orleans, C. C. A., 126 Fed. 920; Railroad Commission v. Rosenbaum, C. C. A., 130 Fed. 110; James v. Wild Goose Mining & Trading Co., 143 Fed. 868; McCarthy v. Bunker Hill & Sullivan Mining and Concentrating Co., C. C. A., 164 Fed. 927; King Lumber Co. v. Benton, C. C. A., 186 Fed. 458.

28 Railroad Commission of Alabama v. Central of Georgia Ry. Co., C. C. A., 170 Fed. 225. This exception was not applied to an appeal from an injunction against a municipal ordinance regulating telephone charges. City of Owensboro

sented for review.[29] The Circuit Court of Appeals may,[30] but rarely will review the exercise if its discretion by the Circuit Court upon the grant or continuance of an injunction or the appointment of a receiver;[31] but if there is no equity in the bill it will dissolve the injunction[32] or the receivership,[33] as the case may be, even it has been held when the point is not suggested in the assignment of errors[34] nor raised in the court below.[35] Where the bill states a case that might justify relief, the defendant is amply protected by a bond and a dissolution of the injunction would cause irreparable injury to the complainant; the Circuit Court of Appeals will rarely disturb the *status quo* until after the final decree.[36] It has been said that the Circuit Court of Appeals should not consider questions concerning the scope of the injunction which were not called to the

v. Cumberland Telephone & Telegraph Co., C. C. A., 174 Fed. 739.

[29] Ferry-Hallock Co. v. Herman, C. C. A., 178 Fed. 550.

[30] Charles E. Hires Co. v. Consumers' Co., C. C. A., 100 Fed. 809.

[31] Bartholomew v. Union Paper & Bag Co., C. C. A., 113 Fed. 289; U. S. Gramaphone Co. v. Seaman, C. C. A., 113 Fed. 745; Stearns-Roger Mfg. Co. v. Brown, C. C. A., 114 Fed. 939; Am. Fur Ref. Co. v. Cimiotti Unhairing Co., C. C. A., 118 Fed. 838; Harding v. Corn Products Refining Co., C. C. A., 168 Fed. 658; City of Owensboro v. Cumberland Telephone & Telegraph Co., C. C. A., 174 Fed. 739; Kings County Raisin & Fruit Co. v. U. S. Consol. Seeded Raisin Co., C. C. A., 182 Fed. 59; City of Shelbyville, Ky. v. Glover, C. C. A., 184 Fed. 234; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; Interurban Ry. & Terminal Co. v. Westinghouse Electric & Mfg. Co., C. C. A., 186 Fed. 166; King Lumber Co. v. Benton, C. C. A., 186 Fed. 458; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321; Texas Traction Co. v. Barron G. Collier, C. C. A., 195 Fed. 65; City of Grand Rapids v. Warren Bros. Co., C. C. A., 196 Fed. 892.

[32] New Albany Waterworks v. Louisville Banking Co., C. C. A., 122 Fed. 776; Kerr v. New Orleans, C. C. A., 126 Fed. 920; Continuous Glass Press Co. v. Schmertz Wire Glass Co., C. C. A., 153 Fed. 577; Bush v. Pioneer Mining Co., C. C. A., 154 Fed. 480; Shelbyville v. Glover, C. C. A., 184 Fed. 234; Love v. Atchison, T. & S. F. Ry. Co., C. C. A., 185 Fed. 321; Acme Acetylene Appliance Co. v. Commercial Acetylene Co., C. C. A., 192 Fed. 321.

[33] Northern Securities Co. v. Harriman, C. C. A., 134 Fed. 331; s. c., aff. 196 U. S. 641, 49 L. ed. 631; Cabaniss v. Reco Min. Co., C. C. A., 116 Fed. 318.

[34] Cabaniss v. Reco Min. Co., C. C. A., 116 Fed. 318, 323.

[35] Shubert v. Woodward, C. C. A., 167 Fed. 47.

[36] Coram v. Ingersoll, C. C. A., 133 Fed. 226. See City of Grand

attention of the court below. Where the court refuses to read or hear affidavits and letters that are pertinent evidence in opposition to an application for an injunction, they must be considered by the Circuit Court of Appeals.[37] Where, on the hearing of a petition for injunction against infringement, affidavits used on a prior hearing are referred to and used, they should, under the circumstances of this case, be incorporated in the record on an appeal.[38] Such an appeal does not affect the jurisdiction of the District Court to proceed with the cause in every respect not involved in the appeal.[39] The grant or denial of a supersedeas upon such an appeal is within the discretion of the court below.[40] A supersedeas may be allowed upon the filing of a bond by the appellant,[41] but such a bond is not indispensable.[42] Where the appeal is taken in open court, there need be no summons nor severance.[43] If it is necessary to bring in parties not duly served with the citation, the defect may be corrected in the court of review.[44] Where the controversy between the parties had been substantially settled pending an appeal, the order was affirmed without passing upon the equity of the bill.[45]

Rapids v. Warren Bros. Co., C. C. A., 196 Fed. 892.

37 New Albany Waterworks v. Louisville Banking Co., C. C. A., 122 Fed. 776. See Tunstall v. Stearns Coal Co., C. C. A., 192 Fed. 808; N. J. Patent Co. v. Schaefer, 178 Fed. 276; Shubert v. Woodward, C. C. A., 167 Fed. 47.

38 Staples & Hanford Co. v. Lord, C. C. A., 148 Fed. 15.

39 Cuyler et al. v. Atlantic & N. C. R. Co., 132 Fed. 568; Foote v. Parsons Non-Skid Co., C. C. A., 196 Fed. 951.

40 City of Shelbyville v. Glover, C. C. A., 184 Fed. 234, 240.

41 Cotting v. Kansas City Stock-Yards Co., 82 Fed. 850, 857. See *infra*, Chapter on Writs of Error and Appeals.

42 Pneumatic Scale Corporation v. Automatic Weighing Mach. Co., C. C. A., 200 Fed. 572. There the complainant failed to apply for a bond in the court below, and it was held that the appellate court would not require one to be filed because of matters of which such complainant had knowledge when the stay was granted.

43 Williams v. City Bank & Trust Co., C. C. A., 186 Fed. 419.

44 Ibid.

45 Victor Talking Mach. Co. v. American Graphophone Co., C. C. C., 192 Fed. 1023.

CHAPTER XIX.

RECEIVERS.

§ 301. Definition of receiver. A receiver is an officer appointed by a court of equity to assume the custody of property pending litigation concerning the same. The effect of the appointment of a receiver is to put the property in his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession to the property.[1] In England the term is usually applied only to those appointed to receive the rents and profits of land and to get in outstanding property; and one selected to carry on or superintend a trade or business is usually denominated "a manager," or "a receiver and manager."[2] But in the United States both classes of officers are called receivers. The Revised Statutes authorize the Comptroller of the Currency to appoint in certain cases a receiver of a national banking association, whose powers and duties are in many respects analogous to those of a receiver appointed by a court of equity.[3] But, as the learning upon this subject does not concern the practice of the courts, it will not be considered here.

§ 302. When receivers will be appointed. A receiver may be appointed to provide for the safety of property pending litigation to determine the title to the same; to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession; to preserve the property of infants during their minority, when they have no guardian and their parents are dead or unfit to be trusted with it; to preserve the property of idiots and lunatics when it is impossible to ob-

§ 301. [1] Union Bank v. Kansas C. Bank, 136 U. S. 223, 236, 34 L. ed. 341, 346. See High on Receivers, (4th ed.) § 1.

[2] Daniell's Ch. Pr. (2d Am. ed.) 2006.

[3] See U. S. R. S., §§ 5234–5237; 19 St. at L. 63; 1st Supp. U. S. R. S. 216; 24 St. at L., ch. 28, p. 8; Price v. Abbott, 17 Fed. 506; *supra*, §§ 81 and 94; *infra*, § 302.

tain a proper person as committee; and when the appointment is authorized by statute.[1] A receiver may be appointed to provide for the safety of property pending litigation to determine the title to the same, whether the litigation is in a court of equity,[2] or probate,[3] or of bankruptcy,[4] in a foreign court,[5] or sometimes, though very rarely, in a court of law.[6] The most usual cases where a receiver is appointed are suits in equity to obtain equitable assets, for the foreclosure of a mortgage, and for the dissolution or winding up of the affairs of a partnership. It was the English rule that a receiver could not be appointed at the suit of a first mortgagee, since he had it in his power to take possession himself.[7] In this country, however, receivers are frequently appointed in such a case.[8] Ordinarily, a receiver of the effects of a partnership will not be appointed unless the bill prays a dissolution and shows a proper case for the same.[9] But where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered, the court will take care that the decree shall not be defeated by anything to be done in the meantime, and may appoint a receiver to protect the property.[10] Receivers may be ap-

§ 302. [1] Kerr on Receivers (2d Am. ed.), 3.

[2] Davis v. Duke of Marlborough, 2 Swanst. 108; Curling v. Marquis Townshend, 19 Ves. 628. But see Moore v. Bank of Br. Columbia, 106 Fed. 574.

[3] King v. King, 6 Ves. 172; Matter of Colvin, 3 Md. Ch. Dec. 279; Robinson v. Taylor, 42 Fed. 803; Underground El. Rys. Co. v. Owsley, 169 Fed. 671; aff'd. C. C. A., 176 Fed. 26, where it was held that the receivership should be provisional until an application to the Surrogate's Court for the appointment of a temporary administrator could be made and determined, and should then terminate, unless that court refused to make such appointment.

[4] Sedgwick v. Place, 3 N. B. R. 35; Alabama & C. R. Co. v. Jones, 5 N. B. R. 97; Keenan v. Shannon, 9 N. B. R. 441. See 30 St. at L. 544, 546, § 2.

[5] Transatlantic Co. v. Pietroni, Johns. 604.

[6] Talbott v. Scott, 4 K. & J., 96; Fingal v. Blake, 2 Molloy, 50; Whitney v. Buckman, 26 Cal. 447; Horton v. White, 84 N. C. 297; Jeffreys v. Smith, 1 J. & W. 298; Robinson v. Taylor, 42 Fed. 803. But see Tornanses v. Melsing, C. C. A., 106 Fed. 775.

[7] Berney v. Sewell, 1 J. & W. 647.

[8] See, for example, Stanton v. Alabama & C. R. Co., 2 Woods, 506; Allen v. D. & W. R. Co., 3 Woods, 316, 326.

[9] Goodman v. Whitcomb, 1 J. & W. 589; Oliver v. Hamilton, 2 Anst. 453; Daniell's Ch. Pr. (2d Am. ed.) 1966, 1967; Kerr on Receivers (2d Am. ed.), 93.

[10] Daniell's Ch. Pr. (2d Am. ed.) 1967; Const. v. Harris, T. & R. 496.

pointed to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession, at the suit of beneficiaries, legatees, next of kin, or creditors, where a trustee,[11] executor,[12] or administrator[13] is insolvent and has not given bonds, or is guilty of misconduct; or where two trustees or executors disagree so that it is impossible for them to act together;[14] at the suit of the United States to cancel a land patent,[15] or at the suit of remaindermen,[16] where the holder of the particular estate or party in possession, as the case may be, is guilty of voluntary or permissive waste, or in a suit by a remainderman when he improperly refuses to renew a leasehold.[17] In the case of trustees, the court will thus interfere whether the trust is express or implied.[18] Upon an interlocutory application, in a suit to enjoin the infringement of a patent by an insolvent defendant, a Circuit Court appointed a receiver of the profits made by such infringement.[19] A receiver may be appointed over the property of an infant,[20] when the latter has no guardian, or his guardian is insolvent or has been guilty of misconduct,[21] and he has no parents, or his parents are unfit to be intrusted with the case of his estate.[22] Receivers may be appointed over the property of idiots and lunatics, when

[11] Hagenbeck v. Hagenbeck Z. A. Co., 59 Fed. 14; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Brodie v. Barry, 3 Meriv. 695; Janeway v. Green, 16 Abb. Pr. (N. Y.) 215, note.

[12] Utterson v. Mair, 2 Ves. Jr. 95; Scott v. Becher, 4 Price, 346. But see Gladdon v. Stoneman, 1 Madd. 143, n.; Langley v. Hawk, 5 Madd. 46; Kerr on Receivers (2d Am. ed.) 20.

[13] Hervey v. Fitzpatrick, Kay, 421; Ware v. Ware, 42 Ga. 408.

[14] Ball v. Tompkins, 41 Fed. 486.

[15] U. S. v. Whitmire, C. C. A., 188 Fed. 422.

[16] Vose v. Reed, 1 Woods, 647, 650.

[17] Bennett v. Colley, 2 M. & K. 225; s. c., 5 Sim. 181, 192; Lord Montford v. Lord Cadogan, 17 Ves. 485.

[18] Pritchard v. Fleetwood, 1 Meriv. 54; Daniell's Ch. Pr. (5th Am. ed.) 1724.

[19] Parkhurst v. Kinsman, 2 Blatchf. 78.

[20] Hicks v. Hicks, 3 Atk. 277; Union Tr. Co. v. Ill. M. R. Co., 117 U. S. 434, 29 L. ed. 963; Sage v. M. & L. R. Co., 125 U. S. 361, 31 L. ed. 694; Kerr on Receivers (2d Am. ed.), 16–18.

[21] Pitcher v. Helliar, Dick. 580; High on Receivers, §§ 725–732.

[22] Butler v. Freeman, Amb. 301; Kiffin v. Kiffin, cited in 1 P. Wms. 705; Kerr on Receivers (2d Am. ed.), 16–18.

no person can be found disposed to act as committee;[23] or, it seems, when the committee is infirm, or the management of the estate is very onerous, or the committee lives far from the estate.[24] The statutes of the several States authorize the appointment of receivers in numerous cases, especially in providing for the dissolution of corporations. In so far as State statutes authorize the appointment of receivers, they will usually be followed by the Federal courts, provided at least that they no not deprive a party of a trial by jury to which he would have been entitled at common law; and the Federal courts will also observe the statutory conditions required for such appointments, but not the State practice.[25] State statutes forbidding the appointment of receivers or the taking of possession by a mortgagee in certain cases will not be followed by the Federal courts.[26] The statutes of the United States authorize the appointment of a receiver of a national bank by the Comptroller of the Currency in certain specified cases.[27] Until the Comptroller has acted, a court of the United States may appoint a receiver of the assets of such a corporation.[28] After the appointment by the Comptroller of such a receiver, it is doubtful whether a court of the United States would appoint another; and

[23] Ex parte Warren, 10 Ves. 622; Anon., 1 Atk. 578; Ex parte Radcliffe, J. & W. 639; Kerr on Receivers (2d Am. ed.), 113, 114.

[24] Kerr on Receivers (2d Am. ed.), 113, 114, citing Re Birch, Shelf. on Lun. 146; Re Seaman, Shelf. on Lun. 146.

[25] Bates v. International Co. of Mexico, 84 Fed. 518; Flash v. Wilkerson, 22 Fed. 689; Fechheimer v. Baum, 37 Fed. 167; Tomlinson & W. Mfg. Co. v. Shatto, 34 Fed. 380; Davis v. Gray, 16 Wall. 203, 219, 220, 21 L. ed. 447, 452, 453; *supra*, § 82. In Dancel v. Goodyear Shoe Machinery Co., U. S. C. C., S. D. N. Y., April 8th, 1905, in which the author was counsel, Judge Lacombe appointed a receiver of the property within the State of a foreign corporation, the defendant to a suit in equity, after a decree for the payment of money by it and the return of an execution unsatisfied. The appointment was made by a petition at the foot of the decree, which complied with the provisions of the New York Code of Civil Procedure and also with the requirements of Federal equity practice. No opinion was rendered.

[26] American Nat. Bank v. Northwestern M. I. Co., 89 Fed. 610; *supra*, § 83.

[27] U. S. R. S., §§ 5141, 5191, 5195, 5201, 5205, 5234, 5235; 5236; Laws of 1876, ch. 156 (19 St. at L., p. 63); 1st Supp. U. S. R. S., p. 216; *supra*, § 5.

[28] Wright v. Merchants' Nat. Bank, 1 Flippin, 568; Irons v. Mfrs. Nat. Bank, 6 Biss. 301.

after the appointment of a receiver by a court of competent jurisdiction, it is doubtful whether the Comptroller of the Currency could thus interfere.[29] A court of equity may appoint a receiver of the assets of a national bank at the suit of unsecured creditors, without a judgment at law, although the Comptroller of the Currency has refused to make such an appointment.[30]

Independently of statutory authority, a court of equity will ordinarily appoint a receiver of the property of a corporation in only eight classes of cases: Firstly, at the suit of mortgagees,[31] or other holders of liens upon it,[32] or those whose claims against the owner are purely equitable and cannot otherwise be enforced or protected.[33] Secondly, at the suit of judgment creditors seeking equitable assets after executions have been returned unsatisfied, and the return shows that there is no corporate property upon which a levy can be made.[34] Thirdly,

[29] Harvey v. Lord, 10 Fed. 236.

[30] King v. Pomeroy, C. C. A., 121 Fed. 287, 289.

[31] Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 17 L. ed. 900; Mercantile Tr. Co. v. Missouri, K. & T. Ry. Co., 1 L.R.A. 397, 36 Fed. 221; Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 Fed. 661; Strain v. Palmer, C. C. A., 159 Fed. 628. But see Trust & D. Co. of Onondaga v. Spartanburg Water Works, 91 Fed. 324. For such cases where a receivership was denied, see Farmers' Loan & Tr. Co. v. Central Park, N. & E. R. R. Co., 165 Fed. 503; Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. A court of equity will often appoint a receiver of a railroad in a suit for the foreclosure of a mortgage containing a clause pledging its tolls and income, when it would not do so if no such clause were included in the mortgage. Tysen v. Wabash R. Co., 8 Biss. 247. "The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property are not to be measured by the same rules as are applied to an ordinary mortgage on a farm or house and lot, to secure one or two notes held by one mortgagee." Allen v. D. & W. R. Co., 3 Woods, 316, 326, per Woods, J.

[32] Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Bird v. People's Gas & El. Light Co., 158 Fed. 903.

[33] D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780, 783; Farmers' L. & Tr. Co. v. Winona & Str. Ry. Co., 59 Fed. 957; Park v. N. I. V. & S. W. R. Co., 70 Fed. 641; Dancel v. Goodyear Shoe Machinery Co., S. D. N. Y., *supra*, note 25. Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; certiorari denied 207 U. S. 594, 52 L. ed. 356.

[34] Covington D. Co. v. Shepherd, 21 How. 112, 16 L. ed. 38; Shainwald v. Lewis, 6 Fed. 166, 775; Buckeye E. Co. v. Donau Br. Co., 47 Fed. 6. See Brown v. Lake S. I. Co., 134 U. S. 530, 534, 33 L. ed. 1021, 1024; Sage v. Memphis & L.

at the suit of a creditor with or without a judgment when a receiver has been appointed in another jurisdiction;[35] and in some cases, such as ancillary appointment has been made upon the application of the foreign receiver.[36] Thirdly, at the suit of persons interested in the property, whether as stockholders[37] or creditors, even, it has been held, creditors without judgments or liens,[38] where there is a breach of duty by the directors, and an actual or threatened damage[39] of a serious nature, although there is no insolvency.[40] Fourthly, where a corporation has

R. R. Co., 125 U. S. 361, 31 L. ed. 694.

35 Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130, 132, 133; Bowker v. Haight & Freese Co., S. D. N. Y., May 10, 1905, per La Combe, J., *infra*, § 242.

36 In the Third Circuit. *Re* Haight & Freese Co., May, 1905 per McPherson, J.

37 Evans v. Coventry, 5 De G., M. & G. 911; Powers v. Blue Grass B. & L. Ass'n, 86 Fed. 705. But see Edwards v. Bay State Gas Co., 91 Fed. 942; Hunt v. American Grocery Co., 80 Fed. 70; Becker v. Hoke, 80 Fed. 973; Texas C. C. & Mfg. Ass'n v. Storrow, 92 Fed. 5; Ranger v. Champion C. P. Co., 52 Fed. 609; Aiken v. Colorado River Irr. Co., 72 Fed. 591; Columbia Nat. Sand Dr. Co. v. Washed Bar Sand Dr. Co., 136 Fed. 710; Glover v. Manila Gold Min. & Mill Co., 19 S. D. 559, 104 N. W. 261; Wayne Pike Co. v. Hammons, 129 Ind. 368; Supreme Sitting, etc., Order v. Baker, 134 Ind. 293, 20 L.R.A. 210. But see Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; Parks v. U. S. Bankers' Corporation, 140 Fed. 160.

38 Sage v. Memphis & L. R. R. Co., 125 U. S. 361, 31 L. ed. 694; Consolidated T. L. Co. v. Kansas C. V. Co., 43 Fed. 204; Doe v. Northwestern C. & T. Co., 64 Fed. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. 314; King v. Pomeroy, C. C. A., 121 Fed. 287; Kentucky, etc., Ass'n v. Galbreaith, 117 Ky. 66, 77 S. W. 371. *Contra*, Leary v. Columbia R. & S. S. Nav. Co., 82 Fed. 775; Texas C. C. & Mfg. Ass'n v. Storrow, C. C. A., 92 Fed. 5; Syers v. Brighton Br. Co., 11 L. T. (N. S.) 560; Mills v. Northern Ry. of B. A. Co., 23 L. T. (N. S.) 719; Slover v. Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 68 L.R.A. 852; McKee v. City Garbage Co., 140 Mich. 497, 103 N. W. 906. See Pennsylvania Co. for Insurance, etc. v. Jacksonville, T. & K. W. Ry. Co., C. C. A., 55 Fed. 131. But see Nesbit v. North Georgia El. Co., 156 Fed. 979. But see Maxwell v. McDaniels, C. C. A., 184 Fed. 311; Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262. That lienholders have a right to a receiver in such a case is held in Farmers' L. & Tr. Co. v. Winona & Str. Ry. Co., 59 Fed. 957. See Herrick v. Grand Trunk Ry. Co., 7 Upper Can. 240.

39 Quoted with approval by Wellborn, J., in Aiken v. Colorado River Irr. Co., 72 Fed. 591, 593. But see Carson v. Allegany Window Glass Co., 189 Fed. 791.

40 Columbia Nat. Sand Dr. Co. v.

been dissolved and has no officer to attend to its affairs.[41] Fifthly, where for a long time the corporation has ceased to transact business and its officers have ceased to act.[42] Sixthly, where the governing body is so divided and engaged in such mutual contentions that its members cannot act together.[43] Seventhly, at the suit of unsecured creditors, where the corporation makes no defense and waives its right to require the complainants to reduce their claims to judgment, upon proof that the corporation is insolvent, that unless the court interferes its business will be interrupted by the levy of judgments and executions, and that the continuance of such business is necessary for the convenience of the public, or possibly when such interruption will greatly depreciate the value of its assets.[44] And eighthly,

Washed Bar Sand Dr. Co., 136 Fed. 710. But see Maxwell v. McDaniels, C. C. A., 184 Fed. 311; Carson v. Allegany Window Glass Co., 189 Fed. 791; Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262; Smith v. Chase & Baker Piano Mfg. Co., 197 Fed. 466. In case of a life insurance company, the court will rarely appoint a receiver when there is no apprehension as to its solvency. Watson v. Nat. Life & Tr. Co., C. C. A., 189 Fed. 872.

[41] The Late Corporation of the Church of J. C. of L. D. S. v. U. S., 136 U. S. 1, 34 L. ed. 478; Lawrence v. Greenwich F. Ins. Co., 1 Paige (N. Y.), 587. See also Hamilton v. Accessory T. Co., 26 Barb. (N. Y.) 46; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140.

[42] Quoted with approval by Wellborn, J., in Aiken v. Colorado River Irr. Co., 72 Fed. 591, 593; Warren v. Fake, 49 How. Pr. (N. Y.) 430.

[43] Featherstone v. Cooke, L. R. 16 Eq. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780. For the appointment of a receiver because of a controversy between bondholders, see Benedict v. St. Joseph & W. R. Co., 19 Fed. 173. For an extraordinary case, where a receiver was appointed because of a dispute with one stockholder, see Arents v. Blackwell's D. T. Co., 107 Fed. 338.

[44] Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. See Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 37 L. ed. 1113; Sage v. Memphis St. R. Co., 125 U. S. 361, 31 L. ed. 694; Consolidated T. Co. v. Kansas C. T. Co., 43 Fed. 204; Doe v. Northwestern C. & T. Co., 64 Fed. 928; Merchants' Nat. Bank v. Chattanooga C. Co., 53 Fed. 314; Park v. N. Y., L. E. & W. R. Co., 70 Fed. 641; Enos v. N. Y. & O. R. Co., 103 Fed. 47. But see Leary v. Columbia & P. S. Nav. Co., 82 Fed. 775; Texas C. C. & Mfg. Co. v. Storrow, C. C. A., 92 Fed. 5. See High on Receivers, (4th ed.) §§ 287–312e. "Apart from statutes, moreover, the law of receiverships has gone through a curious course of development with respect to corporations. The rule has been uniformly stated in the books and is still insisted upon that, in the absence of statutory authority, a court of equity has no power to appoint

in a few cases receivers have been appointed at the application of the corporations themselves, made before default in the payment of mortgage interest, where it was for the interest of the public that the corporate business, the operation of a railroad, should be continued without interruption, it was hopelessly insolvent, and there was danger of attempts by creditors to gain preference by attachments or otherwise in such a manner as would have stopped the operation of the railroad.[45] It has been held that, in a suit against a corporation, a consent to the appointment of a receiver, signed by the president, will not be recognized where it appears from the pleadings that he is an interested party adverse to the company, and no author-

a receiver even of an insolvent corporation. It is said that such a court has no inherent power to wind up a corporation and that it cannot accomplish by indirection that which it cannot do directly. And it is perfectly true that the administration of the affairs of a corporation by a receiver and the distribution of its assets while not destroying its corporate existence do leave it a mere shell. Nevertheless exceptions to the rule have been evolved which are, in some aspects, as broad as the rule itself. One of these exceptions is in the case of creditors' bills. Courts of equity long ago lent their assistance to common law courts to enable particular judgment creditors to reach, through receivers, property beyond the reach of execution. These suits soon broadened in scope and were treated as equitable levies in favor of all judgment creditors entitled to seize the defendant's property—a substitute for separate proceedings. In these suits no distinctions were drawn between corporations and individuals and out of them the practice has grown up and become established of permitting creditors having judgments to apply to courts of equity to take possession of the assets of corporations and undertake through receivers their general administration. And now that which was formerly regarded as the essential thing—the judgment—is unnecessary unless the corporations object. Thus is illustrated anew the vainness of saying what courts of equity *cannot* do. The practice of making such appointments has become particularly well established in the case of quasi public corporations where the interests of the public require continuous and continued operation and where, generally, the bankruptcy act is not available." Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

[45] Wabash, St. L. & P. Ry. Co. v. Central Tr. Co., 22 Fed. 138; s. c., 22 Fed. 272; s. c., 22 Fed. 513, 515; s. c., 23 Fed. 513, 29 Fed. 618; Brassey v. N. Y. & N. E. R. Co., 19 Fed. 663. *Cf.* Quincy, Mo. & Pac. Ry. Co. v. Humphreys, 145 U. S. 82, 95, 36 L. ed. 632, 636. *Contra*, Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Hugh v. McRae, Chase 466.

ity from the directors to give the consent is shown.[46] It has been said: that "a managing receivership is never undertaken, except with the view to winding up the affairs of the business and the sale of its property; the business being taken over and continued, in order that the whole may be disposed of in the end as a going concern."[47] It has been held, that a receiver should not be appointed merely for the purpose of bringing a suit.[48] It has been held that a receiver of the assets of a building and loan association may be appointed, when they are insufficient to carry to completion the purposes of its creation; although it has enough to pay all debts that have matured.[49] The court will appoint a receiver of the assets of a foreign corporation, when the latter has submitted to the jurisdiction.[50] A court will not usually appoint a receiver of a foreign corporation, which does not submit to the jurisdiction, in a suit founded upon the mismanagement of its officers or directors, who reside elsewhere.[51] A court has no jurisdiction to appoint a receiver of the property of a corporation or other person and a party to the suit.[52] It is doubtful whether the receiver of a corporation can be appointed by a Federal court at a suit of a shareholder whose shares are not worth more than $2,000.[53] The right to apply for a receivership of a corporation may be lost by laches.[54] Usually a receiver will not be appointed at the suit of subsequent lienors over property of which a mort-

[46] Nesbit v. North Georgia El. Co., 156 Fed. 979.

[47] Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72. The selection of the plaintiff by an officer of the corporation was held to be insufficient to establish collusion. Burton v. R. G. Peters Salt & Lumber Co., 190 Fed. 262.

[48] Zuber v. Micmac Gold Min. Co., 180 Fed. 625, misappropriation of corporate assets; Street Grading Dist. No. 60 of Little Rock, Ark. v. Hagadorn, C. C. A., 186 Fed. 451, to collect unpaid assessments upon real estate pledged for the payment of loans used in public improvements.

[49] Gunby v. Armstrong, C. C. A., 133 Fed. 417.

[50] Lewis v. American Naval Stores Co., 119 Fed. 391; Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328.

[51] Republican M. Silver Mines v. Brown, C. C. A., 24 L.R.A. 776, 58 Fed. 644; Leary v. Columbia R. & P. S. Nav. Co., 82 Fed. 775.

[52] Hook v. Bosworth, 64 Fed. 443.

[53] Robinson v. West Va. L. Co., 90 Fed. 770. *Contra*, Towle v. American B. L. & Inv. Soc., 60 Fed. 131. *Supra*, §§ 237, 238.

[54] Romare v. Broken Arrow C. & Min. Co., 114 Fed. 194.

gagee is in possession; but an injunction may be issued to prevent the mortgagor from applying the rents and profits to any other purpose than the satisfaction of the mortgage.[55] It has been held that an assignment made by a corporation for the benefit of creditors after the filing of a bill for the appointment of a receiver will not deprive the court of jurisdiction to appoint a receiver.[56] When a railroad is in the hands of receivers pending a foreclosure suit, the court may extend the receivership over a portion of the road for the benefit of an intervenor claiming a prior lien thereupon.[57] Where a receiver has been appointed at the suit of a judgment or other creditor, his suit may be consolidated with a subsequent foreclosure suit, and the receivership extended for the benefit of the mortgagee.[58] Where receivers of a railroad covered by a lease had been appointed in a suit, to which the lessee was a defendant and admitted its insolvency, it was held proper to extend the receivership for the benefit of the lessor upon the latter's petition alleging that it also was insolvent.[59] Where a receiver was appointed at the suit of a creditor, with the requisite difference of citizenship, the mortgagee has been allowed to intervene, file a cross-bill to foreclose the mortgage and take the benefit of the receivership, although the mortgagor and mortgagee were citizens of the same State.[60] Where a receiver had been appointed over the property of a corporation which controlled a railroad company through the ownership of a majority of its stock, it was held that he should surrender pos-

55 U. S. v. Marich, 44 Fed. 10.

56 Belmont Nail Co. v. Columbia I. & S. Co., 46 Fed. 8.

57 Mercantile T. Co. v. Mo., K. & T. Ry. Co., 41 Fed. 8, 9.

58 Lloyd v. Chesapeake, C. & S. W. R. Co., 65 Fed. 351.

59 Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403. The fact that there may be a conflict of interests as to the distribution or application of the earnings of the receivership, was held not to be a reason for the appointment of separate receivers to operate the property of several lessors of the same system of street railroads. S. C., as Pennsylvania Steel Co. v. N. Y. City Ry. Co., 160 Fed. 221; *infra*, §§ 306, 308, 320.

60 Park v. N. Y., L. E. & W. R. Co., 64 Fed. 190; S. C., 70 Fed. 641. In another case it was held, that since the receiver already appointed acted for all parties in interest, there was no reason for granting a subsequent motion by the trustees for the extension of the receivership or the appointment of a new receiver. Bird v. People's Gas & El. Light Co., 158 Fed. 903.

session to a receiver of the latter corporation subsequently appointed by a State court.[61] The appointment of a receiver will not be set aside for collusion, because the complainant brought the suit and made the application at the request of the corporation.[62] Where the defendant corporation appeared and submitted to the jurisdiction, an intervening stockholder or creditor cannot object to the same.[63] It has been held that where a State is divided into several districts and the statutes permit process in one to be served in another, that a receiver appointed in one district has power over all property in the State.[64] Until an ancillary appointment has been made a receiver has no power over property in another State except by the comity of the court there held.[65] It has been held that the title of a receiver dates from the time of his appointment and the filing of the same in the clerk's office, cutting off all rights or liens that accrued between then and the time when the order was transcribed by the clerk and the bond filed;[66] but that it does not relate back to the time when the order was signed.[67] The rules regulating applications for the appointment of receivers over property in the custody of another court have been previously explained.[68] It has been held that a receiver will not be appointed to assist a trust formed to maintain a monopoly, or

61 Central R. & B. Co. v. Farmers' L. & Tr. Co., 56 Fed. 357.

62 Dickerman v. Northern Tr. Co., 176 U. S. 181, 44 L. ed. 423; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801; Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

63 Re Metropolitan Receivership, 208 U. S. 90, 52 L. ed. 403; Lewis v. American Naval Stores Co., 119 Fed. 391. *Supra*, §§ 258–260.

64 Horn v. Pere Marquette R. Co., 151 Fed. 626, 631.

65 Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871; Kirker v. Owings, C. C. A., 98 Fed. 499; Greene v. Star C. & P. Car Co., 99 Fed. 656; Morrill v. Am. Reserve Bond. Co., 151 Fed. 305. *Supra*, § 93, *infra*, §§ 304, 306. For cases where foreign receivers have been allowed to collect domestic assets without ancillary appointments, see Farley v. Talbee, 55 Fed. 892; *supra*, § 92, *infra*, § 311.

66 Horn v. Pere Marquette R. Co., 151 Fed. 626, 627.

67 Wilcox v. National Shoe & Leather Bank, 67 App. Div. 466.

68 *Supra*, § 55. See Morrill v. Am. Reserve Bond Co., 151 Fed. 305.

otherwise to aid in the prosecution of an enterprise against public policy.[69]

§ 303. Rules regulating the appointment of receivers. It has been said that, in order to obtain the appointment of a receiver, the moving party must show, first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.[1] The appointment of a receiver is always in the discretion[2] of the court, which, however, must be exercised with great circumspection,[3] and is subject to review by an appellate court.[4] It has been said, that the appointment can be made only in accordance with the following rules: "1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2nd That is must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3rd. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That 'fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved;' and 5th. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."[5]

[69] Am. B. & Mfg. Co. v. Klotz, 44 Fed. 721.

§ 303. [1] Chancellor Buckner in Mays v. Rose, Freeman's Ch. (Miss.) R. 703, 718. See also Beecher v. Bininger, 7 Blatchf. 170; Tysen v. Wabash R. Co., 8 Biss. 247. "Mere insolvency arising from no proved fault in the management of a private corporation is not a sufficient ground. There should be some evidence of waste or mismanagement or carelessness or fraud or extravagance, wantonness or collusion; some ground to apprehend that the property will suffer deterioration or serious injury: something to show that there is danger of probable loss, or that some rights may be substantially impaired." Brawley, J., in Tr. & D. Co. v. Spartanburg Water Works Co., 91 Fed. 324, 325.

[2] Owen v. Homan, 4 H. L. C. 997, 1032.

[3] Milwaukee & Minn. R. Co. v. Soutter, 2 Wall. 521, 17 L. ed. 903.

[4] Tysen v. Wabash R. Co., 8 Biss. 247.

[5] Le Grand, C. J., in Blondheim

§ 304. Ancillary receivers. An ancillary receiver is a receiver appointed in aid of a receiver appointed by another court.[1] When a receiver has been appointed by one Federal District Court, the others through judicial comity will usually appoint the same person an ancillary receiver of so much of the same estate as is within their jurisdiction,[2] sometimes

v. Moore, 11 Md. 365, 374. See Kelly v. Bettecher, 89 Fed. 125; *infra*, § 315.

§ 304. [1] Jennings v. Phil. & R. R. Co., 23 Fed. 569; Williams v. Hintermeister, 26 Fed. 889. As to bankruptcy, see § 612, *infra*.

[2] Jennings v. Phil. & R. R. Co., 23 Fed. 569; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618; Parsons v. Charter Oak L. Ins. Co., 31 Fed. 305; Shinney v. N. A. S., L. & Bld'g Ass'n, 97 Fed. 9; Dillon v. Oregon, S. L. & U. N. Ry. Co., 66 Fed. 622; Lewis v. Am. Naval Stores Co., 119 Fed. 391; Platt v. Philadelphia & R. R. Co., 54 Fed. 569; N. Y., P. & O. R. Co. v. N. Y., L. E. & W. R. Co., 58 Fed. 268; Dillon v. Oregon, S. L. & U. N. Ry. Co., 66 Fed. 622; Coltrane v. Templeton, 106 Fed. 370, 375. See Corn Exchange Bank v. Rockwell, 58 Ill. App. 506; Taylor v. Atlantic G. W. Ry. Co., 57 How. Pr. (N. Y.) 9. But see Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130, 132, 133, Wallace, J.: "When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other State that the corporation is insolvent and that a proper case exists in that State for the appointment of a receiver and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each State to the records and judicial proceedings of every other State of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case and whether the proper administration of the assets requires the appointment of a receiver." In Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 916, 917, Putnam, J.: "Now comes the question as to the nature of the bill before me. If this were a bill asking me merely to appoint a receiver *ad interim*, ancillary to an *ad interim* receiver appointed in New Jersey, I should pay no attention to it. But in my view it is a bill asking me to assist in enforcing a final decree made by the Circuit Court for the District of New Jersey, and asking me to gather together assets, or cause them to be gathered together, so that they can ultimately be accounted for where they should ultimately be accounted for; that is, for the Circuit Court for the District of New Jersey. It is like any bill asking the gathering up of assets by an ancillary proceeding for the purpose of causing them to be remitted to be disposed of by the court having jurisdiction at the place of domicile. Such proceedings relate alike to the estates of deceased persons, to corporations, and

joining with him, a co-receiver who resides within the ancillary jurisdiction.[3] The usual practice is to make such an applica-

to all other subject matters where there is occasion for gathering together and administering, marshaling, and forwarding the net results to the court of primary jurisdiction. In my view, it is a proper bill, addressed properly to the equity side of this court, praying final relief of the kind I have described, to which the motion now before us is purely interlocutory in its character, with a view to the temporary administration of the assets until this bill is disposed of on a hearing on the merits. Therefore I find no difficulty in the frame of the bill, except the necessity of making these two subsidiary corporations parties defendant." It has been held that, when a receiver has been appointed in a court where proceedings in bankruptcy are pending, the Bankruptcy Court in another district where there are assets may appoint the same person ancillary receiver of property within its district, upon the petition of the original petitioners in bankruptcy. *Re* Schrom (E. D. Ia.), 97 Fed. 760; *Re* Sutter Bros. (S. D. N. Y.), 131 Fed. 654; *Re* Benedict (E. D. Wis.), 140 Fed. 55. *Contra*, *Re* Williams (E. D. Arkansas), 120 Fed. 38, 40, holding that such an appointment could only be made by a plenary bill in the State courts or the Circuit Courts of the United States. Ross-Meeham Foundry Co, v. Southern Car & Foundry Co. (W. D. Tennessee), 124 Fed. 403, 409, holding that it must be by such a bill in a court of equitable jurisdiction, which may perhaps be a District Court of the United States, but not such a court sitting in bankruptcy. In re Peiser (E. D. Pennsylvania), 115 Fed. 199; a trust company in Pennsylvania was ordered to show cause in "proceedings ancillary to, and in aid of, proceedings in bankruptcy in the District Court for the southern district of New York," why it should not pay property of the bankrupt to the receiver appointed in the New York district. See Ancillary Receivers in Bankruptcy by L. M. Friedman, Harv. Law Rev., XVIII, 519. For a form of a decree and order appointing an ancillary receiver, see Baltimore & O. R. Co. v. Freeman, C. C. A., 112 Fed. 237; Conklin v. U. S. Shipbuilding Co., 124 Fed. 1020. In Bowker v. Haight & Freese Co. (where the writer was counsel), although the corporation was chartered in New York, the Federal court there treated its receivership as ancillary to the proceedings in Massachusetts, where a receiver had been first appointed and the corporation subsequently appeared.

[3] Bowker v. Haight & Freese Co., S. D. N. Y., May 10th, 1905. That has been said to be the rule in the First Circuit, Platt v. Phil. & R. R. Co., 54 Fed. 569; Coe v. East & W. R Co. of Ala., 52 Fed. 531. But not in the district of Maine, where, in the absence of extraordinary circumstances, public notice of the application by publication and otherwise is usually required. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988. It has frequently been done in the Second Circuit. Buchanan v. Bay State Gas Co., S. D. N. Y., October 16, 1896. In the same case in which the author was counsel,

tion *ex parte*;[4] but the court may require notice to be given to the persons interested in opposition;[5] and to subsidiary or constituent corporations within the district, a majority of the stock in which is owned by the defendant, when it is sought to have their stock transferred upon their books to the receiver.[6] Public notice by advertisement in daily papers in and outside of the ancillary district, and notice to the United States attorney for the ancillary district, may also be required.[7] The appointment may be vacated after hearing parties interested.[8] The better practice is to move in a new suit instituted by the plaintiff to the bill upon which the original receiver was appointed, or by some other creditor[9] or stockholder,[10] claiming a right to share in the property of which a receiver is desired. It seems that an appearance and a waiver of an objection to the jurisdiction because of non-residence may be made in the name of a defendant corporation by the receiver appointed in the State of its incorporation[11] at least where the officers and directors of the corporation have been enjoined from acting. It seems that the application should not be made by the receiver who wishes the ancillary appointment;[12] nor in a summary ap-

ancillary receivers were thus appointed *ex parte* in the Circuit Courts of New Jersey, Pennsylvania and Massachusetts.

[4] Bowker v. Haight & Freese Co., S. D. N. Y., May 10th, 1905; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894.

[5] Greene v. Star C. & P. Car. Co., 99 Fed. 656; Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988.

[6] Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 914.

[7] Conklin v. U. S. Shipbuilding Co., 123 Fed. 913; Haydock v. Fisheries Co., 156 Fed. 988.

[8] Greene v. Star C. & P. Co., 99 Fed. 656.

[9] In re Brant, 96 Fed. 257; Greene v. Star C. & P. Co., 99 Fed. 656.

[10] Bluefields S. S. Co. v. Steele, C. C. A., 192 Fed. 23. See s. c., C. C. A., 184 Fed. 584, 106 C. C. A., 564.

[11] That was done in all the courts in the case of Buchanan v. Bay State Gas Co., *supra*, note 3. Stone v. Pontiac R. R. Co., N. Y. S. C., County of N. Y., Special Term, April 12, 1905. See *infra*, §§ 307, 311.

[12] In re Brant, 96 Fed. 257; Greene v. Star C. & P. Car Co., 99 Fed. 656; Mabon v. Ongley El. Co., 156 N. Y. 196. Where receivers appointed in one district obtained their appointment in another district upon a bill filed by them *ex parte*, which prayed for no distinct equitable relief; it was held that that did not give them power to sue in the latter district. Fairview Flour, Spar & Lead Co. v. Ulrich, C.

plication where no bill has been filed.[13] It is the safer practice for the bill to show the difference of citizenship or Federal question that will be essential to the jurisdiction over the original appointment; but it might be held that a Federal question sufficiently appeared when the bill was brought to enforce the final decree of a Federal court of equity in another district.[14] The original receiver need not be made a party to the bill,[15] nor is there any necessity for joining another corporation, against which charges are made in the bill, where no relief is asked against it;[16] but, where there is a prayer to have transferred to the name of the receiver shares of the capital stock of another corporation, such corporation should be made a party.[17] The ancillary appointment depends upon the comity of the court that has jurisdiction of the assets sought to be impounded.[18] It may refuse to give the original receiver an ancillary appoint-

C. A., 192 Fed. 894. The practice in the Third Circuit has been said by Judge McPherson to permit this, and he required the application to be so made in the Matter of Haight & Freese Co., E. D. Pa., May, 1905.

13 Ibid.

14 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 914.

15 Phinizy v. Augusta & K. R. Co., 56 Fed. 273.

16 Phinizy v. Augusta & K. R. Co., 56 Fed. 273.

17 Conklin v. U. S. Shipbuilding Co., 123 Fed. 913.

18 Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Kirker v. Owings, C. C. A., 98 Fed. 499; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. Conklin v. U. S. Shipbuilding Co., 123 Fed. 913, 915, 916, per Putnam, J.: "The rule of so-called comity has little influence with me. The best late writer on international law—Dicey—says very truly: 'The term "comity," as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the court. I know of few propositions that now come before the courts which are not governed by law, and in this case I must be governed by the law as practiced, and by the precedents, and not by any mere matter of comity. The law as recognized in the Circuit Courts of the United States is that, when the Federal court of jurisdiction at the domicile of the corporation appoints a receiver, or makes a decree winding up a corporation and disposing of its assets, a decree of foreclosure, or any other decree looking to a disposition of its property, thereupon, assuming that to aid another Federal court involves a Federal question which will lawfully support the exercise of jurisdiction by the Federal judiciary, the Circuit Courts in other circuits will exer-

ment.[19] And, after such an appointment, it may remove him.[20] It has been held that the suit cannot be maintained merely for the purpose of obtaining a ratification by the court of what has been done in a court of another jurisdiction.[21] Upon an ancillary receivership, the court that had original jurisdiction is considered as the court of primary jurisdiction and of principal decree; and proceedings in the other courts are usually considered as ancillary and subordinate thereto. In the case of a railway company chartered by the United States, extending through several districts, the court of primary jurisdiction should ordinarily be that where the principal operating offices are situated and there is some material part of the railroad.[22] But where the corporation had recognized the jurisdiction of a court in another district, it was held that that court should be considered the court of primary jurisdiction.[23] Where the first receiver of a State corporation had been appointed, in a district where its business was carried on and a large part of its property situated, and the corporation had acquiesced in the jurisdiction there; it was held that a receiver, subsequently appointed in a district of the State where the corporation was chartered, must be treated as auxiliary and ancillary to the former.[24] The accounting of the receiver is usually first in-

cise ancillary jurisdiction, and assist in carrying out the purpose of the court at the place of domicile." But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 73 Fed. 26.

19 Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Greene v. Star C. & P. Car Co., 99 Fed. 656; Phinizy v. Augusta & K. R. Co., 56 Fed. 273. But see Farmers' Loan & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26.

20 Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Greene v. Star C. & P. Car Co., 99 Fed. 656; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. But see Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26; Chattanooga T. Ry. Co. v. Felton, 69 Fed. 273.

21 Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894, 897.

22 Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26, 31, as to the rule in districts in the same circuit. See Jud. Code § 56, quoted, *infra*, § 306. For a case of a difference between the administration in two districts of the same Circuit where the Circuit Judge refused to interfere, see Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135.

23 Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26.

24 Lewis v. Am. Naval Stores Co., 119 Fed. 391, 397; Bowker v. Haight & Freese Co., 157 Fed. 1006.

stituted in the court where he was first appointed.[25] He may be directed to file, in the court of ancillary jurisdiction, a certified copy of such accounts and order approving them.[26] The court of ancillary jurisdiction has ordered a sale in the manner directed by that of primary jurisdiction, and in opposition to its own views of the proper course.[27] Where the court of primary jurisdiction exacted a stipulation from the receiver as to his conduct in a suit in the ancillary jurisdiction, the court there enforced observance of such stipulation.[28] The courts of ancillary jurisdiction frequently remit to the court of primary jurisdiction, for relief of claimants to a preferential interest in the fund.[29] They may establish a resident's status as a creditor;[30] but not if the distribution of the estate will be thereby confused or embarrassed.[31] To the latter court also was left the determination of the propriety of continuing a traffic agreement operating in two or more States,[32] and in one case even the propriety of excepting from the receivership assets within the ancillary jurisdiction.[33] It has been held that assets in the hands of ancillary receivers cannot be subjected to the payments of damages for torts committed by the receivers in the primary jurisdiction.[34] The court of ancillary jurisdiction has control over the acts of the ancillary receiver within its territorial lim-

[25] Jennings v. Phila. & R. R. Co., 23 Fed. 569. As to the effect of an order or decree therein in an ancillary jurisdiction, see Coe v. Patterson, 122 App. Div. 76.

[26] Central R. & Banking Co. v. Farmers' L. & Tr. Co., 113 Fed. 405, 412.

[27] Central Tr. Co. v. U. S. Flour Milling Co., 112 Fed. 371.

[28] Wheeling, B. & St. T. Ry. Co. v. Cochran, 85 Fed. 500.

[29] Jennings v. Philadelphia & R. R. Co., 23 Fed. 569; Clyde v. Richmond & D. R. Co., 56 Fed. 539; Bowker v. Haight & Freese Co., 140 Fed. 797. In Farmers' L. & Tr. Co. v. Northern Pac. R. R., U. S. C. C., S. D. N. Y., N. Y. L. J. May 15, 1902, it was held that the claimant of a lien upon real estate must apply, either to a court of primary jurisdiction, or to a court in the State or district where the real estate is situated.

[30] Pfahler v. McCrum-Howell Co., 197 Fed. 684. But see Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 93; Whelan v. Enterprise Transp. Co., 138 Fed. 138.

[31] Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85, 93; Pfahler v. McCrum-Howell Co., 197 Fed. 684.

[32] Ames v. Union Pac. Ry. Co., 60 Fed. 966.

[33] Mercantile Tr. Co. v. Baltimore & O. Ry. Co., 79 Fed. 388.

[34] Union Tr. Co. v. Atchison, T. & S. F. R. Co., 87 Fed. 530.

its.[35] The courts of ancillary administration have the power to retain the assets which they collect and to distribute them independently.[36] They usually apply them to the discharge of local liens,[37] the expenses of the ancillary receivership and to the payment of claims arising out of their management of the property before transmitting any funds to the court of primary jurisdiction.[38] Local creditors, without liens or other security, have no absolute right to assets in the hands of the ancillary receiver prior to that of creditors in the other districts;[39] and the ancillary court may order the transmission of all the proceeds of the assets to the court of primary jurisdiction and require unsecured local creditors to present their claims for adjudication there.[40] The proceedings in the courts of ancillary administration are not binding upon that of original jurisdiction;[41] except to the extent to which they affect assets within the territorial jurisdiction of the former courts. The court of primary jurisdiction remitted to the ancillary court the determination of the priority of receiver's certificates issued by the latter.[42] A judgment against an ancillary receiver is not bind-

[35] Chattanooga Terminal Ry. Co. v. Felton, 69 Fed. 273.

[36] Kirker v. Owings, C. C. A., 98 Fed. 499; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Miles v. New So. B. & L. Ass'n, 99 Fed. 4; N. Y. Security & Tr. Co. v. Equitable Mtg. Co., 71 Fed. 556.

[37] Fletcher v. Harney P. T. M. Co., 84 Fed. 555, where the court of primary jurisdiction expressed its views as to the proper action of the court of ancillary jurisdiction upon claims for taxes. Clyde v. Richmond & D. R. Co., 65 Fed. 336; Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 69 Fed. 658.

[38] Kirker v. Owings, C. C. A., 98 Fed. 499.

[39] Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Smith v. Taggart, C. C. A., 87 Fed. 94; Parsons v. Charter Oak L. I. Co., 31 Fed. 305. But see Taylor v. Life Ass'n of A., 3 Fed. 465; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 72 Fed. 26, 31; Kirker v. Owings, C. C. A., 98 Fed. 499; Johnson v. Southern B. & L. Ass'n, 99 Fed. 646. For a case where they were not allowed to interfere with the settlement of a suit by the ancillary receivers, see Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85.

[40] Ibid.; Jennings v. Phila. & R. R. Co., 23 Fed. 569; Sands v. E. S. Greeley & Co., C. C. A., 88 Fed. 130; Smith v. Taggart, C. C. A., 87 Fed. 94; Parsons v. Charter Oak L. I. Co., 31 Fed. 305. See So. Banking & Loan Ass'n v. Miller, C. C. A., 118 Fed. 369.

[41] Reynolds v. Stockton, 140 U. S. 254, 272, 35 L. ed. 464, 470.

[42] Doe v. N. W. Coal & Transp. Co., 78 Fed. 62.

ing upon the court of primary jurisdiction.[43]. But it has been held that a suit for services to the ancillary receivers in aiding in the sale of assets may be brought against the same persons as receivers in the court of primary jurisdiction.[44] An ancillary receiver is not justified in sending the assets to the court of original jurisdiction without the permission of the ancillary court; and he may be held personally responsible for such conduct.[45]

§ 305. Terms upon the appointment of receivers, and preferences in foreclosure suits. As the appointment of a receiver is in its discretion, the court may impose terms upon the party applying for it or may deny the application upon the filing of a bond by the defendant.[1] Thus, it may insist as a condition precedent to appointing a receiver to manage a colliery that the moving party advance the funds necessary to continue the business.[2] So a party or person interested in a suit was in England rarely appointed receiver unless he agreed to act without compensation.[3] By analogy to this rule to practice, the Supreme Court of the United States first sustained the principle granting preferences to certain classes of unsecured creditors upon the foreclosure of railroad mortgages.[4] It is the

[43] Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464.

[44] Colonial Tr. Co. v. Pac. Packing & Nav. Co., 142 Fed. 298.

[45] Kirker v. Owings, C. C. A., 98 Fed. 499.

§ 305. [1] Norton v. Hartford, 113 Fed. 1023; Cary Bros. v. Dalhoff Const. Co., 126 Fed. 584.

[2] Gibbs v. David, L. R. 20 Eq. 373.

[3] Wilson v. Greenwood, 1 Swanst. 471.

[4] Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 251, 252, 25 L. ed. 339, 342. See also Turner v. Ind., B. & W. Ry. Co., 8 Biss. 315. This is said to depend upon the principle that he who seeks equity must do equity. Waite, C. J., in Fosdick v. Schall, 99 U. S. 235, 253, 25 L. ed. 339, 342; Farmers' L. & T. Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. 664, 666, 667. "The doctrine is analogous to that of the admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result, working destruction to the mortgage, should be compensated in priority to the mortgage." So Caldwell, J., in Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182, 190, 191. For criticisms of the practice, see Coe v. N. J. Midland Ry. Co., 27 N. J. Eq. 37; Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Hollister v.

better practice to provide for such preferences as a condition in the order for the appointment of the receiver.[5] Even where no such order has been made when the receiver was appointed, if it appears at any time in the progress of the cause that bonded interest has been paid, additional equipment provided, or repairs of the property made out of its earnings during a short time before the default in interest, the court usually directs that such debts then incurred be paid out of the income of the receivership after the payment of the receiver's expenses in preference to the claims of creditors secured by a mortgage or other lien.[6] Although usually they are paid out of the net

Stewart, 111 N. Y. 644, 663. The doctrine originated in Kentucky. Douglas v. Cline, 12 Bush (Ky.), 613 (1876).

[5] Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551. For forms of such orders, see Dow v. Memphis & L. R. Ry. Co., 20 Fed. 260, 266, 267; Central T. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551, 553, 554.

[6] In Fosdick v. Schall, 99 U. S. 235, 253, 254, 25 L. ed. 339, 342, 343; Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344; Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308, 27 L. ed. 117, 125; Union T. Co. v. Souther, 107 U. S. 591, 27 L. ed. 488; Union T. Co. v. Walker, 107 U. S. 596, 27 L. ed. 490; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474, with a valuable note; Porter v. Pittsburg Bessemer S. Co., 120 U. S. 649, 30 L. ed. 830; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; Douglas v. Cline, 12 Bush (Ky.), 608. The rule is ordinarily otherwise when there was no diversion of the earnings from the payment of operating expenses. Penn v. Calhoun, 121 U. S. 251, 30 L. ed. 915; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co., 125 U. S. 658, 31 L. ed. 832; Wood v. Guarantee T. & S. D. Co., 128 U. S. 416, 32 L. ed. 472; Kneeland v. Am. L. & T. Co., 136 U. S. 89, 34 L. ed. 379; Lackawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 44 L. ed. 475; U. S. Trust Co. v. N. Y. W. S. & B. R. Co., 25 Fed. 800; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 52 Fed. 524; Ruhlender v. Chesapeake, O. & S. W. R. Co., C. C. A., 91 Fed. 5; International T. Co. v. T. B. Townsend B. & C. Co., C. C. A., 95 Fed. 850; Gregg v. Metropolitan Tr. Co., C. C. A., 124 Fed. 721; aff'd 197 U. S. 183, 49 L. ed. 717. The payment by the receivers of rent to another railway company under a lease, made prior to the receivership and adopted by them, does not constitute such a diversion of income as will entitle a creditor, whose claim was subsequent to the lease, to a preference over a mortgage. Fordyce v. Omaha, Kansas City & E. R. R., 145 Fed. 544. In no case is a creditor entitled to a preference because of a diversion, unless there would have been net earnings ap-

income of the receivers, in special cases,[7] especially where this income has been used to pay for betterments or mortgage interest by a receiver appointed in the foreclosure suit[8] or even by a receiver appointed in a prior suit to foreclose a junior lien[9] or to preserve the property for other creditors or stockholders,[10] or by a reorganization committee representing bondholders and stockholders,[11] such claims have been ordered paid out of the proceeds of the foreclosure sale before any payment on account of mortgage bonds; and in some cases it has been made a condition of the sale that the purchaser pay these claims in addition to the nominal amount of his bid.[12] The doctrine has been extended so as to provide for preferences to those who have furnished supplies and performed labor, and to railroad companies with connecting lines, who have claims for the settlement of ticket, freight and supply accounts, and to loans incurred within a short time before the receivership, irrespective of whether there has been a diversion of income for the benefit of the mortgage bondholders,[13] but not to the claim of another

plicable to the claim had there been no such diversion. Ibid.

7 Miltenberger v. Logansport, C. C. L. W. R. Co., 106 U. S. 286, 311, 313, 27 L. ed. 117, 126, 127; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 365–367, 42 L. ed. 1068, 1071, 1072; Blair v. St. Louis, H. & K. R. Co., 22 Fed. 471, 475; Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543.

8 Ibid.

9 Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 370, 42 L. ed. 1068, 1073.

10 See cases in note 20, *infra*.

11 Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 Fed. 41.

12 Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458.

13 Virginia & A. Coal Co. v. Central R. Co., 170 U. S. 355, 365, 42 L. ed. 1068, 1071; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 311, 312, 27 L. ed. 117, 126, 127. "It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repair, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodations of travel and traffic, may well place such payments in the category of

railway company for a proportionate share of the cost of maintaining flagmen at a crossing,[14] nor to the claims of transportation companies connecting with an insolvent steamship line,[15] although freight collected by the receiver for them after his appointment must be repaid by him. Betterments, as distinguished from repairs, are less often allowed a preference[16] even

payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien." It has been suggested that since the enactment of the Interstate Commerce law, there is no longer any justification for such a preference of the claims of other railroad companies. *Cessante ratione, cessat ipsa lex*, Carbon Fuel Co. v. Chicago C. & L. R. Co., C. C. A., 202 Fed. 172, 174.

[14] City Trust Co. v. Sedalia Light & Traction Co., 195 Fed. 845.

[15] Whelan v. Enterprise Transp. Co., 175 Fed. 212.

[16] Lackawanna I. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 44 L. ed. 475; Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; s. c., C. C. A., 124 Fed. 721; Am. L. & Tr. Co. v. E. & W. R. Co., 46 Fed. 101; Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; Illinois Tr. & Sav. Bank v. Doud. C. C. A., 105 Fed. 123, but see dissenting opinion of Caldwell, J.; Niles Tool Works v. Louisville, N. A. & C. Ry. Co., C. C. A., 112 Fed. 561, 563; Central Trust Co. v. Colorado Ry., Light & Power Co., 200 Fed. 85; Addison v. Lewis, 75 Va. 701, 713. Thus a claim for the construction of a bridge was denied a preference. Int. Tr. Co. v. T. B. Townsend B. & Cr. Co., C. C. A., 95 Fed. 850. *Contra*, Cleveland, C. & S. Ry. Co. v. Knickerbocker Tr. Co., 86 Fed. 73; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 704. So were claims for *railroad ties*: Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; s. c., C. C. A., 124 Fed. 721; for *ballast cars*, Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., C. C. A., 154 Fed. 629; Fordyce v. Omaha, Kansas City & E. R. R., 145 Fed. 544; for *air brakes*, which were placed upon the cars in obedience to an act of Congress; State Tr. Co. v. Kansas City, P. & G. R. Co., 129 Fed. 455; for the price of *machinery* used in the construction of car shops upon a railroad leased to the mortgagor and not covered by the mortgage, Niles Tool Works v. Louisville, N. A. & C. Ry. Co., C. C. A., 112 Fed. 561, 564. See Fordyce v. Kansas City & E. R. R., 145 Fed. 544, for the price of *gas meters* which were held *to be not* a part of the operating expenses of a gas company. Reyburn v. Consumers' Gas F. & L. Co., 29 Fed. R. 561. And *preferences* were *allowed* for debts incurred by the purchase of an *electric generator*, Man. Tr. Co. v. Sioux City C. Co., 76 Fed. 658; and for a new *gear wheel* and *pinion* upon a cable railway, Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269. In Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. 704, 705, per Treat, J., Blair v. St. L., H. & K. R. Co., 22 Fed. 471, per Brewer, J.; s. c., In re Merriwether, 22 Fed. 769, 770, per Treat, J.; s. c., 23 Fed. 704, per Brewer, J., betterments were al-

if made by a receiver when the mortgagee was not a party to the

lowed a preference. There was, however, a Missouri statute (Mo. R. S., § 3200) which may have affected these decisions. Where a receiver had completed, under an order of the court, a building partly constructed for the mortgagor upon property not covered by the mortgage, it was held that the entire cost of the construction should be paid by the receiver before he made any payment to the mortgagee. Girard I. & T. Ry. Co. v. Cooper, 162 U. S. 529, 40 L. ed. 1062; Virginia Passenger & Power Co. v. Lane Bros. Co., C. C. A., 174 Fed. 513, improvement of water power. Illinois Tr. & Sav. Bank v. Doud, 52 L.R.A. 481, 105 Fed. 123, 148, 149, per Sanborn, J.: "When a careful examination and analysis of the facts and opinions in all the cases in the Supreme Court upon the subject of preferential claims in suits to foreclose mortgages of *quasi-public* corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a *quasi*-public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises. A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remained unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. The broad language of the dicta in Fosdick v. Schall, that 'necessary operating and managing expenses, proper equipment, and useful improvements' are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises,

suit.[17] The later cases hold that in a case of a betterment, where there has been no diversion of income, there can be no preference, except for wages, out of the proceeds of the sale, unless immediate payment is necessary in order to keep the railroad in operation.[18] The rule has been applied to an application for a decree of strict foreclosure instead of a sale, whereupon the decree was granted saving the rights of intervenors who held claims which in the case of a receivership would have been entitled to a preference.[19] The rule includes claims incurred by contracts made with a corporation to which was leased the railroad foreclosed, for the benefit of which the work was done, or which it had permitted to manage and operate its railroad under color of a lease or by virtue of the ownership or control of a majority of its stock.[20] It must appear, however, in all cases, that the creditor allowed the debt to be incurred in the belief that it would be paid from

has been disapproved and modified, and the class of claims entitled to equitable preference has been limited, by the later decisions of the Supreme Court." But see dissenting opinion of Caldwell, J. *Cf.* Farmers' L. & Tr. Co. v. Am. Waterworks Co., 107 Fed. 23.

17 Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209; Fordyce v. Omaha, K. C. & E. R. R. 145 Fed. 544; Merchants' L. & Tr. Co. v. Chicago Rys. Co., 158 Fed. 923.

18 Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; Fordyce v. Omaha, K. C. & E. R. R., 145 Fed. 544; Union Trust Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193; Virginia Passenger & Power Co. v. Lane Bros. Co., C. C. A., 174 Fed. 513; Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635; Central Trust Co. v. Colorado Ry., Light & Power Co., 200 Fed. 85; Carbon Fuel Co. v. Chicago, C. & L. R. Co., C. C. A., 202 Fed. 172, 174.

19 Burnham v. Bowen, 111 U. S. 776, 782, 783, 28 L. ed. 596, 598, 599. Where the parties to a foreclosure suit waived a sale, and entered an order by consent leasing the property to another railroad and appointing a receiver of the rent, the court directed that all floating unsecured creditors should be paid out of the rent before its application in discharge of the claims of the bondholders. Farmers' L. & Tr. Co. v. Mo., I. & N. Ry. Co., 21 Fed. 264.

20 Virginia & A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; Clark v. Central R. R. & B. Co., 66 Fed. 803. But see Felton v. Cincinnati, C. C. A., 95 Fed. 336; Southern Ry. Co. v. Ensign Mfg. Co., C. C. A., 117 Fed. 417. Such claims may also be given a preferred lien upon the whole property of the lessee or controlling company. Central of Ga. Ry. Co. v. Hitchcock, C. C. A., 91 Fed. 209; Clyde v. Richmond & D. R. Co., 56 Fed. 539.

the current earnings of the railroad and that he did not rely solely upon the personal credit of the corporation with whom he made the contract,[21] and that the debt was one fairly to be regarded as part of the operating expenses of the railroad, incurrent receipts,[22] and, it has been held, that it was incurred before the diversion.[23] In a proper case the disbursements or liabilities of a prior receiver appointed at the suit of a stockholder or junior incumbrancer may be thus given a preference when they were essential to the maintenance of the mortgaged property.[24] The mere fact that money loaned to the mortgagor was expended in paying interest upon the mortgage bonds and operating expenses so as to enable the railway company to maintain itself as a going concern is insufficient to entitle the lender to a preference.[25] In accordance with these principles the practice arose in the Seventh Circuit to impose as a condition upon the

[21] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 290, 44 L. ed. 458, 472; Lackawanna I. & C. Co. v. Farmers' L. & Tr. Co., 176 U. S. 298, 44 L. ed. 475; Virginia & A. Coal Co. v. Central R. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068, and cases cited; Southern Ry. Co. v. Ensign Mfg. Co., C. C. A., 117 Fed. 417.

[22] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 44 L. ed. 458, 475; Fordyce v. Kansas City & N. Connecting R. Co., 145 Fed. 566.

[23] Fordyce v. Omaha, K. C. & E. R. R., 145 Fed. 544.

[24] Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. ed. 117; Pennsylvania Co. for Insurance v. J. T. & K. W. Ry. Co., 93 Fed. 60; Reinhart v. Augusta M. & Inv. Co., 94 Fed. 901; Central of Ga. Ry. Co. v. Hitchcock, 91 Fed. 209; Ætna Life Ins. Co. v. Leonard, C. C. A., 186 Fed. 148; Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co., 189 Fed. 282. *Cf.* Central Appallachian Co. v. Buchanan, C. C. A., 90 Fed. 454. But see Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 34 L. ed. 379; Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. 62; Ruhlender v. Ches., O. & S. W. R. Co., 91 Fed. 5; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. 202; Haehnlen v. Drayton, C. C. A., 192 Fed. 300.

[25] Morgan's La. & Tr. R. & S. S. Co. v. Texas C. Ry. Co., 137 U. S. 171, 34 L. ed. 625; Contr. & B. Co. v. Continental Tr. Co., C. C. A., 108 Fed. 1. See George v. St. Louis C. & W. Ry. Co., 44 Fed. 117. Where a claim to a preference is made because money was loaned the mortgagor at the request of the bondholders, a request made by all the bondholders should be shown. In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. 846

appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within the six previous months be paid out of the net income or in some cases, out of the proceeds of the sale of the road, before the debt secured by the mortgage.[26]

[26] In re Kelly v. Green Bay & Minn. R. Co., 5 Fed. 846. See Union Tr. Co. v. Souther, 107 U. S. 591, 593, 27 L. ed. 488; Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474. Preferences have thus been given to claims for *fuel*, Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Clark v. Central of Ga. R. & B. Co., C. C. A., 66 Fed. 803; Va. & A. Coal Co. v. Central of Ga. R. & B. Co., 170 U. S. 355, 42 L. ed. 1068; City Trust Co. v. Sedalia Light & Traction Co., 195 Fed. 845. See High on Receivers, (4th ed.) §§ 394a–394L, *locomotives and cars*, Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344; Frank v. Denver & R. G. Ry. Co., 23 Fed. 123; Union Trust Co. of New York v. Forty-Second St., M. & St. N. Ave. Ry. Co., 179 Fed. 981. But see Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. 532; McGoukey v. Toledo & O. C. Ry. Co., 146 U. S. 536, 36 L. ed. 1079; *car springs and spirals*, Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; *jackscrews*, Southern Ry. Co. v. Chapman Jack Co., 117 Fed. 424; *repairs*, Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 311, 27 L. ed. 117, 126; Guaranty Trust Co. v. New York v. Philadelphia & L. V. Traction Co., 160 Fed. 761; *rails*, Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 44 L. ed. 458; money advanced to pay *taxes*, Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; U. S. Tr. Co. v. Mercantile Tr. Co., C. C. A., 88 Fed. 140; Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209. The annual franchise tax, which accrued subsequent to the receivership, was held to be a preferred lien so long as the corporation remained undissolved. Conklin v. U. S. Shipbuilding Co., 148 Fed. 129. *Contra*, Franklin Tr. Co. v. State of New Jersey, C. C. A., 181 Fed. 769, Putnam, J., dissenting, where it was imposed by a foreign State, in which it was domiciled but did not transact business. Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209. *Board and rations furnished employees*, Finance Co. v. Charleston, C. & C. R. Co., 49 Fed. 693; Northern Pac. R. Co. v. Lamont, C. C. A., 69 Fed. 23; but see Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676; *telegrams*, Newgass v. Atlantic & D. R. Co., 72 Fed. 712; *furniture, care, heat and light of stations*, Northern Pac. R. Co. v. Lamont, C. C. A., 69 Fed. 23; as to *electric power*, see Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co., 189 Fed. 282; *advertising*, Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 Fed. 41; *contra*, Central Tr. Co. v. East Tenn., V. & G. R. Co., C. C. A., 80 Fed. 624. Claims for preferences for *car rent* are usually disallowed. Thomas v. Western Car Co., 149 U. S. 95, 37 L. ed. 663;

Grand Trunk Ry. Co. v. Central Vt. R. Co., 90 Fed. 163; Pullman's Palace Car Co. v. Am. L. & Tr. Co., 84 Fed. 18; Rodger Ballast Car Co. v. Omaha. K. C. & E. R. Co., 154 Fed. 629. Where a balance is due upon the purchase price of *cars* or *locomotives* delivered to the railroad company under a contract of conditional sale, and the seller reclaims them or the receiver rejects them, a claim for the value of their use or for the injury done to them while in the possession of the railroad is not entitled to a preference. Fosdick v. Schall, 99 U. S. 235, 255, 25 L. ed. 339, 343; Huidekoper v. Loc. Works, 99 U. S. 258, 25 L. ed. 344; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97, 34 L. ed. 379, 383. If, however, the receiver retains them with the assent of the seller, the balance of the purchase-money, or at least the reasonable value of their use by the receiver, may be a preferred claim to that of a prior mortgagee at whose suit the receiver was appointed. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 103, 34 L. ed. 379, 385; Fosdick v. Car Co., 99 U. S. 253, 25 L. ed. 344; Frank v. Denver & R. G. Ry. Co., 23 Fed. 123. But not the value of their use by a former receiver appointed at the suit of a judgment creditor to which the mortgagee was a party. Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 97, 34 L. ed. 379 383. But see Kneeland v. Bass F. & M. Works, 140 U. S. 592, 35 L. ed. 543; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 27 L. ed. 117. And where the value of the purchase price is allowed a preference, it is inferior to the claims of laborers for services rendered immediately before the appointment of the receiver and subsequently to the delivery of the rolling stock to the company. Frank v. Denver & R. G. Ry. Co., 23 Fed. 123. A claim for *oil* necessary for use in operating a railroad, furnished before a default in interest, was subordinated to the lien of the mortgagees; but a claimant for oil furnished since such default was given an equitable lien superior to the mortgagees, when the claimant had accepted a promissory note of the railroad company on account of part of both classes of indebtedness; which note he surrendered to the receiver upon petitioning for the payment of his claim. Central Tr. Co. v. Texas & St. L. Ry. Co., 23 Fed. 703. It has been held that, in the absence of a State statute, *judgments* against a railroad company for *personal injuries* are *not* entitled to a preference Farmers' L. & Tr. Co. v. Northern Pac. R. Co., C. C. A., 79 Fed. 227; Farmers' L. & T. Co. v. Nestelle, C. C. A., 79 Fed. 748; Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471; Front St. C. Ry. Co. v. Drake, 84 Fed. 257; Farmers' L. & T. Tr. Co. v. Longworth, C. C. A., 103 Fed. 336; Hampton v. Norfolk & W. Ry. Co., C. C. A., 127 Fed. 662; Central Tr. Co. v. Warren, C. C. A., 121 Fed. 323; Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209; Atchison, T. & S. F. Ry. Co. v. Osborn, 148 Fed. 606; Pennsylvania Steel Co. v. N. Y. City Ry. Co., S. D. N. Y., 165 Fed. 485. It was so held as to such claims not reduced to judgment until after the receivership. Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471; St. Louis Tr. Co. v. Riley, C. C. A., 30 L.R.A. 456, 70 Fed. 32; Farmers' L. & Tr. Co. v. Green B., W. & St. P. Ry. Co., 45 Fed. 664; Fi-

delity Ins. & S. D. Co. v. Norfolk & W. Ry. Co., 114 Fed. 389. See Central Tr. Co. v. East Tenn., V. & G. R. Co., 30 Fed. 895. *Contra*, Central Tr. Co. v. Texas & St. L. Ry. Co., 22 Fed. 135; Dow v. Memphis & L. R. Co., 20 Fed. 260, 266, 267, both of Caldwell, J. But such claims have been allowed a preference out of income that accrued in the hands of a receiver before the institution of a foreclosure suit, although the judgment for the tort was subsequently obtained. Veatch v. Am. L. & Tr. Co., C. C. A., 84 Fed. 274. Upon the construction of the South Carolina statute, see Southern Ry. Co. v. Bonkright, C. C. A., 30 L.R.A. 823, 70 Fed. 442; Phinzy v. Augusta & K. R. Co., 63 Fed. 922; Central Trust Co. v. Madden, C. C. A., 70 Fed. 451; Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. 257; State v. Port R. & A. Ry. Co., 84 Fed. 67. Upon that of the North Carolina statute, see Finance Co. v. Charleston, C. & C. Ry. Co., 61 Fed. 369; Fidelity I. Tr. & S. D. Co. v. Norfolk & W. R. Co., 90 Fed. 175; s. c., 114 Fed. 389. As to the Iowa statute, Central Tr. Co. v. Central Iowa Ry. Co., 38 Fed. 889. As to the Tennessee statute, Central Tr. Co. v. East Tenn., V. & G. Ry. Co., 70 Fed. 764. As to the Vermont statute, Grand T. Ry. Co. v. Central Vt. R. Co., 91 Fed. 696. Claims for *damages by fire* to adjoining property caused before the appointment of the receiver have been *denied* a preference. In re Dexterville M. & B. Co. v. Case, 4 Fed. 873; Hiles v. Case, 14 Fed. 141; s. c., 9 Biss. 549. *Contra*, Dow v. Memphis & L. R. Co., 20 Fed. 260, 266, 267. Claims for the value of *a right of way*, including damages to easements, even when reduced to judgment, are *allowed* a preference which is analogous to a vendor's lien. Mercantile Tr. Co. v. Pittsburgh & W. R. Co., 29 Fed. 732; Central Tr. Co. v. Hennen, C. C. A., 90 Fed. 593; Central Tr. Co. v. Louisville & T. Ry. Co., 81 Fed. 772; Fordyce v. Kansas City & N. Connecting R. Co., 145 Fed. 566. *Cf.* Wright v. Kentucky & G. E. Ry. Co., 117 U. S. 72, 29 L. ed 821; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 566. In one case a consolidated mortgage covered leases of branch lines and nearly all of the capital stock of the lessor companies, with a covenant by the trustee that in case of default it would take possession of the mortgaged property and then "operate such railroads and conduct the business . . . and receive all tolls, rents, income and profits from said railroad and other property, . . . and from such rents to pay all expenses of taking possession of said railroads and other property and operating said railroads and conducting said business, . . . and all taxes due upon any of the mortgaged property, and all amounts due for interest or principal of any of the bonds or other obligations of the railway company secured by mortgages or pledges prior in lien to this mortgage; and after deducting such expenses and payments and retaining a reasonable compensation for the services of the trustee in connection with the making of said entry and taking possession of said railroads and other property, and operating the same, and conducting the said business, to apply the net income to the payment of any interest previously due or becoming due during such possession on bonds secured by

this mortgage." The trustee further covenanted "to cause all of the railroads and other property thus secured by this mortgage, including all shares of capital stock and bonds held in trust under the provisions hereof, to be sold as one property at public auction," &c. The mortgagor lessee had covenanted to pay *interest* upon the bonds of the lessors of the branch lines as *rent*. The earnings of the branch line were insufficient to pay the rent. It was held that the first covenant constituted a contract by teh amount of its earnings collectsion of the railroads of the mortgagor, either directly or through a receiver, to pay the *interest on the bonds of the branch roads*, as obligations of the mortgagor, before the net income was applied to the payment of interest on the bonds secured by the consolidated mortgage; and that the holders of these bonds had an equity upon the net earnings of the entire system superior to that of the holders of bonds and coupons under the consolidated mortgage. Mercantile Tr. Co. v. St. Louis & S. F. Ry. Co., 71 Fed. 601, 608, 609, s. c., as Mercantile Tr. Co. v. Farmer's L. & Tr. Co., C. C. A., 81 Fed. 254. But see Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863. Coupons on bonds of a lessor, due for *rent* when a receiver of the lessee was appointed, were denied a preference in Central Tr. Co. v. Charlotte, C. & A. R. Co., 65 Fed. 264. See St. Louis, A. & T. H. R. Co. v. Cleveland, C. & C. I. Ry. Co., 125 U. S. 658, 31 L. ed. 832. Rent of a terminal property was allowed a preference in Manhattan Tr. Co. v. Sioux City & N. R. Co., 102 Fed. 710. Creditors of a lessor railroad were given an equitable lien upon the amount of its earnings collected by the lessee. Terre Haute & L. R. Co. v. Cox, C. C. A., 102 Fed. 825. Upon the foreclosure of a consolidated mortgage, the court ordered the receivers to pay *interest* upon bonds secured by mortgage upon a vital portion of the system although there was some doubt whether the mortgage foreclosed was not a superior lien. Park v. N. Y., L. E. & W. R. Co., 64 Fed. 190. See also Lloyd v. Ches. O. & S. W. R. Co., 65 Fed. 351. It was held otherwise, however, in the case of mortgages upon parts of the consolidated road which could be separated from the rest without a serious depreciation. Cleveland, C. & S. R. Co. v. Knickerbocker Tr. Co., 64 Fed. 623. Where the receivers appointed under a consolidated mortgage had paid *interest on prior divisional mortgages*, taxes, operating expenses, debts for equipment, and for that purpose had incurred a preferential indebtedness, it was held: that the consolidated mortgagee could not in the subsequent foreclosure in the same suit of mortgagees on different parts of the line have that preferential debt apportioned between its own and the divisional mortgages, or require an account of the receipts and disbursements of each division before the extension of the receivership to the division of mortgages so as to displace in its favor the liens of some of those mortgages; but that these debts were primarily a charge upon the interest of the consolidated mortgagee. N. Y. S. & Tr. Co. v. L., E. & St. L. Con. R. Co., 102 Fed. 382. Under State statutes preferring the claim of persons who perform labor upon the

property, the services of a civil engineer who superintended the construction, Central Tr. Co. v. Richmond N. I. & Br. Co., 54 Fed. 723; and of a managing agent and a superintendent of trains, who occasionally ran cars, cleaned cars, repaired tracks, and acted as "general utility man," were held to be included, Gilchrist v. Helena, H. S. & S. R. Co., 58 Fed. 708; but that of a man who had charge of the office and receipts and entered in a book the time of the workmen as handed in to him was not. Ibid. In the following cases the *fees of attorneys* and counsel for services immediately before the receivership were allowed a preference: Finance Co. v. Charleston C. & C. Co., 52 Fed. 526; Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. Fees for the services of attorneys and counsel have been disallowed a preference where rendered more than a year (Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521) and more than two years before the receiverships although the services had increased the value of the property. Finance Co. v. Charleston C. & C. Co., 52 Fed. 526. Fees for services performed partly more than six months before the receiverships, but principally within that time, were allowed a preference when they had increased the fund. Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. So it seems would be services of counsel for the corporation in preparing bills to be filed by creditors, under which were appointed original and ancillary receivers, and for advice therewith connected, although he did not act as attorney of record. Linen Thread Co. v. A. Booth & Co., C. C. A., 192 Fed. 515. When the order of appointment gives a preference to "wages of employees," counsel fees due an attorney who was not employed as general counsel are not included. Louisville, E. & St. L. R Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. But see Gurney v. Atlantic & G. W. Ry. Co., 58 N. Y. 358. Attorneys are denied preferences for services in attempting to set aside the appointment of a receiver that had previously been made, Barker v. Southern Building & Loan Ass'n., 181 Fed. 636; for the payment, at the request of the president of the company, a few weeks before its default, under a promise of reimbursement within a few months, of judgments and other claims against it for wages and injuries to cattle, Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521; and for the payment as surety upon *appeal bonds* of judgments against the railroad upon claims two or three years old, although the appeals were taken a few months before the appointment of the receiver, and the payment made after the appointment. Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 521; Whiteley v. Central Tr. Co., C. C. A., 34 L.R.A. 303, 76 Fed. 74; and for services in securing a preference to unsecured creditors, Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023. Preferences have been allowed to sureties upon appeal and replevin bonds given on behalf of a receiver, Union Tr. Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825; or by a mortgagee, Jones v. Central Tr Co., C. C. A., 73 Fed. 568, or, it has been *held*, by a mortgagor, in order

This is called "the six months rule."[27] Other Circuits adopt a similar practice.[28] Three months is not an un-

to save the property. City Tr. Co. v. Sedalia Light & Traction Co., 195 Fed. 845. *Contra*, Pennsylvania Steel Co. v. New York City Ry. Co., 165 Fed. 485; Central Tr. Co. of New York v. Third Ave. R. Co., C. C. A., 180 Fed. 710. Railroad mortgages usually provide for the payment, prior to the bonds, of the fees and expenses of the trustee; but where the inaction of the trustee has compelled the institution of litigation by a bondholder or other person interested, the trustee's counsel fees may be disallowed. So when the services were unnecessary. Bound v. S. C. R. Co., 62 Fed. 536. When on account of the inaction of the trustee or otherwise a necessary suit was instituted by a bondholder or other beneficiary to preserve the fund, the counsel fees of the plaintiff may be allowed a preference. Cowdrey v. Galveston, H. & H. R. Co., 93 U. S. 352, 23 L. ed. 950; Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Central R. & B. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915; *infra*, § 421. The counsel fees of the attorney for the mortgagor cannot be awarded a preference, unless the mortgage so provides. Mercantile Trust Co. v. Missouri K. & T. Ry. Co., 41 Fed. 8, 10; Union Loan & Trust Co. v. Southern Cal M. R. Co., 51 Fed. 106. *Cf.* Mason v. Pewabic Min. Co., C. C. A., 66 Fed 391. *Contra*, Bound v. S. C. R. Co., 43 Fed. 404. The fees, counsel fees and other debts of a receiver, and a master appointed in a former suit by shareholders or junior incumbrances, may be allowed a preference. Pennsylvania Co. v. J. T. & K. W. Ry. Co., 93 Fed. 60; Reinhart v. Augusta, M. & Inv. Co., 94 Fed. 901. *Contra*, Am. L. & Tr. Co. v. South Atl. & O. R. Co., 81 Fed. 62. A preference was denied to so much of a judgment as included costs incurred before the receivership. Williams v. Groat, 73 Fed. 59. The claim of a secretary for a balance of salary due him within the prescribed time has been thus preferred. Olyphant v. St. Louis & O. S. Co., 22 Fed. 179. But see Wells v. Southern Min. Ry. Co., 1 Fed. 270; Addison v. Lewis, 75 Va. 701, 712, 713; Union L. & T. Co. v. Southern Cal. M. R. Co., 51 Fed. 106. No case as yet extends the preference to the salary of a president. Nat. Bank of Augusta v. Carolina, K. & W. R. Co., 63 Fed. 25; Title Ins. & Tr. Co. v. Home Telephone Co., 200 Fed. 263. A president forfeits any right he may possess to such a preference by publishing in the annual report a statement that his salary has been paid. Addison v. Lewis, 75 Va. 701, 713. A contract for future employment is not binding on the receiver. Keeler v. Atchison, T. & S. F. R. Co., 92 Fed. 545.

[27] In re Kelly v. Receiver of G. B. & M. R. Co., 5 Fed. 846, 851, note. Title Ins. & Tr. Co. v. Home Telephone Co., 200 Fed. 263.

[28] Atkins v. Petersburg R. Co., 3 Hughes, 307; Blair v. St. Louis, H. & K. Ry. Co., 22 Fed. 471, 474; Olyphant v. St. Louis O. & S. Co., 22 Fed. 179; Taylor v. Phila. & R. R. Co., 7 Fed. 377; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 91 Fed. 195; Central Tr. Co. v. Eastern T. & G. R. Co., C. C. A., 80 Fed.

common limitation of time.[29] Claims due eight,[30] and eleven[31] months, and even two years,[32] before the receivership; in one case claims for loans to the amount of more than $3,000,000 advanced upon collateral for operating expenses of the railroad within two years before the receivership;[33] a claim for materials furnished three years before the appointment, for which a note was given sixteen months before the receivership;[34] and in one case, those who advanced money, after a default in interest two years before the receivership, to pay the arrears of wages due striking laborers, under a promise from the president of the mortgagor that they would be repaid out of the current earnings of the road, have been given a preference.[35] And by Judge Caldwell: "The debts due from a railroad company for ticket and freight balances, and for work, labor, materials and machinery, fixtures, and supplies of every kind and character done, performed or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in the State of Kansas, and liabilities incurred by said company in the transportation of freight and passengers, including damage to person or property, which have accrued since the execution of the mortgage set out in the bill of complaint," about two years and three months before the receivership,[36] were allowed a preference. A creditor does

624; Gregg v. Metropolitan Tr. Co., 197 U. S. 183, 49 L. ed. 717; Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. ed. 403.

[29] Fosdick v. Schall, 99 U. S. 235, 238, 25 L. ed. 339; Hale v. Frost, 9 U. S. 389, 25 L. ed. 419; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 308, 27 L. ed. 117, 125; Virginia & A. Coal Co. v. Central R. & B. Co., 170 U. S. 355, 366, 42 L. ed. 1068, 1072. But see Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

[30] Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320. *Contra*, Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635.

[31] Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286, 44 L. ed. 458, 471.

[32] Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 30 Fed. 332, 334, per Brewer, J.; Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. 182, per Caldwell, J. See Atkins v. Petersburg R. Co., 3 Hughes, 307. But see Duncan v. Mobile & O. R. Co., 2 Woods, 542; Addison v. Lewis, 75 Va. 701, 713, 714.

[33] Ibid.

[34] Hale v. Frost, 99 U. S. 389, 25 L. ed. 419.

[35] Atkins v. Petersburg R. Co., 3 Hughes, 307.

[36] Farmers' L. & Tr. Co. v. Kansas City, W. & N. R. Co., 53 Fed. 182, 184.

not lose his preference by taking notes of the railroad company for several months;[37] nor by renewing the notes after the receiver's appointment;[38] nor by reducing his claim to judgment, even though the judgment is entered pending the receivership in a suit begun previously,[39] but it was held that he waived his preference by filing under the State statute after the receiver's appointment a notice of a mechanic's lien.[40] The delivery by the mortgagor of a voucher for the payment of the claim does not give the owner thereof a preference, although it expended the money represented by the voucher for charges that might have been preferred,[41] nor does an attachment obtained after a mortgage had been executed but before the bonds thereunder had been issued;[42] nor recovery of a judgment after a receivership.[43] In the allowance of interest upon preferred claims, it has been held that the decisions of the State court need not be followed, although they would be binding in actions at common law.[44] It seems that interest will be allowed when stipulated for in the contract;[45] but it has been held that when it is not stipulated for by contract, nor expressly authorized by statute, it cannot be allowed during the delay necessary for the settlement of the receivership.[46] An assignee of a preferred

[37] Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 286, 44 L. ed. 458, 471; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Central T. R. Co. v. Texas & St. L. Ry. Co., 23 Fed. 703. Preferences were refused where notes were originally taken for six months, with the right of renewal for the same term, and the payment had been extended for more than five years, Lackawanna L. & C. Co. v. Farmers' L. & T. Co., 176 U. S. 298, 317, 44 L. ed. 475, 484; and where the notes were endorsed by a third party upon whose credit the money or supplies were advanced. Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 93 Fed. 532.

[38] Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596.

[39] Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269.

[40] State Trust Co. v. Kansas City, P. & G. R. Co., 129 Fed. 455.

[41] First Trust & Savings Bank v. Southern Indiana Ry. Co., 195 Fed. 330.

[42] *Re* Sunflower State Refining Co., 183 Fed. 834.

[43] Mercantile Tr. Co. v. So. State L. & Tr. Co., 86 Fed. 711; Williams v. Groat, 73 Fed. 59.

[44] Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 778.

[45] Hitner v. Diamond State Steel Co., 176 Fed. 384; Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289. See Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

[46] Tredegar Co. v. Seaboard Air

claim has all the rights of his assignor;[47] but usually a guarantor who pays a debt has no more right to a preference than the original creditor.[48] A purchaser under a decree which provides for the payment of preferred claims cannot contest their right to a preference;[49] and upon their payment he is not entitled to be subrogated to the rights of the claimants.[50] Where payment had been made on account of advances, some of which were entitled to a preference and some not, it was held that in the absence of a prior application by the parties, the mortgagee could procure their application upon the preferred claims.[51] It has been held that pending a receivership in a Federal court, where parties are entitled to a lien, and can secure it by proceedings under a State statute, they are not

Line Ry., C. C. A., 183 Fed. 289. There, the receivership was prayed by the insolvent, but a cross-bill asking similar relief was filed by a trustee.

[47] Union Tr. Co. v. Walker, 107 U. S. 596, 27 L. ed. 490; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193. Where, before the appointment of a receiver, a bondholder accepted a compromise which scaled down the indebtedness; in pursuance thereof surrendered his bonds, under an agreement to receive in exchange new bonds secured by a subsequent mortgage; and did receive enough to replace the greater part of those which he surrendered; but there were a few for which no new bonds issued.—apparently because none were engraved for so small an amount:—it was held that his unadjusted claim for this balance remained secured by the old mortgage, and was superior to those under the subsequent mortgage given to secure the new bonds. Blair v. St. Louis, H. & K. Ry. Co., 23 Fed. 524. But where rails had been sold to an individual upon his own credit for the use of the railroad by its lessee, a preference against the interest of the lessor was denied. Rhulender v. Ches., O. & S. W. R. Co., C. C. A., 91 Fed. 5. For a case where it was held that a party who paid a preferred claim became an equitable assignee of the preference, see Kneeland v. Luce, 141 U. S. 491, 35 L. ed. 830. For one where it was held that he did not, see U. S. Tr. Co. v. Western C. Co., C. C. A., 81 Fed. 454.

[48] Farmers' L. & Tr. Co. v. Stuttgart & A. R. Co., 92 Fed. 246; Blair v. St. Louis, H. & K. Ry. Co. (Norton, Intervenor), 23 Fed. 523. But see Union Tr. Co. v. Morrison, 125 U. S. 591, 31 L. ed. 825.

[49] Swann v. Wright's Ex'r, 110 U. S. 590, 28 L. ed. 252; St. Louis S. W. Ry. Co. v. Stark, 55 Fed. 758; *infra*, § 394; Laughlin v. U. S. Rolling Stock Co., 64 Fed. 25.

[50] Morgan's L. & T. R. & S. S. Co. v. Moran, 91 Fed. 22.

[51] Illinois T. & S. Bank v. Ottumwa El. Ry. Co., 89 Fed. 235.

required to go to the expense of such proceedings, but the Federal court will act as though all needful steps had been taken to establish the lien;[52] and that "where like demands are presented from other States in which no statutory lien therefor exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis."[53] The right to a preference may be lost by laches;[54] but it need not be asserted when the claim is first proved.[55] Laches, during which preferential claims have arisen, may deprive a general creditor of his right to compel a receiver in a foreclosure suit to surrender property not covered by the mortgage.[56] In one case, a preference was denied, when a majority of the creditors of the same class had waived their right to the same.[57] It was held that intervening petitions filed by judgment creditors, after the appointment of a receiver under a creditor's bill, operated as equitable levies and created equitable liens for the satisfaction of the same out of the income and property of the corporation from the date of their filing, subject to prior liens and superior equities;[58] and that where a foreclosure suit had been begun, subject to the appointment of such receiver, a mortgagee could properly assert its right to possession by intervention in the receivership, and that such intervention gave it a prior right to the income earned by the receiver over subsequent intervening judgment creditors, whose judgments were obtained after the receiver was appointed, when the mortgage covered all the defendant's property and income, although the existing receivership had not been formally extended for the benefit of the mortgagee prior to the judgment creditor's interven-

[52] Brewer, J., in Central Tr. Co. v. Texas, & St. L. Ry. Co., 23 Fed. 673, 674, 675; Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861; Commonwealth Roofing Co. v. North Am. Tr. Co., C. C. A., 135 Fed. 984. But see Hassall v. Wilcox, 130 U. S. 493, 32 L. ed. 1001.

[53] Treat, J., in Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862.

[54] Lockport Felt Co. v. United Box Board & Paper Co., 189 Fed. 767; First Trust & Savings Bank v. Southern Indiana Ry. Co., 195 Fed. 330, where a sale had taken place.

[55] Pennsylvania Steel Co. v. N. Y. City Ry. Co., 187 Fed. 287.

[56] State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

[57] Empire State Surety Co. v. Carroll County, C. C. A., 194 Fed. 593.

[58] Atlanite Tr. Co. v. Dana, C. C. A., 128 Fed. 209

tion.[59] A claimant to a preference of a class for which no provision has been made by a previous order or decree cannot regularly apply upon a motion, but he should plead his claim in a petition for an intervention,[60] or perhaps in a bill.[61] It has been held that an averment, that when an action had occurred the railroad was being operated by a company acting as the agent of the bondholders, was a conclusion of law too vague and general to show with sufficient certainty that it was well founded;[62] that an averment, upon information and belief, that within twelve or eighteen months before the complainant's bill was filed there had been a diversion of a gas company's earnings to the payment of interest on its mortgage bonds and for the improvement of the plant, which failed to allege the dates or amounts of such diversion or that they occurred within the time when the indebtedness to the complainant arose, was insufficient because of its lack of certainty;[63] but that, where the pleader avers the receipt by the receiver of earnings properly applicable to his claim, he need not allege that such earnings had not been disbursed, since such fact, if it existed, was a matter of defense.[64] The attorneys of both the receiver and the complainant should have notice of the hearing of such claim before a master.[65] An application for a preference may be denied with leave to renew until other claims to preferences have been decided and the determination of litigation which may increase the assets.[66] An entry upon the books of the mortgagor showing the claim to be good is, in the absence of suspicious circumstances, *prima facie* proof.[67] An order granting a preference may be set aside at any time before the final decree.[68] The consent of

[59] Atlantic Tr. Co. v. Dana, C. C. A., 128 Fed. 209.

[60] Grand Trunk Ry. Co. v. Central Vt. R. Co., 91 Fed. 561.

[61] Louisville & N. R. Co. v. Memphis G. L. Co., C. C. A., 125 Fed. 97.

[62] Veatch v. Am. L. & Tr. Co., C. C. A., 79 Fed. 471.

[63] Louisville & N. R. Co. v. Memphis Gas Light Co., C. C. A., 125 Fed. 97.

[64] Veatch v. Am. L. & T. Co., C. C. A., 84 Fed. 274.

[65] Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862.

[66] Pennsylvania Steel Co. v. New York City Ry. Co., 182 Fed. 155.

[67] Blair v. St. Louis, H. & K. R. Co., 19 Fed. 861, 862, Treat, J.; s. c., 22 Fed. 471, 472, Brewer, J.

[68] Atchison T. & S. F. Ry. Co. v. Osborn, C. C. A., 148 Fed. 606.

the receiver cannot prevent any creditor who is a party to the record from taking an appeal from an order granting a preference to another.[69] An order directing a receiver to carry out his corporation's contracts does not necessarily give those who claim damages for a breach of those contracts a preference over lien-holders.[70] Where a receiver was appointed because the taxes upon the mortgaged premises were unpaid, there being no proof then of any other danger to the security of the mortgagee and the mortgage not covering the rents; it was held that, after payment of such taxes and the expense of the receivership, the balance of the rents collected by him must be paid to the owner of the equity of redemption although a foreclosure sale had meanwhile taken place and resulted in a deficiency.[71] Whether this doctrine applies to the foreclosure of any mortgage except those made by railway, telegraph, or other companies to which are delegated the right of eminent domain or which are engaged in public service, is very doubtful.[72] It applies to a mortgage made by an electric light company.[73] It has been extended to a receivership of a mine.[74]

§ 306. Property over which receivers may be appointed. A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, which can be seized by execution at law or which constitutes equitable assets.[1] Thus receivers have

[69] Empire State Surety Co. v. Carroll County, C. C. A., 194 Fed. 593.

[70] Olyphant v. St. Louis O. & S. Co., 28 Fed. 729.

[71] So. Building & L. Ass'n v. Carey, C. C. A., 114 Fed. 288.

[72] Wood v. Guarantee Tr. & S. D. Co., 128 U. S. 416, 32 L. ed. 472; Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Reyburn v. Consumers' Gas, F. & L. Co., 29 Fed. 561; Seventh Nat. Bank v.e Shenandoah Iron Co., 35 Fed. 436; Fidelity I. & S. D. Co. v. Shenandoah Iron Co., 42 Fed. 372; U. S. Investing Corporation v. Portland Hospital, 40 Or. 523, 67 Pac. 194, 56 L.R.A. 627.

[73] Illinois Tr. & Sav. Bank v. Ottumwa El. Ry. Co., 89 Fed. 235.

[74] Reinhart v. Augusta M. & I. Co., 94 Fed. 901. But see Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co., 42 Fed. 372.

§ 306. [1] Davis v. Gray, 16 Wall. 203, 217, 21 L. ed. 447, 452; Davis v. Duke of Marlborough, 2 Swanst. 108, 127; Blanchard v. Cawthorne, 4 Sim. 566. See Palmer v. Vaughan, 3 Swanst. 173; Meriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200.

been appointed to collect and hold the profits of a rectory,[2] of a college fellowship,[3] of a patent for an invention,[4] of the offices of a master forester in a royal forest,[5] and of a county clerk of peace;[6] of the tolls of a turnpike;[7] to manage and collect the profits of mines,[8] plantations,[9] a theatre,[10] a newspaper,[11] a hotel,[12] a ship,[13] a line of telegraph,[14] a wireless telegraph system,[14a] and a railroad;[15] to exercise the right to sell a conditional right of membership in an exchange;[16] to exercise options to buy land;[17] and to take possession of the estate of an intestate with pow-

2 Silver v. Bishop of Norwich, 3 Swanst. 112; White v. Bishop of Peterborough, 3 Swanst. 109.

3 Feistel v. King's College, 10 Beav. 491.

4 Parkhurst v. Kinsman, 2 Blatchf. 78. See *supra*, § 303.

5 Blanchard v. Cawthorne, 4 Sim. 566.

6 Palmer v. Vaughan, 3 Swanst. 173.

7 Knapp v. Williams, 4 Ves. 430, note; Dumville v. Ashbrooke, 3 Russ. 98, note.

8 Jefferys v. Smith, 1 J. & W. 298.

9 Morris v. Elme, 1 Ves. Jr. 139.

10 Const v. Harris, T. & R. 496, 528.

11 Chaplin v. Young, 6 L. T. (N. S.) 97; Kelley v. Hutton, 17 W. R. 425.

12 Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456; Cater v. Woodbury, 3 App. D. C. 60.

13 Cronenwett v. Boston & A. Tr. Co., 95 Fed. 52. In this case the receiver, who had been appointed under a creditor's bill against an insolvent corporation, was directed to distribute the insurance money after the vessel's loss in accordance with the priorities that would be recognized by a court of admiralty.

14 United L. Tel. Co. v. Boston S. D. & T. Co., 147 U. S. 431, 37 L. ed. 231.

14a Williams v. United Wireless Tel. Co., N. Y. Sup. Ct. June 20th, 1911, Cohalan, J., in which the author was counsel.

15 Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692; Davis v. Gray, 16 Wall. 203; 21 L. ed. 447; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; *infra*, § 308. Before the passage of a statute allowing it to be done, the English court held that a receiver could not be appointed to manage a railroad, Gardner v. London, C. & D. Ry. Co., L. R. 2 Ch. App. 201; but such an appointment is authorized without statutory authority in this country, and even in England a receiver might always be appointed to receive the tolls of a railroad. Hopkins v. W. & B. C. Co., L. R. 6 Eq. 437; Jones on Railroad Securities, § 456. A lugubrious picture of the result of such appointments was drawn by Miller, J., in Barton v. Barbour, 104 U. S. 126, 137, 138. See also the language of the Governor of Texas quoted in Mercantile Tr. Co. v. Texas & P. Ry. Co., 51 Fed. 529, 533, 537.

16 Powell v. Waldron, 89 N. Y. 328; In re Ketchum, 1 Fed. 840; In re Werder, 15 Fed. 789; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Platt v. Jones, 96 N. Y. 24.

17 Twin City Power Co. v. Barrett, C. C. A., 126 Fed. 302.

er to apply for letters of administration.[18] After the repeal of the charter of the city of Memphis, a receiver was appointed to take possession of all its property which could be subjected to the payment of its debts.[19] But the Supreme Court refused to direct such a receiver to levy taxes,[20] or to collect those already levied.[21] Where an order appointing a receiver of a railroad company directed that "all the books, vouchers and papers touching the operation of the railroad," and "all and every part of the properties, interest, effects, moneys, receipts, earnings" of the railroad, should be delivered to the receiver, it was held, that the order included the company's seal and all records of its past transactions and books relating to its previous history.[22] A receiver of a corporation is entitled to

18 Re Mayer, L. R. 3 P. & D. 39.

19 Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197.

20 "1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn. 2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted. 3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. 4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief." Chief Justice Waite in Merriwether v. Garrett, 102 U. S. 472, 501, 26 L. ed. 197, 200. Upon the first three propositions the court was unanimous. The fourth was decided by a majority only. See a criticism of this case by Judge Baxter, in Garrett v. Memphis, 5 Fed. 860.

21 Thompson v. Allen County, 115 U. S. 550, 558, 29 L. ed. 472, 475.

22 American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 52 Fed 937.

remittances by its officers to its general account received by a bank subsequent to his appointment and the bank can assert no lien against the same.[23] The receiver appointed in a suit to foreclose a railway mortgage has no right to collect or retain moneys earned by the railroad before his appointment, although paid subsequently to such appointment; where the mortgage contains a clause allowing the mortgagor to remain in possession and collect and use its revenues before default, and the receiver does not represent judgment creditors.[24] A court has power to appoint a receiver of the property of a foreign corporation within the State.[25] Where obedience to its decree can be compelled by process against the person of a defendant, it seems that a court of equity may appoint a receiver of property, real or personal, situated beyond its territorial jurisdiction.[26] The Judicial Code provides.[27] "Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing

23 Horn v. Pere Marquette R. Co., 151 Fed. 626, 627.

24 Hook v. Bosworth, 64 Fed. 443, 449.

25 De Bemer v. Drew, 57 Barb. 438; Murray v. Vanderbilt, 39 Barb. 140; Barclay v. Quicksilver Min. Co., 9 Abb. Pr., N. S., 283. See, also, s. c., 6 Lans. 25; Redmond v. Hoge, 3 Hun (N. Y.) 171; Popper v. Supreme Council, 61 App. Div. (N. Y.) 405; Rousens v. Manufacturing & Selling Co., 99 App. Div. (N. Y.) 214.

26 Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96; Stewart v. Laberee, C. C. A., 185 Fed. 471. The English Court of Chancery has appointed receivers of property in India, Logan v. Prince of Coorg, Seton on Decrees, 5th ed., 681; Keys v. Keys, 1 Beav. 425; China, Houlditch v. Donegal, 8 Bligh N. S. 301; Italy, Hinton v. Galli, 24 L. J. Ch. 121; New South Wales, Underwood v. Frost, Seton on Decrees, 5th ed., 681; Canada, Tyler v. Tyler, Seton on Decrees, 5th ed., 682; the West Indies, Bunbury v. Bunbury, 1 Beav. 318, 331.

27 Jud. Code, § 36, 36 St. at L. 1087.

and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be." Otherwise, in the absence of a statute vesting the assets of the corporation in him, it is doubtful whether a receiver appointed by a court of the defendant's domicile has any power over assets in another State.[28]

§ 307. Powers of receivers in general. The powers of a receiver, in the absence of any special authority given in the order for his appointment, are very limited. He can take possession of the property which he is appointed to receive.[1] If any of it is land under lease, he can accept attornment and payment of rent and arrears of rent from the tenants.[2] He can give notice to quit to tenants from year to year;[3] and in States where the remedy by distress still exists, he may distrain for rents not more than one year in arrear.[4] He may also pay out small sums of money in customary repairs of the property which he holds in trust,[5] and insure it against fire.[6] Beyond

[28] Keatley v. Furey, 226 U. S. 399, 403, 404, 57 L. ed. —; Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147, 148, 149.

§ 307. [1] Daniell's Ch. Pr. (2d Am. ed.) 1987, 1988.

[2] Codrington v. Johnstone, 1 Beav. 520; McDonnell v. White, 11 H. L. C. 570.

[3] Doe v. Reed, 12 East, 57, 59.

[4] Pitt v. Snowden, 3 Atk. 750; Brandon v. Brandon, 5 Madd. 473; Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452.

[5] Atty. Gen. v. Vigor, 11 Ves. 563; Daniell's Ch. Pr. (2d Am. ed.) 1990.

[6] Thompson v. Phœnix Ins. Co., 136 U. S. 287, 293, 294, 34 L. ed. 408, 411, 412; Brown v. Hazlehurst, 54 Md. 26, 28

this, he can do nothing without express authority of the court.[7] He cannot sue to recover debts or other property belonging to the estate,[8] nor even, it seems, defend suits or actions brought against him,[9] nor spend any money whatever which belongs to the estate, except such very small sums as are above referred to,[10] without an order authorizing him to do so, made at or subsequent to his appointment. If, however, he does any of these things without leave and the Court determines that the money thus expended has been beneficial to the estate, his expenditures for that purpose may be allowed him.[11] Otherwise, he must make good all loss thereby occasioned.[12] It seems that an unauthorized contract made by him with a stranger may be ratified by an order of the court made before the stranger has given notice of his intention to abandon it.[13] A fire insurance company which has received a premium from a receiver cannot in an action on the policy dispute his authority to insure the property;[14] but it has been held that the holder of a note assigned to him by receivers after it was due, could not recover its amount unless he proved that the court had authorized the assignment.[15] It seems that an order giving a receiver authority to sell carries with it authority to execute and deliver to the purchaser a deed;[16] but if not, a subsequent confirmation by the court of a sale irregularly made validates from that time a deed previously executed by the receiver.[17] It has been said: that "a purchaser under a

7 Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

8 Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., Brown. Ch. C. 88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

9 Swaby v. Dickon, 5 Sim. 629.

10 Atty. Gen. v. Vigor, 11 Ves. 563.

11 Tempest v. Ord, 2 Meriv. 55; Blunt v. Clitherow, 6 Ves. 799; Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294, 34 L. ed. 408 412.

12 Atty. Gen. v. Vigor, 11 Ves., 563.

13 Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465; Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639. *Cf.* Girard L. A. & Tr. Co. v. Cooper, 51 Fed. 332.

14 Thompson v. Phœnix Ins. Co., 136 U. S. 287, 294, 295, 34 L. ed. 408, 412.

15 The Clara A. M'Intyre, 94 Fed. 552.

16 Koontz v. Northern Bank, 16 Wall. 196, 201, 21 L. ed. 465, 468.

17 Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465.

deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was authorized by the courts to sell the property; that a sale was made under such authority, that the sale was confirmed by the court; and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by an order o fthe court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process."[18] The court may authorize a receiver to complete the comstruction of a railroad,[19] or other public work,[20] under a contract with the person over whose estate he was appointed, and to continue for a limited time the defendant's business.[21] He may be authorized to borrow money and to issue as security receiver's certificates for that purpose.[22] An order authorizing a receiver to make a contract is construed strictly in favor of the estate.[23]

[18] Mr. Justice Field in Koontz v. Northern Bank, 16 Wall. 196, 202, 21 L. ed. 465, 468.

[19] Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639; La Crosse Railroad Bridge, 2 Dillon, 465.

[20] Patterson v. Patterson, 182 Fed. 952. The receiver of a water company may be authorized to increase his charges for water when they are not limited by statute or ordinance. C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348 When he furnished water to a city for the use of the fire department, without a contract as to the price, it was *held* that he should be paid a fair compensation for the service, a just proportion of the operating expenses, taxes and costs of administration, and of a just and reasonable return on the cost of reproducing the plant and its growing value. Ibid.

[21] Gay v. Hudson River El. Power Co., 173 Fed. 1003. Where authority was given to contract to supply electrical power for a term of five years. An order directing the receiver of a hotel to carry on and manage the business of the hotel as previously carried on, was held to authorize him to incur the customary debts in carrying on that business. Cate v. Woodbury, 3 App. D. C. 60; s. c., Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

[22] Kennedy v. St. Paul & P. Ry. Co., 2 Dillon, 448.

[23] Farmers' L. & T. R. Co. v. Lo-

After the execution of a contract has been authorized by the court, the order will not ordinarily be revoked except in case of fraud.[24] A receiver cannot accomplish by estoppel or waiver what he has no power to do directly.[25] Without authority from the court a receiver cannot by receipt of rent or otherwise bind the parties or a subsequent purchaser to recognize a lease.[26] The court may, however, either in the original order of appointment or subsequently, give a receiver very extensive powers. It is usual in the order appointing a receiver to give him power to bring and defend suits or actions affecting the estate. Other and much more extensive authority, such as to borrow money needed for the proper administration of his trust, and issue as security therefor certificates giving their owner a first lien upon the estate;[27] to contract for the construction of a bridge;[28] to levy an assesment upon stockholders;[29] to pay a faithful and deserving employee his wages during the time that he is kept from work by the result of an injury received while at work for the receiver, without contributory negligence, but for which the receiver is not responsible;[30] and in Ireland, to spend money in relieving and giving employment to poor tenants, for the reason that they may be enabled in the future to pay their rent more regularly,[31] have been given to receivers. The order appointing a receiver of land usually contains a clause em-

gansport, C. & S. W. Ry. Co., 4 Fed. 184.

[24] Wabash, St. L. & P. Ry. Co. v. Central Trust Co., 22 Fed. 269. But see Weeks v. Weeks, 106 N. Y. 626.

[25] Van Dyck v. McQuade, 85 N. Y. 616; Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 659. But see Central Tr. Co. v. Ohio Central R. Co., 23 Fed. 306; Armstrong v. Armstrong, L. R. 12 Eq. 614; Koontz v. Northern Bank, 16 Wall. 196, 21 L. ed. 465; Stanton v. Ala. & C. R. Co., 31 Fed. 585.

[26] Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co., 44 Fed. 653, 659.

[27] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; *infra*, § 309.

An order authorizing a receiver to borrow money to expend in building an unfinished portion of a railroad does not authorize him to contract for municipal aid in such construction. Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

[28] La Crosse Railroad Bridge, 2 Dill. 465.

[29] Kirkpatrick v. Am. Alkali Co., 135 Fed. 230.

[30] Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 33 Fed. 701; s. c., Blaener, Intervenor, 41 Fed. 319, limited by Thomas v. East Tenn., V. & G. Ry. Co., 60 Fed. 7. But see Hoyt v. Thompson, 5 N. Y. 320.

[31] Jackson v. Jackson, 2 Hogan, 238.

powering him to set and let the same.[32] Even with this, it seems that without special authority he cannot let any part thereof so as to bind the estate for a longer period of time than is authorized by the Statute of Frauds,[33] but that a lease made for a longer time would bind a tenant who had accepted it.[34] It is the safer practice for the receiver not to employ a rent collector until he has authority from the court.[35] Where the board of directors may assess the stockholders, the receiver may be empowered to do the same.[36] It is doubtful whether a receiver has the right to use a patent under a license given the person over whose estate he was appointed.[37] A receiver of a dissolved corporation may sustain a bill to compel the assignment to him of a patent by the legal owner when the corporation had the equitable title to the same.[38] The court may authorize a receiver of a corporation to make any contract within the corporate powers, provided, at least, that it does not bind the property after the receivership is terminated.[39]

§ 308. Powers of receivers of railroads. Very extensive powers are often granted to the receivers of railroads.[1] And in a carefully considered opinion, Mr. Justice Bradley said: "It may be laid down as a general proposition, that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed

32 Daniell's Ch. Pr. (2d Am. ed.) 1989.

33 Kerr on Receivers (2d Am. ed.), 210, 211.

34 Dancer v. Hastings, 4 Bing. 2; Kerr on Receivers (2d Am. ed.), 211.

35 Peters v. John Kress Brewing Co., N. Y., Sp. Tm., N. Y. Co. Dec. 13, 1905.

36 Maxwell v. Akin, 89 Fed. 178.

37 Compare Montrose v. Mabie, 30 Fed. 234, with Curran v. Craig, 22 Fed. 101.

38 McCulloh v. Association Horlogerie Suisse, 45 Fed. 479.

39 South Carolina & G. R. Co. v. Carolina C. E. & C. Ry. Co., C. C. A., 93 Fed. 543, 553.

§ 308. 1 Davis v. Gray, 16 Wall. 203, 219, 220; Cowdrey v. Railroad Co., 1 Woods, 331, 336. See Railroad Receivers in Federal Courts, by Judge Caldwell, 44 Am. Law Rev. 161.

merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court or to the master appointed in that behalf, for advice and authority in any matter of importance, which may require a considerable outlay of money in lump; and except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet with his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance and obtain his authority for the purchase or improvement proposed."[2] It has been held that the receiver is not obliged to obtain special authority from the court to make contracts for ordinary supplies or accommodations needed for the operation of the railroad; such as equipment, repairs, the use of the round-

[2] Cowdrey v. Railroad Co., 1 Woods, 331, 336. This language has been thus construed in a case in a State court: "This rule, it will be observed, simply prescribes what expenditures, out of the fund in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands belonging to the trust to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them or disregard them entirely. This, in my judgment, is the only safe rule which can be adopted." Van Fleet, V. C., Lehigh Coal & Nav Co. v. Central R. of N. J., 35 N. J. Eq. 426, 429. To a similar effect is Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963.

houses and terminals, and the employment of an agent to solicit business and to contract to transport goods over other lines or by connecting boats;[3] and that such contracts, although subject to review by the court, will not be set aside unless the charges are unreasonable, unusual, or extravagant. The receiver is justified in paying claims for the loss of freight upon proof by the affidavits of the shippers without any application to the court, where that is the usual course of business by railway and express companies.[4] A loan to a receiver whom the court has not authorized to borrow money will be denied priority.[5] A receiver cannot make a permanent traffic agreement without the authority of the court.[6] It has been held that the court has power to authorize the receiver of a railroad company under proceedings for a foreclosure, to ratify a contract previously made by the corporation giving a telegraph company certain privileges upon its road; and that the contract thus ratified will be binding upon purchasers of the railroad at a foreclosure sale;[7] that such a receiver may be authorized to make such expenditures as are necessary to render the operation efficient and to perfect the service, in return for which the franchises were given,[8] complete the construction of a line of railroad, and to borrow money for that purpose,[9] to purchase a lien upon part

[3] No. Pac. Ry. Co. v. Am. Trading Co., 195 U. S. 439, 461, 49 L. ed. 269, 279; South Carolina v. Port Royal & A. Ry. Co., 89 Fed. 565, 572, 574.

[4] Central Tr. Co. v. Colorado Mid. Ry. Co., 89 Fed. 560, 564.

[5] Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 477, 29 L. ed. 963, 978; § 309, *infra*.

[6] Investment Co. of Phila. v. Ohio & N. W. Ry. Co., 4 Fed. 378.

[7] W. U. Tel. Co. v. Atl. & Pac. Tel. Co., 7 Biss. 367.

[8] Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 455. This includes the completion of car houses, which were being rebuilt and enlarged on some of the lines held by the receiver. Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 180 Fed. 704, where it was said that the apportionment of the expense between the different mortgagees should be determined on a final accounting.

[9] Kennedy v. St. P. & P. Ry. Co., 2 Dill. 448; *infra*, § 309. See also Smith v. McCullough, 104 U. S. 25; Allen v. D. & W. R. Co., 3 Woods, 316. In such a case, notice to the lienors should be given. Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786. It has been held that a railroad receiver may be authorized to pledge securities which are the property of the corporation as collateral for a loan, and to incur liability for the expenses of a scheme to refund the corporate indebtedness. Clarke v. Central R. & B. Co., 54 Fed. 556.

of its property, to assume a lease of a connecting railway,[10]

[10] Farmers' L. & Tr. Co. v. Burlington & S. W. Ry. Co., 32 Fed. 805. See also Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 259; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Easton v. Houston & T. C. Ry. Co., 38 Fed. 784. The rules which should regulate a receivership of a consolidated railroad holding leased lines with separate mortgages upon the different branches, as well as a general mortgage upon the whole system, were thus stated in an opinion of Judge Brewer, delivered when denying an application by a receiver of such a system of railroads for leave to reject such leased roads as were unprofitable: "This Wabash road is composed of many subdivisions. While it is a single corporation today, yet into it have passed many corporations and many separate railroad properties. In administering such a consolidated property, the court must look at, not merely the interest of the mortgagee in this general mortgage, or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective incumbrances, and, back of all that, the duty which every railroad corporation owes to the public. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches,—all its parts; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road, as a system, was in operation, a going concern, from one end to the other; as such, discharging its duties as best it could to its various creditors. This court, at the instance of the corporation, and to preserve the integrity of the system, took possession of it by its receivers. It took possession of it as a going concern, and so far as is reasonable and practicable, it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it. With that preface, and calling these separate branches which have passed into this consolidated road, subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgages, we pass orders substantially as follows: The first is one which has already been entered, and we simply emphasize it by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained. 2. Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any part diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receiver's certificates. . . . 3.

even without notice to the mortgagee,[11] and to lease a railway for a fixed term; although, in such a case, a provision for a cancellation of the lease at the option of the court should ordinarily be inserted.[12] Where the lease contains no such clause, the lessee is entitled to compensation for the unexpired term, if, before his lease expires, he is ousted from possession by the court.[13] Receivers for the lessee of a number of connecting street railroads in the same suit under leases from different lessors were authorized to use the income for the entire system for the purpose of operating and maintaining the same as a unit, notwithstanding the provisions of mortgages upon parts

Where a subdivision earns no surplus.—simply pays operating expenses.—no rental or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do. But see Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 180 Fed. 704, 4. Where a subdivision not only earns no surplus but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum." Treat, J., concurring, in Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863, 865–867. In the same case, Judge Woods subsequently rejected a claim to a preference over the mortgage for rents accrued pending a receivership, in a suit in which the mortgagee had been denied the extension of the receivership for his benefit. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 46 Fed. 26. But see Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254; *supra*, § 305. *Cf. infra*, § 321.

[11] Mercantile Tr. Co. v. Mo., K. & T. Ry. Co., 41 Fed. 8, 11, 12.

[12] Farmers' L. & Tr. Co. v. Eaton, C. C. A., 114 Fed. 14.

[13] Ibid.

of the property.[14] It has been held that receivers should not be authorized to lease street railways to a new corporation, with authority to the lessee to issue bonds secured by a mortgage with priority over mortgages previously existing, in order to raise the funds for the improvement of the property, under the direction of a board of engineers representing the city, and not the original owners of the property;[15] but, in the same case the Circuit Court subsequently authorized the receivers to deliver the street railways to the reorganized corporation before the foreclosure sale.[16] Without authority from the court a receiver of a railroad cannot lease offices for a term of four years;[17] nor it seems for any time.[18] Such authority is not included in the grant of power to make all contracts that may be necessary in carrying on the business of the railroad,[19] nor is the lease ratified by the approval of monthly accounts showing payment of rent under the same.[20]

§ 309. Receiver's certificates. Where it is absolutely necessary to raise money for the preservation of the property in his hands, a receiver may be empowered by the court to issue certificates which give their owners a lien upon the property prior to that held by any persons except those whose claims are paramount to the rights of the parties to the suit.[1] Such certificates may have a priority over a vendor's lien upon rails.[2] Such

14 Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., C. C. A., 180 Fed. 648.

15 Merchants' L. & Tr. Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923.

16 Guaranty Tr. Co. v. Chicago Union Traction Co., 158 Fed. 1015.

17 Chicago Deposit Vault Ry. Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819.

18 Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18, 21. The same case considers the proper disbursements of a receiver for hotel bills.

19 Chicago Deposit Vault Ry. Co. v. McNulta, 153 U. S. 554, 38 L. ed. 819.

20 Ibid.

§ 309. 1 Meyer v. Johnston, 53 Ala. 237; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Stanton v. Ala. & C. Ry. Co., 2 Woods, 506; s. c., 31 Fed. 585; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Hoover v. Montclair & G. L. R. Co., 29 N. J. Eq. 4; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 37; Union Tr. Co. v. Illinois Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963. For a case where certain property was exempted from the lien, see Third St. & S. Ry. Co. v. Lewis, 79 Fed. 19.

2 Royal Tr. Co. v. Washburn B. & I. Ry. Co., C. C. A., 120 Fed. 11.

certificates are usually issued only in suits for the foreclosure of railroad or telegraph mortgages, or mortgages of other public corporations, in order to raise money for repairs, or to defray operating expenses,[3] or to discharge claims having an equitable preference to that of the party at whose instance the receiver was appointed,[4] or to restore to the rightful owners so much of the income as the receiver has improperly applied to the foregoing purposes.[5] In a few cases, receivers have been authorized thus to borrow money in order to complete the construction of railroads, and save from forfeiture land grants and municipal subscriptions.[6] Certificates have been issued to pay interest upon a divisional mortgage prior to that to foreclose which the suit was brought. In cases of industrial corporations, which are not engaged in public service, such as mining companies,[8] manufacturing companies,[9] and land and irrigation com-

[3] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117. But see Merchants Loan & Tr. Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923; Gay v. Hudson River El. Power Co., 166 Fed. 771.

[4] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Taylor v. Phila. & R. R. Co., 7 Fed. 377; Skiddy v. Atlantic, M. & O. R. Co., 3 Hughes, 320.

[5] Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 183 Fed. 250; Am. Trust Co. v. Metropolitan S. S. Co., C. C. A., 190 Fed. 113; approved Harv. Law Rev., xxv, 460.

[6] Kennedy v. St. Paul & P. R. Co., 2 Dill. 448; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 294, 295, 27 L. ed. 117, 120, 121. See also Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639. But see Investment Co. v. Ohio & N. W. R. Co., 36 Fed. 48; Merchants' Loan & Trust Co. v. Chicago Rys. Co., C. C. A., 158 Fed. 923; Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786. See Credit Co. v. Arkansas Central R. Co., 15 Fed. 446.

[7] Skiddy v. Atlantic, Miss. & O. R. Co., 3 Hughes, 320, 341. See Am. Trust Co. v. Metropolitan S. S. Co., C. C. A., 190 Fed. 113. *Contra*, Knickerbocker Tr. Co. v. Oneonta, Cooperstown & Richfield Springs Ry. Co., 201 N. Y. 379.

[8] Fidelity I. & S. Co. v. Shenandoah Iron Co., 42 Fed. 372; Farmers' L. & Tr. Co. v. Grape Creek Coal Co., 16 L.R.A. 603, 50 Fed. 481; International Tr. Co. v. Decker Bros., C. C. A., 152 Fed. 78.

[9] Fidelity I. & S. Co. v. Shenandoah Iron Co., 42 Fed. 372; Laughlin v. U. S. Rolling Stock Co., 64 Fed. 25; Newton v. Eagle & P. Mfg. Co., 76 Fed. 418; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193. See Conklin v. U. S. Shipbuilding Co., 123 Fed. 913. See High on Receivers, (4th ed.) § 312b.

panies,[10] the court has no power to issue receivers' certificates to displace mortgage liens without the consent of the mortgagee, except to provide for the necessary expenditures incident to the administration of the assets, and the preservation of the property from deterioration, pending the winding up of the business and a settlement of the receivership. It has been held that such a receiver has no power, for the purpose of completing an unfinished building, to borrow money by means of certificates, which have priority over a pre-existing mortgage.[11] Where the net earnings of a railroad are sufficient to defray current expenses, the court will not authorize the issue of receiver's certificates merely for the sake of paying interest upon the mortgage under foreclosure.[12] It has been said to be doubtful whether the court has the power to authorize a receiver to issue car-trust certificates secured by a lien upon the cars which are thus bought, and payable in ten annual installments.[13] An order authorizing the issue of receiver's certificates to pay "wages and freights due and to become due" does not authorize the issue of a certificate to pay money advanced to pay wages by honoring "store orders."[14] The power of courts of equity to issue receiver's certificates is of modern origin,[15] has been severly criticized,[16] and should be exercised with great reluctance.[17] Without leave from the court, a receiver has no power

10 Hanna v. State Tr. Co., C. C. A., 30 L.R.A. 201, 70 Fed. 2; Farmers' Loan & Tr. Co. v. Burbank Power & Water Co., 196 Fed 539.

11 Raht v. Attrill, 106 N. Y. 423, 60 Am. Rep. 456. See U. S. Investing Corp. v. Portland Hospital (Oregon, 1902), 67 Pac. 194, 56 L.R.A. 627. See Baltimore Building & Loan Ass'n v. Alderson, C. C. A., 90 Fed. 142, 32 C. C. A. 542.

12 Taylor v. Phila. & R. R. Co., 9 Fed. 1.

13 Ibid.

14 Fidelity Ins. & S. D. Co. v. Shenandoah I. Co., 42 Fed. 372, 377.

15 The first case seems to have been Meyer v. Johnson (1875), 53 Ala. 237; Coe v. N. J. Mid. Ry. Co., 27 N. J. Eq. 37; Hoover v. Montclair & G. L. Ry. Co., 29 N. J. Eq. 4; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895.

16 Barton v. Barbour, 104 U. S. 126, 138, 26 L. ed. 672, 678; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 46. See the Court Management of Railroads, by Hon. S. D. Thompson, 27 Am. Law Rev. 481.

17 Wallace v. Loomis, 97 U. S. 146, 163, 24 L. ed. 895, 901; Shaw v. Railroad Co., 100 U. S. 605, 612, 25 L. ed. 757, 759; Taylor v. Phila. & R. R. Co., 9 Fed. 1; Credit Co. of London v. Arkansas Cent. R. Co., 15 Fed. 46; Street v. Md. Cent. Ry. Co., 59 Fed. 25.

to pledge the trust estate, nor to make a contract for a loan of money which will bind the estate,[18] or even bind the proposed lender.[19] An order for the issue of receiver's certificates is usually granted only upon notice to all parties in interest.[20] Those who have not received notice may move to set aside the order and to cancel the certificates, if they act as soon as they learn what was done.[21] The order, although *ex parte*, remains in force till set aside; and is not revoked by a reference to determine all claims against the receiver, and a confirmation of a report thereat making no mention of the certificates, when it appears that they were not presented or considered at the reference, and that their holder had no notice of the reference.[22] A very short delay after knowledge that such an order has been grated will estop a party from objecting to the validity of certificates issued in pursuance of it,[23] and from claiming that

[18] Union Tr. Co. v. Ill. Mid. Ry. Co., 117 U. S. 434, 29 L. ed. 963; Cent. Tr. Co. v. Cincinnati, J. & M. Ry. Co., 58 Fed. 500; § 308, *supra*. The court may ratify the loan after it has been made. Elk Fork O. & G. Co. v. Foster, C. C. A., 99 Fed. 495; Ibid., 90 Fed. 767.

[19] Smith v. McCullough, 104 U. S. 25, 29, 26 L. ed. 637, 639.

[20] Bibber-White Co. v. White River Val. El. R. Co., C. C. A., 115 Fed. 786; Union Tr. Co. v. Southern Sawmills & Lumber Co., C. C. A., 166 Fed. 193; Illinois Steel Co. v. Ramsey, C. C. A., 176 Fed. 853, 866; Knickerbocker Tr. Co. v. Oneonta, Cooperstown & Richfield Springs Ry. Co., 201 N. Y. 379.

[21] Ex parte Mitchell, 12 S. C. 83. But see Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 297, 298, 27 L. ed. 117, 121, 122.

[22] Hervey v. Ill. Mid. Ry. Co., 28 Fed. 169. *Cf.* Central T. R. Co. v. Sheffield & B. C. I. & Ry. Co., 44 Fed. 526. Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874.

[23] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Union Tr. Co. v. Ill. Midland Ry. Co., 117 U. S. 434, 29 L. ed. 963; Central Tr. Co. v. Marietta & N. G. R. Co., C. C. A., 75 Fed. 193; s. c., 75 Fed. 209; Berwind-White Coal Min. Co. v. Metropolitan S. S. Co., 183 Fed. 250. It was held that notice of an application for receiver's certificates given to a trustee of a mortgage who was not a party to a suit did not make them, when issued, prior to his mortgage. Farmers' L. & Tr. Co. v. Centralia & C. R. Co., C. C. A., 96 Fed. 636; and that a bondholders' committee empowered to act in matters requisite or necessary for the enforcement and protection of the legal rights of the holders of mortgage bonds had no authority to consent in their behalf to the issue of receiver's certificates with a priority over the mortgage, in order to pay claims not entitled to a preference. Ibid. See Fordyce v. Omaha, Kansas City v. E. R. R., 145 Fed. 544, 556.

property is not subject to the lien of such certificates.[24] Receiver's certificates are assignable, but not negotiable.[25] "Receivers' certificates, being merely evidences of indebtedness, can have no higher character than the debts of which they are the representatives."[26] "The receivers' certificate is defined within the corners of the court's order, aided, in interpretation, somewhat by the petition on which issued and such other documentary evidence as may be relevant."[27] A purchaser of receiver's certificates at par from the receiver without notice of any suspicious facts is not prejudiced by the appropriation of the funds by the receiver for his own use.[28] The court has power to pay out of the fund receivers' certificates in the hands of *bona fide* purchasers, although the receivership is dissolved and the bill dismissed.[29] It has been said that the power to issue them is a personal one which the receiver cannot delegate.[30] The holders of receiver's certificates are bound by all subsequent proceedings in the suit, whether or not the same affect their lien and with or without notice.[31] It was held to be an abuse of discretion for the court to sell property, without

[24] State Tr. Co. v. Kansas City, P. & G. R. Co., 120 Fed. 398.

[25] Union Tr. Co. of N. Y. v. Chicago & L. H. R. Co., 7 Fed. 513; Stanton v. Ala. & C. R. Co., 31 Fed. 585; Turner v. Peoria & S. R. Co., 95 Ill. 134, 35 Am. Rep. 144; Stanton v. Ala. & C. R. Co., 2 Woods, 506; s. c., 31 Fed. 585; Central Nat. Bank v. Hazard, 30 Fed. 484.

[26] Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co., 42 Fed. 372, 377; Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470.

[27] *Re* J. B. & J. M. Cornell Co., 201 Fed. 381, 388.

[28] Mercantile Tr. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874. Where a receiver issued a certificate to a person named therein as payee, for negotiation and sale, and the latter never paid over any money on account of it, a purchaser of the certificate at much less than par, who was unable to prove that the person from whom he bought it had paid anything therefor to the person named as payee, was not allowed to receive anything from the receiver on account of the same. Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. 513. See Stanton v. Ala. & C. R. Co., 31 Fed. 585; s. c., 2 Woods, 506.

[29] El. Supply Co. v. Put-in-Bay W. L. & Ry. Co., 84 Fed. 740.

[30] Union Tr. Co. v. Chicago & L. H. R. Co., 7 Fed. 513. But see Ala. Iron & Ry. Co. v. Armiston L. & Tr. Co., C. C. A., 57 Fed. 25.

[31] Gordon v. Newman, 62 Fed. 686; Mercantile T. Co. v. Kanawha & O. Ry. Co., C. C. A., 58 Fed. 6. But see Sheffield & B. C. I. & Ry. Co. v. Newman, C. C. A., 77 Fed. 787.

first determining questions raised concerning the validity of receivers' certificates;[32] and that such questions should be determined, after taking testimony rather than upon a demurrer.[33] The purchaser at a judicial sale made subject to the payment or receiver's certificates cannot contest their validity,[34] unless his right so to do is reserved. A receiver is personally responsible for a fraudulent statement in a certificate which he issues.[35] In at least one case, the court ordered the receiver to execute a mortgage to secure the receiver's certificates.[36] But, ordinarily, the order for the issue of the certificates provides that they shall constitute a lien upon the property superior to all prior incumbrances, which is sufficient.[37] It has been said that a receiver's certificate payable out of the income is in the nature of a call loan, and that the holder has the right to presume that the receiver will notify him when the loan is to be collected or the money paid.[38] Where the order provides that the certificates shall be a first lien on the property, the lien may be enforced by an independent suit,[39] or by a petition in the suit in which they were issued to the court which ordered their issue,[40] or to a court having territorial jurisdiction over a part of the railroad in an ancillary suit.[41] When the proceeds of the property are insufficient to pay the receiver's certificates in full, those issued to defray the expenses

[32] International Tr. Co. v. Decker Bros., C. C. A., 11 L.R.A.(N.S.) 152, 152 Fed. 78.

[33] Savings & Tr. Co. v. Bear Valley Ir. Co., 112 Fed. 693.

[34] Central Nat. Bank v. Hazard, 30 Fed. 484; Central T. Co. v. Sheffield & B. C. & I. Ry. Co., 44 Fed. 526.

[35] Bank of Montreal v. Thayer, 7 Fed. 622.

[36] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

[37] For a good form of an order and a certificate, see Kennedy v. St. Paul & P. R. Co., 2 Dill. 448. In one case the order simply stated that the certificates should be payable out of the income of the property, and "be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid." Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 298, 27 L. ed. 117, 122.

[38] Sage J., in Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874, 878.

[39] Swann v. Clark, 110 U. S. 602, 28 L. ed. 256. But see *Re* C. M. Burkhalter & Co., 179 Fed. 403.

[40] Mercantile T. Co. v. Kanawha & O. Ry. Co., 50 Fed. 874. See Am. Trust Co. v. Metropolitan S. S. Co., C. C. A., 190 Fed. 113.

[41] Ibid.

of the receivership will be paid before certificates given for preferential debts of the mortgagor,[42] but certificates issued for betterments were not given a priority over the claims for material and supplies furnished to the insolvent within a few months before the receivership;[43] and the lien of certificates issued for the expenses of the receivership was postponed to that for tax liens and mechanics' liens that previously vested, although the mortgagee consented that such certificates should be prior to the mortgage.[44] Where there were two sets of receivers' certificates, the first with the consent of the bondholders made a lien prior to the mortgage, the second issued without such consent and without such a provision; it was held that the second set should be paid subsequent to the mortgage.[45] Where the property was situated outside of the State and judicial district, and lienholders, who were indispensable parties, were citizens of the same State as the complainant; it was held that an order issuing receivers' certificates to complete an unfinished building was void.[46] A receiver appointed in a suit for the foreclosure of a second railroad mortgage may be authorized to issue certificates constituting a prior lien to that of the first mortgage, provided the mortgagor is in default as to that, and the first mortgagee is a party to the suit.[47] An order

42 Bank of Commerce v. Central Coal & Coke Co., C. C. A., 115 Fed. 878. This was so held even when the decree provided that the fund arising from the sale should be applied, after payment of costs and expenses, "to the payment of all interventions or other claims heretofore or hereafter to be allowed . . . as superior to the liens of the bonds . . . or, if the fund realized be not sufficient, to pay the same, then to the payment of the same pro rata."

43 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 455; § 305, *supra*.

44 Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 634.

45 *Re* J. B. & J. M. Cornell Co., 201 Fed. 381, 393. In that bankruptcy case, the order of priority was fixed as follows: (1) All taxes due; (2) cost of administration; (3) claim of the holder of the first series of certificates, which were by their terms a lien prior to the mortgage; (4) claims of bondholders secured by the mortgage; (5) second series of certificates and claims of creditors, who had furnished merchandise to the receivers, which were placed upon an equality; (6) claims for damages for breach of contract; (7) claims for injuries. *Re* J. B. & J. M. Cornell Co., 201 Fed. 381, 393.

46 Baltimore Building & Loan Ass'n v. Alderson, C. C. A., 90 Fed. 142, 32 C. C. A. 542.

47 Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117.

authorizing the issue of receiver's certificates is appealable.[48] A Federal court has no power to enjoin a receiver appointed by a State court from issuing certificates of indebtedness.[49]

§ 310. Advice to receivers. Receivers may apply to the court for instructions and advice, both generally and in particular cases.[1] In every doubtful case, it is the duty of the receiver to apply for the instructions of the court.[2] "If there are parties in interest, and they have their day in court, the advice may be decisive. But if the matter is *ex parte*, the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument."[3] He may be authorized to attend the hearings before a State Public Service Commission.[4] It has been said, that from the nature of things the court cannot determine how many trains a receiver shall run,[5] nor select his employees,[7] although it may regulate his treatment of them,[7] and his contracts with them,[8] and will listen to their complaints of unfair treatment by him.[9] The courts have, at the request of receivers, instructed them what rates to charge,[10] and directed them not to obey so much of a State statute as impaired the obligation of a contract, where the petition for instructions was filed a month before the act

[48] Farmers' L. & T. Co. Petitioner, 129 U. S. 206, 32 L. ed. 656.

[49] Reinach v. Atlantic & G. W. R. Co., 58 Fed. 33.

§ 310. [1] Frank v. Denver & R. G. Ry. Co., 23 Fed. 757; Ex parte Koehler, 23 Fed. 529; Mo. Pac. Ry. Co. v. Tex. & P. Ry. Co., 31 Fed. 862.

[2] Chable v Nicaragua C. C. Co., 59 Fed. 846.

[3] Mo. Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. 862; Jones v. Moore, 198 Fed. 301, an order granting leave to sue.

[4] *Re* Metropolitan St. Ry., 166 Fed. 1006.

[5] Brewer, J., Treat, J., concurring, in Central Tr. Co. v. Wabash St. L. & P. Ry. Co., 23 Fed. 863, 867.

[6] Brewer, J., in Frank v. Denver & R. G. Ry. Co., 23 Fed. 757, 764.

[7] Frank v. Denver & R. G. Ry. Co., 23 Fed. 757, 764; Waterhouse v. Comer, 19 L.R.A. 403, 55 Fed. 149.

[8] Waterhouse v. Comer, 19 L.R.A. 403, 55 Fed. 149; Platt v. Phila. & R. R. Co., 65 Fed. 660. The court refused to permit receivers of a railroad to reduce the wages of the employees and change the terms of their employment without notice to them. Ames v. Union Pac. Ry. Co., 60 Fed. 674. A reduction was allowed in U. S. Tr. Co. v. Omaha & St. L. Ry. Co., 63 Fed. 737.

[9] Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514.

[10] Ex parte Koehler, 23 Fed. 529.

went into operation,[11] and advised a receiver whether he should pay a tax,[12] and authorized them to default in the payment of mortgage interest under a stipulation with the trustees that foreclosure suits be instituted and the receivership extended to them, and that the entry of the decree of foreclosure and sale should then be postponed until time had been afforded for a reorganization.[13] When a railroad was in the hands of a receiver appointed in a suit to foreclose a mortgage, the court refused to entertain a petition by the mortgagee asking for instructions as to the propriety of postponing a meeting of its stockholders, and for permission to postpone the meeting.[14]

§ 311. Litigation by receivers. The causes of action which a receiver can enforce are of two kinds,—those which belong to the estate of which he has charge before it was entrusted to him, and those which have accrued since his appointment. As has been said before, he cannot sue upon either without the leave of the court which appointed him.[1] A suit upon a cause of action which belonged to the estate before his appointment is brought in the name of the legal owner of the estate;[2] unless, as is not uncommon, the order authorizes the receiver to sue in his own name.[3] In the former case, the person whose name is used is indemnified out of the fund for all costs to which he is thereby made liable.[4] Receivers of corporations are usually authorized to sue and defend in the name of the corporation.[5] An order of ancillary appointment, giving the

11 Ibid.

12 Ledoux v. La Bee, 83 Fed. 761.

13 Gay v. Hudson River El. Power Co., C. C. A., 169 Fed. 1020.

14 Taylor v. Phila. & R. R. Co., 7 Fed. 381.

§ 311. 1 Wynne v. Lord Newborough, 1 Ves. Jr. 164; s. c., 3 Brown. Ch. C. 88; Green v. Winter, 1 J. Ch. (N. Y.) 60.

2 Dick v. Struthers, 25 Fed. 103; Dick v. Oil-Well S. Co., 25 Fed. 105; Daniell's Ch. Pr. (2d Am. ed.) 1977. This has been held to be the proper practice before final decree. Bay State Gas Co. v. Rogers, 147 Fed. 557, 559.

3 Davis v. Gray, 16 Wall. 203, 21 L. ed. 447. See Frankle v. Jackson, 30 Fed. 398.

4 Daniell's Ch. Pr. (2d Am. ed.) 1991.

5 Frankle v. Jackson, 30 Fed. 398; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Harland v. B & M. Tel. Co., 33 Fed. 199; Hale v. Hardon, 89 Fed. 283, 287. *Cf.* Wilder v. New Orleans, C. C. A., 87 Fed. 843; Braddock Br. Co. v. Pfaudler V. M. Co., C. C. A., 106 Fed. 604. Unfair trade may be enjoined at the suit of a receiver authorized to carry on a business. Dixon v.

receiver all the powers described in the order appointing him, in the court of primary jurisdiction, which had authorized him to institute actions or suits in any court for the recovery of any estate, property or judgment existing in favor of the corporation, gives him the right to sue in the name of the corporation to recover unlawful profits made by a director of the same.[6] Costs recovered against a receiver in an action brought by him in his official capacity, are entitled upon the distribution of the fund to a priority over claims that existed against it before the receiver's appointment.[7] In the conduct of litigation, as in every other proceeding by him, a receiver is under the constant supervision of the court.[8] He is not bound by a stipulation which is not advantageous to the estate, made by himself or his counsel without the sanction of the court.[9] He cannot waive a defense on the merits.[10] He cannot allow a set-

Dixon, Ch. D. 89 L. T. 272. Harv. L. Rev. XVII. 196.

6 Bay State Gas Co. v. Rogers. 147 Fed. 557.

7 Camp v. Receivers Niagara Bank, 2 Paige (N. Y.), 283; Columbian Ins. Co. v. Stevens. 37 N. Y. 536; Locke v. Covert, 42 Hun (49 N. Y. S. C. R.), 484.

8 Van Dyck v. McQuade. 85 N. Y. 616; McEvers v. Lawrence, Hoff. Ch. (N. Y.) 175.

9 Van Dyck v. McQuade. 85 N. Y. 616; Platt v. Phila. & R. R. Co., 115 Fed. 842. *Cf.* Vance v. Royal C. Mfg. Co., 82 Fed. 251; Central Tr. Co. v. Worcester Cycle Mfg. Co., 114 Fed. 659; where such a stipulation was enforced. A stipulation by the receiver of a corporation, to enter its appearance in a suit brought against it, does not bind him to enter his own appearance as receiver. *Re* Muncie Pulp Co., 151 Fed. 732, 733. In the absence of a seasonable and well founded objection, a stipulation made by receivers of an insolvent corporation binds its creditors. Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.

10 McEvers v. Lawrence, Hoffman Ch. (N. Y.) 172; Keiley v. Dusenbury, 10 J. & S. (N. Y. Super. Ct.) 238; s. c., 77 N. Y. 597; Van Dyck v. McQuade, 85 N. Y. 616. A receiver may waive service of process and an objection to the jurisdiction founded upon residence. Whitcomb v. Hooper, C. C. A., 81 Fed. 946. It was held that a receiver who had removed an action brought against him in a State court could not afterwards object that the Federal court had not acquired jurisdiction; Baggs v. Martin, 179 U. S. 206, 45 L. ed. 155; but that his appearance and filing a motion to quash an attachment in the State court, without leave of the Federal court, did not affect the prior jurisdiction of the Circuit Court of the United States. Memphis Sav. Bank v. Houchens, C. C. A., 115 Fed. 96, 112. A receiver is bound by an admission in the litigation made in good faith by the corporation before his appointment. Perry v.

off not authorized by law.[11] He may be allowed to discontinue without costs an action honestly but erroneously begun by him.[12] The court will not direct its receiver to dismiss an ejectment suit brought by him, except on clear proof that it is impossible for him to succeed.[13] The rights of a receiver are in general no greater than those of the person whose estate he holds.[14] Thus, a receiver of an insolvent corporation appointed in a creditor's suit cannot "enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent," [15] for example a statutory liability of stockholders and creditors.[16] He may sue to collect an unpaid stock subscription,[17] and to set aside a fraudulent transaction, by which stock was cancelled in return for the delivery to the stockholder of the property.[18] "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied." [19] The defendant to an action by the receiver of an insolvent's estate cannot set off claims against the insolvent which have been assigned to him

Godbe, 82 Fed. 141. He is not, however, bound by a promise of his own made before his appointment. Stanton v. Ala. & C. R. Co., 31 Fed. 585.

11 Van Dyck v. McQuade, 85 N. Y. 616. *Cf.* Central Tr. Co. v. Clark, C. C. A., 81 Fed. 269.

12 St. John v. Denison, 9 How. Pr. (N. Y.) 343; Reeder v. Seely, 4 Cowen, 548; Arnoux v. Steinbrenner, 1 Paige (N. Y.), 82.

13 Pakradooni v. Storey Cotton Co., 151 Fed. 607.

14 Jacobson v. Allen, 12 Fed. 454, 457. But see Hart v. Barney & S. Mfg. Co., 7 Fed. 543.

15 Wallace, J., in Jacobson v. Allen, 12 Fed. 454.

16 Jacobson v. Allen, 12 Fed. 454. A complaint in such an action was *held* not to be bad for uncertainty because it did not show whether the suit was based on a statute or upon an agreement made to define a statutory liability. French v. Busch, 189 Fed. 480.

17 Kirkpatrick v. Am. Alkali Co., 135 Fed. 230.

18 Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Aldrich v. Gray, C. C. A., 147 Fed. 453.

19 Andrews, J., in Atty. Gen. v. Guardian M. L. Ins. Co., 77 N. Y. 272, 275. See also Gillet v. Mooly, 3 N. Y. 479, 488; Talmadge v. Pell, 7 N. Y. 328; Whittlesey v. Delaney, 73 N. Y. 571; National T. Co. v. Miller, 33 N. J. Eq. 155, 158; Jacobson v. Allen, 12 Fed. 454, 455.

since the application for the receiver's appointment.[20] Ordinarily, a foreign receiver cannot sue until he has obtained an ancillary appointment;[21] but he may sue in a foreign court, upon a judgment which he has recovered in the court that appointed him;[22] or to recover land conveyed to him as receiver.[23] He can also do so when he has received a voluntary assignment of the assets of the insolvent,[24] or when a statute vests him with the title to the same.[25] In a court that has appointed an ancillary receiver it will be presumed, in the absence of allegations to the contrary, that a suit there instituted is brought in his ancillary capacity.[26] A substituted trustee can, however, sue in a foreign jurisdiction, even though the trial court that appointed him required him to give a bond and to account to itself in the same manner as a receiver.[27] It seems that a receiver appointed by a State court can sue in the Federal court in the same district.[28] A receiver is especially favored in the enforcement of causes of action arising after his appointment. He can, upon motion or petition in the suit wherein he is appointed, obtain injunctions to prevent disobedience to contracts made with him,[29] or prevent interference with property in his possession,[30] whether the person enjoined is a party to the suit or not, even if he be a state officer; for example, a tax collector.[31]

[20] In re Van Allen, 37 Barb. (N. Y.) 225, 231; Van Dyck v. Quade, 85 N. Y. 616; City of Shelbyville, Ky. v. Glover, C. C. A., 184 Fed. 234.

[21] *Supra*, § 93.

[22] Wilkinson v. Culver, 25 Fed. 639.

[23] Oliver v. Clarke, C. C. A., 106 Fed. 402.

[24] Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; Lewis v. Clark, C. C. A., 129 Fed. 570.

[25] Converse v. Mears, 162 Fed. 767; *supra*, § —.

[26] Sullivan v. Sheehan, 89 Fed. 247.

[27] Glenn v. Soule, 22 Fed. 417; Holmes v. Sherwood, 16 Fed. 725; s. c., 3 McCrary, 405. *Cf.* Hale v. Hardon, 89 Fed. 283, 287, 288.

[28] Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815; Hegewich v. Silver, 140 N. Y. 414. But see Olney v. Tanner, 10 Fed. 101.

[29] Walton v. Johnson, 15 Sim. 352.

[30] Angel v. Smith, 9 Ves. 335; Lake Shore & M. S. Ry. Co. v. Felton, C. C. A., 103 Fed. 227. In Brady v. South Shore Traction Co., 197 Fed. 669, an injunction was granted against competition upon municipal car tracks, to use which it had a license that was not exclusive, through the operation of cars, by charging lower fares than those charged by the receivers, when it was claimed that the rival company had no power to use the road.

[31] In re Tyler's Petition, 149 U.

In nearly every case, interference with a receiver in the discharge of his duties is a contempt of court, even when no injunction expressly forbidding it has been issued.[32] For example, striking laborers have been adjudged guilty of contempt for attempting to prevent employees of a receiver of a railroad from working for him.[33] The court will not enjoin the employees of a receiver from a peaceable strike, unaccompanied by violence or intimidation.[34] He can compel, by a summary proceeding in the court that appointed him the deliv-

S. 164, 37 L. ed. 689; Ex parte Chamberlain, 55 Fed. 704; Ex parte Huidekoper, 55 Fed. 709; Ledoux v. La Bee, 83 Fed. 761. A sale for taxes without leave of the court is void. Va. T. & C. Steel & I. Co. v. Bristol Land Co., 88 Fed. 134. A valid tax upon the assets is, it seems, a prior lien after the judicial costs. Ledoux v. La Bee, 83 Fed. 761.

[32] Thompson v. Scott, 4 Dill. 508; Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Royal Tr. Co. v. Washburn B. & I. Ry. Co., 113 Fed. 531; *infra*, § 428.

[33] Secor v. Toledo, P. & W. R. Co., 7 Biss. 513; King v. Ohio & M. Ry. Co., 7 Biss. 529; In re Higgins, 27 Fed. 443. "If the testimony makes it clear that when these parties went in such numbers, and conducted themselves in such a way, that while they simply said, 'Please get off this engine,' or 'We want you to get off this engine,' they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and trainmen that personal prudence compelled them to leave,—why, then the government has made out its case. As my brother Treat said in a similar case, that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass upon facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention." Brewer, J., U. S. v. Kane, 23 Fed. 748, 751, citing In re Doolittle, 23 Fed. 544, 548. And in another case the same judge said: "Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discherge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do, and in so doing obstruct the officers of the court although intending no contempt, that is a very different thing." Brewer, J., In re Doolittle, 23 Fed. 544, 548.

[34] Arthur v. Oakes, C. C. A., 25 L.R.A. 414, 63 Fed. 310; *supra*, § 275. It has been held that ordering the employees of a receiver to strike is a violation of an order of the court directing the re-

ery of money or other property of the estate in the possession of a stranger to the suit, who claims no right to its possession,[35] or who acquired the same subsequent to his appointment; even though the stranger claims a lien thereupon adverse to the receiver.[36] Where a marshal had levied on property previously in the possession of a receiver of a State court, the receiver was allowed to proceed by a rule to take the possession of the same, although the regular practice was an intervention by him.[37] It has been held, however, that the court should not enjoin a stranger to the suit who is a citizen of another State from enforcing legal process in his own State against land there in the possession of the receiver.[38] It has been held that a foreign receiver cannot sue in the name of a corporation in another district, where the object is to remove the funds collected to the court that appointed him fro administration,[39] and a receiver must proceed by an original suit to recover property held by a stranger to the litigation under a claim of title.[40] And he cannot ordinarily maintain a bill in equity when he has an adequate remedy at law.[41] After the appointment of ancillary receivers although no issue has been joined or final decree entered, the court may order the oral examination of a

ceiver to operate a manufacturing plant. U. S. v. Weber, 114 Fed. 950.

35 Miles v. New So. B. & L. Ass'n, 95 Fed. 919.

36 Horn v. Pere Marquette R. Co., 101 Fed. 626.

37 Remington P. Co. v. Louisiana Pr. & Pub. Co., 56 Fed. 287.

38 Schindelholz v. Cullum, C. C. A., 55 Fed. 885.

39 Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Fairview Fluor Spar & Lead Co. v. Ulrich, C. C. A., 192 Fed. 894.

40 Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452; Parker v. Browning, 8 Paige (N. Y.), 388, 35 Am. Dec. 717; Noe v. Gibson, 7 Paige (N. Y.), 513. Or to collect a claim of the corporation. Eau Claire v. Payson, C. C. A., 107 Fed. 557. A receiver cannot by petition in the suit obtain an injunction against unlawful discrimination by a railroad company which is not a party to the suit. Wood v. N. Y. & N. E. R. Co., 61 Fed. 236. Where a receiver took pay for corporate property in stock which he kept himself, crediting his fund with price in cash, held that he could not sue individually for fraudulent representations by the vendor of the stock. Kenedy v. Benson, 54 Fed. 836.

41 Sewerage and Water Board of New Orleans v. Howard, C. C. A., 175 Fed. 555; Robinson v. Mutual Reserve Life Ins. Co., 175 Fed. 629.

person not a party to the suit, who, the receivers and the complainant charge, holds assets of the defendant. Such an application will not be denied because material allegations concerning such property are made upon information and belief; nor because the person whose examination is prayed presents an affidavit positively denying that he holds any property of the defendant. It is better practice to require notice of such an application to be served upon the person whose examination is applied for.[42] Since a proceeding to collect assets of an estate, whether brought *in personam* to recover damages, or *in rem*, as by replevin or ejectment, is ancillary to the principal suit, a receiver appointed by a Federal court can bring a suit for that purpose in the court of his appointment irrespective of the citizenship of the parties or the amount involved.[43] Where a Federal receiver had sued in a State court, which had the power to entertain equitable defenses in actions at law, the Federal court refused to direct him to suspend that action, in order to permit the defendant to prosecute a Federal suit in equity to establish his right to a set off, although the courts of the two jurisdictions held different views as to the right of set off under the facts; but the Federal court stayed the suit before it until the State court had disposed of the action which had been there brought before the defendant sued in equity.[44] He cannot sue out a writ of error from the Supreme Court of the United States to the judgment of a State court, except in a case where that might be done by an individual.[45] He has the right of appeal from an appealable order or decree of a Federal court

[42] Bowker v. Haight & Freese Co., U. S. C. C., S. D. N. Y., June 29, 1905, per Lacombe, J. Roger Foster for receivers cited Foster v. Townshend, 68 N. Y. 203, 208; Ch. III, § 10; Daniell's Ch. Pr., First Am. ed. 1269, 1270; Lord Pelham v. Duchess of New Castle, 3 Swanst. 290, n.; Bird v. Littlehales, 3 Swanst. 300, n.; Dixon v. Smith, 1 Swanst. 457; Anon., 6 Ves. 287; Angel v. Smith, 9 Ves. 336; Brooks v. Greathed, 1 J. & W. 178; Hamlyn v. Lee, cited in Seton on Decrees, 413; Johnes v. Claughton, Jac. 573; Treadwell v. Morrell, Chan. N. Y., Aug. 1829 cited in Hoffman's Ch. Pr. I. 156. See Westlake v. Marrin, 176 Fed. 742, s. c. N. Y. L. J., July 7, 1910; *infra*, § 394.

[43] White v. Ewing, 159 U. S. 36, 40 L. ed. 67; Pope v. Louisville, N. A. & C. R. Co., 173 U. S. 573, 43 L. ed. 814; *supra*, §§ 5, 51.

[44] Frees v. John Shields Const. Co., 145 Fed. 1020.

[45] Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633.

which sustains a claim antagonistic to the rights of both parties to the suit, or antagonistic to the rights of either party; subject to the limitation that he may not question any order or decree which distributes burdens, or apportions rights, or distributes the estate in his hands between the parties, or any clause in the order or decree appointing him, or any order or decree resting in discretion.[46] Permission to appeal at the expense of the estate may be refused to a receiver, when the highest creditor is interested against such an appeal,[47] and where the question involved is doubtful, the court may refuse such permission, unless creditors give security for the expenses of the appeal,[48] and may even require security for the costs of the respondent.[49] He may appeal from an order or decree which affects his personal rights, such as an order which disallows his fees or commissions; but it seems that he cannot appeal from an order which rests in the discretion of the court; for example, an order which discharges or removes him, or directs him in the administration of the estate, as, for example, to issue receiver's certificates or to make improvements.[50] "His right to appeal from an allowance or claim against the estate does not necessarily fail when his receivership is terminated, to the extent of surrendering the property in the possession of the receiver."[51] Upon an appeal in a suit brought by him, in the absence of any Federal question, the jurisdiction is considered as dependent upon the difference of citizenship in the suit in which he was appointed; and the judgment or decree of the Circuit Court of Appeals is final.[52]

[46] Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 186, 187, 43 L. ed. 941, 942, 943.

[47] Cook v. Anderson Food Co. (N. J. Ch.), 55 Atl. 1042.

[48] Gay v. Hudson River El. Power Co., 184 Fed. 631.

[49] Ibid.

[50] Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 189, 43 L. ed. 941, 944. An order directing the receiver of a railroad to construct and maintain gates and other safeguards at the crossing of another road, in accordance with a contract made between two railroad companies, with covenants running with the land, is not a decree for specific performance, but merely an interlocutory order affecting the administration of the estate from which he cannot appeal. Hunt v. Ill. Cent. Co., C. C. A., 96 Fed. 644. But see Felton v. Ackerman, 61 Fed. 225.

[51] Bosworth v. St. Louis T. R. Ass'n, 174 U. S. 182, 189, 43 L. ed. 941, 944.

[52] Pope v. Louisville, N. A. & C.

A receiver is presumed to represent all parties to the suit, and he cannot object because other parties have no notice of an application duly served on him;[53] although, of course, the court may listen to a suggestion of that nature by him. No action by the directors or stockholders of a corporation after the appointment of a receiver can release a claim which it owns,[54] or bind it by a contract.[55]

§ 312. Duties of receivers. A receiver holds the property of which he is given the care in trust for all persons interested therein, whether parties to the suit or not,[1] provided that they do not claim it by a title paramount to his own.[2] His duties, therefore, are substantially those of a trustee, although his powers are usually more limited; and the decisions concerning the duties and liabilities of trustees, executors, administrators, and assignees in bankruptcy and insolvency are often of service in determining those of a receiver.[3] A receiver's first duty after his appointment is to take possession of the property entrusted him by the order, using all the powers therein given him.[4] If any of it is under lease he should notify the tenants of his appointment and demand that they attorn to him.[5] Ordinarily as soon as he has obtained possession of all the estate that consists of personal property he should make an inventory thereof;[6] he should investigate all

Ry. Co., 173 U. S. 573, 43 L. ed. 814.

53 McLeod v. New Albany, C. C. A., 66 Fed. 378. As to the right of a creditor to enforce a cause of action owned by a receiver, see *infra*, § 313.

54 Stewart v. Laberee, C. C. A., 185 Fed. 471.

55 Barker v. Southern Bldg. & Loan Ass'n., 181 Fed. 636.

§ 312. 1 Davis v. Gray, 16 Wall. 203, 217, 218, 21 L. ed. 447, 452; Central T. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 863; Hamilton v. David C. Beggs Co., 171 Fed. 157.

2 Davis v. Duke of Marlborough, 2 Swanst. 108, 118, 137, 138; Georgia v. Atlantic & G. R. Co., 3 Woods, 434.

3 See, for example, Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National T. Co., 82 N. Y. 283.

4 Daniell's Ch. Pr. (2d Am. ed.) 1987.

5 Daniell's Ch. Pr. (2d Am. ed.) 1987.

6 Lewin on Trusts (6th ed., London, 1875), 184; England v. Downs, 6 Beav. 269. *Cf.* Williamson v. Wilson, 1 Bland (Md.), 418, 436. But see Guaranty Tr. Co. v. Met. St. Ry. Co., 168 Fed. 937, aff'd. C. C. A., 177 Fed. 925, quoted *infra*, § 394.

pledges and mortgages of any part of the assets[7] and cause the property in his hands to be insured against fire.[8] All moneys that he receives he should either pay into court or deposit in a bank to the credit of himself as receiver, in a separate account from that for his private deposits.[9] In remitting money from one place to another, he may do so by using the ordinary means, provided that he uses due care.[10] He will be personally liable for all loss to the estate caused by his making any other disposition of the funds collected by him.[11] It is advisable for a receiver to take a receipt for all sums of money exceeding twenty dollars paid out by him. By so doing, and by using such receipts as vouchers, he will have less difficulty in passing his accounts.[12] A receiver should so keep the estate in his hands that it can easily be traced, delivered up, or accounted for.[13] When he is carrying on a mercantile business, he must keep cost sheets, in order that whether he is making a profit or loss may readily be ascertained.[14] He should, at least as often as once a year, account and pay into court all the money which he has received, together with the profits thereof, less all necessary or authorized expenditures, and such compensation as the court allows him.[15] If he receives a considerable sum of money during the interval between the regular times for his accounting, it seems that he should apply to the court for directions concerning its investment;[16] and in general,

7 Wise v. Williams, 162 Fed. 161.

8 Thompson v. Phoenix Ins. Co., 136 U. S. 287, 293, 34 L. ed. 408, 411, per Mr. Justice Harlan.

9 Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Wren v. Kirton, 11 Ves. 377; Hinckley v. Railroad Co., 100 U. S. 153, 157, 25 L. ed. 591, 593. For a case where a receiver was held responsible for money lost by the failure of a bank, see Fikener v. Bott, (Ky.) 47 S. W. 251.

10 Knight v. Lord Plimouth, 3 Atk. 480; s. c., 1 Dickens, 120.

11 Salway v. Salway, 4 Russ. 60; s. c., 2 R. & M. 215; Rowth v. Howell, 3 Ves. 565.

12 Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 501.

13 Williamson v. Wilson, 1 Bland (Md.), 418; Hinckley v. Railroad Co., 100 U. S. 153, 157, 25 L. ed. 591, 593; Atty. Gen. v. North Am. L. I. Co., 89 N. Y. 94, 107, 108.

14 Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

15 Daniell's Ch. Pr. (2d Am. ed.) 1992; Shaw v. Rhodes, 2 Russ. 539. See § 319.

16 Shaw v. Rhodes, 2 Russ. 539; Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 3 Brown Ch. C. 41.

he should apply for instructions whenever any unexpected event occurs of which advantage may be taken for the benefit of the state, or which necessitates active measures to preserve the state from loss.[17] He should pay no creditor of the estate without authority from the court; and even an *ex parte* order authorizing such payment will be no protection to him when granted upon the inaccurate representation that there were sufficient funds to make the payments without detriment to the business.[18] He cannot act inequitably, even for the benefit of the estate;[19] and if money is paid him, which in equity belongs to another, he can be compelled to pay the same to its rightful proprietor.[20] Any profit which he may make from the estate belongs to the finally successful party, or to him to whom the surplus, after the payment of prior demands, is finally directed to be paid.[21] If he uses the property over which he has been appointed in his private business, he must pay the estate for its use;[22] and the same may be charged to be subject to a constructive trust after its transfer by him to one who is not a *bona fide* purchaser.[23] It is his duty to exhibit, to claimants against the fund, all entries in the books of the corporation, which relate to their respective claims.[24] A stockholder who, in good faith, asks for an examination of the books, in order to enable him to determine whether a proposed plan of reorganization is desirable, should be accorded such inspection under proper regulations as to time and circumstance, so as not to interfere either with the transaction of the receiver's duties or with the inspection of other stockholders.[25] "In every

17 Shaw v. Rhodes, 2 Russ. 539; Hicks v. Hicks, 3 Atk. 274; Earl of Lonsdale v. Church, 5 Brown Ch. C. 41.

18 Gibbs v. David, L. R. 20 Eq. 373.

19 Skud v. Tillinghast, C. C. A., 195 Fed. 1.

20 Whelan v. Enterprise Transp. Co., 175 Fed. 212.

21 But see Whitesides v. Lefferty, 3 Humph. (Tenn.) 150.

22 Battaile v. Fisher, 36 Miss. 321. When, by the use of the assets, he elects himself president of another corporation, he must account to the beneficiaries of his trust for all profits that he receives therefrom. Strang v. Edson, C. C. A., 198 Fed. 813.

23 Ammon-Stivers Min. Co. v. Great Northern Mining & Development Co., 119 Fed. 377.

24 Bowker v. Haight & Freese Co., 140 Fed. 796.

25 Chable v. Nicaragua C. C. Co., 59 Fed. 846.

case of doubt, it is well for a receiver to refrain from action until he may obtain the instruction of the court, whose officer he is."[26] It is not the duty of a receiver to take part in, or to promote, any plan of reorganization.[27] "If rival and discordant interests between the parties interested in the property produce conflicting plans, upon which they cannot agree, it is the receiver's duty to stand absolutely neutral between all, giving to no one any preference or advantage over the other, and according equal facilities to every stockholder, whether he holds a single share or 10,000."[28] It is usually considered improper for a receiver to retain as his counsel one who has previously acted in the suit for one of the parties.[29] But it is proper for a receiver appointed in a suit brought by a creditor for the satisfaction of his own debt alone, to retain the attorney of the complainant.[30] A receiver of a railroad is a common carrier.[31] He is guilty of impropriety, for which he may be removed, when he discriminates between different persons who use the railway;[32] and he may be obliged to repay such sums of money as he has exacted from shippers of freight by unlawful discriminations against them.[33] A receiver cannot resign without the permission of the court which appointed him.[34] "Whenever in any case pending in any court of the United States, there shall be a receiver or manager in possession of any

26 Ibid.

27 Ibid.

28 Ibid.

29 Ryckman v. Parkins, 5 Paige (N. Y.), 543; Blair v. St. Louis, H. & K. R. Co., 20 Fed. 348. In one case the court refused to allow the receiver to retain a relative who had previously practiced elsewhere, and had come into the Circuit apparently for the purpose of acting as counsel for the receiver. Blair v. St. Louis, H. & K. R. Co., 20 Fed. 348.

30 Shainwald v. Lewis, 8 Fed. 878. See Davis v. Chattanooga U. Ry. Co., 65 Fed. 395.

31 Beers v. Wabash, St. L. & P. Ry. Co., 34 Fed. 244.

32 Handy v. Cleveland & M. R. Co., 31 Fed. 689. See Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 30 Fed. 2; Cutting v. Florida Ry. & Nav. Co., 43 Fed. 747. It has been said that a contract between a receiver of a railroad company and a shipper for the payment of a rebate upon an intrastate shipment, is not illegal. Bibber-White Co. v. White River Val. El. R. Co., 175 Fed. 470.

33 Cutting v. Florida Ry. & Nav. Co., 43 Fed. 747.

34 Daniell's Ch. Pr. (2d Am. ed.) 2002. See In re Matter of Jones, 4 Sandf. Ch. (N. Y.) 615.

property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be fined not more than three thousand dollars or imprisoned not more than one year." [35]

§ 313. Liability of a receiver. The liability of a receiver is in many but not all respects analogous to those of a trustee. He is liable to all persons interested in the estate in his hands for any damage resulting to them from any breach of duty by him, whether intentionally [1] or through negligence.[2] It has ben held that he is personally responsible for funds of the trust embezzled by his clerks.[3] He is, however, free from liability to the parties to the suit on account of any act performed in obedience to an order of the court within its jurisdiction, and not obtained by fraud, until the same has been vacated upon appeal or otherwise.[4] A receiver's liability to strangers is much more limited than that of a trustee.[5] He is not liable personally upon a covenant entered into in his official capacity with the sanction of the court.[6] Although it may be that in

[35] Jud. Code, § 65, 36 Stat. 1087, re-enacting in substance 25 St. at L., § 2, p. 436; 24 St. at L., § 2, p. 554. But see Royal Tr. Co. v. Washburn B. & I. R. Ry. Co., 113 Fed. 531. It has been held that a receiver is subject to the Act of March 4, 1907 (34 St. at L. 1416, c. 2939, Comp. St. Supp. 1911, p. 1321), forbidding a common carrier to permit employees of a certain class to remain on duty for more than sixteen consecutive hours; but that he is ordinarily not personally liable for the fine imposed for its violation (U. S. v. Ramsey, C. C. A., 197 Fed. 144); and that after the appointment of a receiver of an insolvent corporation, the company is not liable to the Corporation Income Tax. Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 774. As to the liability of receivers under Federal statutes, see Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897; U. S. v. DeCoursey, 82 Fed. 302.

§ 313. [1] Knight v. Lord Plimouth, 3 Atk. 480, 481; Kaiser v. Kellar, 21 Iowa, 95, 97; Koontz v. Northern Bank, 16 Wall. 196, 202, 203, 21 L. ed. 465, 468; *infra*, § 321.

[2] Skerrett's Minors, 2 Hog. 192. *Infra*, § 321.

[3] Gunn v. Ewan, 93 Fed. 80.

[4] Holcombe v. Johnson, 27 Minn. 353.

[5] See Taylor v. Davis, 110 U. S. 330, 335, 28 L. ed. 163, 165.

[6] Livingston v. Pettigrew, 7 Lans. (N. Y.) 405; Newman v. Davenport, 9 Baxt. (Tenn.) 538; Taylor

the courts of Massachusetts he is personally responsible for rent when he retains possession of a leasehold,[7] in the Federal courts he is not liable in such a case, and the court may authorize him to abandon a leasehold after experience has shown that it is unprofitable to the estate, and then he incurs no personal liability, and the estate is responsible only for the use of the property during the time that he has remained in possession,[8] according to its rental value.[9] The payment under orders of the court of the rent fixed by the lease, is not an assumption thereof.[10] He has a reasonable time within which to elect

v. Davis, 110 U. S. 330, 335, 28 L. ed. 163, 165; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 259.

7 Com. v. Franklin Ins. Co., 115 Mass. 278; People v. National Tr. Co., 82 N. Y. 283. *Cf.* People v. Univ. L. Ins. Co., 30 Hun (37 N. Y. S. C. R.), 142; Wells v. Higgins, 132 N. Y. 459. But see Stokes v. Hoffman House, 167 N. Y. 554, 53 L.R.A. 870; s. c., 46 N. Y. App. D. 120.

8 St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640; Ames v. Union Pac. Ry. Co., 60 Fed. 966; U. S. Tr. Co. v. Wabash W. Ry. Co., 150 U. S. 287, 37 L. ed. 1085; Seney v. Wabash W. Ry. Co., 150 U. S. 310, 37 L. ed. 1092; Quincy, M. & P. Ry. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89, 34 L. ed. 379; Pennsylvania Steel Co. v. N. Y. City Ry. Co., 165 Fed. 459; s. c., 175 Fed. 812; s. c., 176 Fed. 471; s. c., 190 Fed. 609, 615; s. c., 192 Fed. 135; Coy v. Title Guarantee & Tr. Co., 198 Fed. 275. *Cf.* 3 Columbia Law Rev. 53. For cases where it was held that the court had adopted and assumed the lease, see Central R. & B. Co. of Ga. v. Farmers' L. & Tr. Co., 79 Fed. 158; Mercantile Tr. Co. v. Atlantic & P. R. Co., C. C. A., 88 Fed. 140; s. c., as U. S. Tr. Co. v. M. Tr. Co., C. C. A., 80 Fed. 18; Central T. Co. v. Continental Tr. Co., C. C. A., 86 Fed. 517; U. S. Tr. Co. v. Mercantile Tr. Co., 88 Fed. 140. Dayton Hydraulic Co. v. Felsenthall, C. C. A., 116 Fed. 961. The question whether the court should adopt the lease was said to be administrative rather than judicial in its nature, and not to be reviewed by an appellate tribunal, unless there was a manifest abuse of discretion. Mercantile Tr. Co. v. Farmers' L. & Tr. Co., C. C. A., 81 Fed. 254. *Certiorari* denied, 168 U. S. 710, 42 L. ed. 1213.

9 Pennsylvania Steel Co. v. N. Y. City Ry. Co., 190 Fed. 609, 615; *Re* Adams Cloak, Suit & Fur House, 199 Fed. 337. In Pennsylvania Steel Co. v. N. Y. City Ry. Co., 175 Fed. 812, the receivers, while in possession, were directed to pay the rent, although the same was considered to be exorbitant. See High on Receivers, (4th ed.) §§ 273, 394a. In re Grignard Lithographic Co., 155 Fed. 699, holding that the landlord could not recover for power which was not used by the trustee in bankruptcy.

10 Pennsylvania Steel Co. v. N.

whether to keep the lease as an asset of the estate.[11] Where a receiver retained possession, without giving security, after an order of the court which appointed him directed that he either surrender the property or give security for the rent; it was held that he was personally liable.[12] It has been held that the receiver cannot be dispossessed for nonpayment of rent by a petition in the suit of his appointment,[13] but only by an independent action of ejectment[14] unless a State statute authorizing summary proceedings in landlord and tenant cases exists and is followed.[15] The same principles apply to a lease of personal property such as railroad cars;[16] and it seems to building contracts[17] and other executory contracts the performance of which is incomplete when the receiver is appointed.[18] Receivers of a street railroad system may be authorized, after notice to the public, to discontinue the exchange of transfers, although the corporation had contracted to make them.[19] A receiver is not personally liable for a loss resulting from his conduct of the business, when he was not guilty of negligence or misconduct and acted under the direction of the court without objection

Y. City Ry. Co., 176 Fed. 471; s. c., 175 Fed. 812; s. c., 192 Fed. 135, where a temporary agreement as to the rent was made with the lessor.

[11] Walton v. Stafford, 14 App. D. (N. Y.) 310, Ten (Pennsylvania Steel Co. v. N. Y. City Ry. Co., 190 Fed. 609, 615) and nine (St. Joseph and St. Louis R. R. Co. v. Humphreys, 145 U. S. 105, 36 L. ed. 640) months have been *held* to be not unreasonable periods of time. It was said that it was not unreasonable to preserve the integrity of the system until its sale, by continuance in possession of the leased property. Pennsylvania Steel Co. v. N. Y. City Ry. Co., 176 Fed. 471. See authorities cited in note 8, *supra*.

[12] Brooklyn Improvement Co. v. Lewis, 136 App. Div. (N. Y.) 861.

[13] Johnson v. Lehigh Valley Traction Co., 130 Fed. 932.

[14] Ibid.

[15] See Prince v. Schlesinger N. Y. S. (Trial term, Nov. 28, 1905.)

[16] Sunflower Oil Co. v. Wilson, 142 U. S. 313, 35 L. ed. 1025. *Cf.* Platt v. Phila. & R. R. Co., C. C. A., 84 Fed. 535; Thomas v. Western Car Co., 149 U. S. 95, 37 L. ed. 663; Farmers' L. & Tr. Co. v. Chicago, etc., Ry. Co., 42 Fed. 6; Easton v. Houston & T. C. Ry. Co., 38 Fed. 784.

[17] Commonwealth Roofing Co. v. North Am. Tr. Co., C. C. A., 135 Fed. 984.

[18] See Manhattan Tr. Co. v. Sioux City & N. R. Co., 81 Fed. 50; Central Tr. Co. v. East Tenn. Land Co., 79 Fed. 19; Missouri & K. Interurban Ry. Co. v. Edson, C. C. A., 198 Fed. 819.

[19] *Re* Dry Dock R. R., 165 Fed. 487.

by the parties in interest.[20] A receiver is personally liable to strangers for trespass,[21] fraud,[22] or other wilful act, although performed under color of his office. So, if by mistake, though honestly, he takes possession of the property of another, he is personally liable.[23] The fact that he does so under authority of an order of the court will not justify him as against a person who was not a party to the suit or proceeding in which the order was granted.[24] In all of such cases it seems that he can, independently of the statute, be sued without leave of the court which appointed him.[25] A person who, without having been lawfully appointed, assumes to act as a receiver, has all the liabilities of one duly appointed.[26] A receiver, even when acting as a common carrier, is not liable personally for injuries caused by the negligence of his employees, when he exercised reasonable care in their selection.[27] The only remedy of the person thus aggrieved is by an action against the receiver in his official capacity, seeking satisfaction out of the estate.[28] When, before a suit is brought against him, the receiver has been discharged and the estate sold, or returned to its owner, it has been held that he has ordinarily no remedy in a Federal court except against the employee, unless one has been preserved for him by

20 Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 629.

21 In re Young, 7 Fed. 855; Olney v. Tanner, 10 Fed. 101; Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676. For a case where a receiver was held not liable for malicious prosecution, see Widmeyer v. Felton, 95 Fed. 926.

22 Bank of Montreal v. Thayer, 7 Fed. 622.

23 Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676; Curran v. Craig, 22 Fed. 101.

24 Curran v. Craig, 22 Fed. 101.

25 Barton v. Barbour, 104 U. S. 126, 134, 26 L. ed. 672, 676. In re Young, 7 Fed. 855; Bank of Montreal v. Thayer, 7 Fed. 622; Curran v. Craig, 22 Fed. 101. But see Aston v. Heron, 2 Myl. & K. 390; Chalie v. Pickering, 1 Keen, 749.

26 Wood v. Wood, 4 Russ. 558.

27 Kennedy v. I. C. & L. R. Co., 3 Fed. 97; Union Tr. Co. v. Chicago & L. H. Ry. Co., 7 Fed. 513, 516; Davis v. Duncan, 19 Fed. 477; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Thompson v. No. Pac. Ry. Co., 93 Fed. 384, 389; Hanlon v. Smith, 175 Fed. 192. See, however, Kain v. Smith, 80 N. Y. 458.

28 Kennedy v. I. C. & L. R. Co., 3 Fed. 97; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Union Tr. Co. v. U. & L. H. Ry. Co., 7 Fed. 513, 516; Gray v. Grand Trunk W. Ry. Co., C. C. A., 156 Fed. 736.

the court.[29] For the owner of the property is not liable for the negligence of the receiver's employees.[30] For this reason it is customary to insert in the order for the sale in bulk of property in the possession of a receiver that the purchaser shall take it subject to all claims for injuries caused while it was managed by the receiver.[31] Such a provision, although not mentioned in the order for the sale, may be inserted as a condition in the order confirming the sale, and the purchaser, after taking possession under the latter order, is estopped from disputing the validity of the condition.[32] Claims of this nature are usually enforced in the suit in which the receiver was appointed.[33] The discharge of a receiver until revoked relieves him from all liability to those who had an opportunity to be heard upon the motion for his discharge.[34]

§ 314. Suits against receivers. By the former practice, following the old chancery rule, a receiver could not be sued without the permission of the court that appointed him.[1] An act of Congress has changed the practice as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or trans-

29 Davis v. Duncan, 19 Fed. 477; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97. See § 394, *infra*. But see Gray v. Grand Trunk Ry. Co., C. C. A., 156 Fed. 736. For cases where a State court gave a remedy, see Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81; Texas Pac. Ry. Co. v. Griffin, 76 Tex. 441; Fordyce v. Witters (Texas), 20 S. W. 266; Baer v. McCullough, 176 N. Y. 97.

30 Davis v. Duncan, 19 Fed. 477.

31 Farmers' L. & Tr. Co. v. Central R. R. Co. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; s. c., subsequently considered in 17 Fed. 758.

32 Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 17 Fed. 758; *infra*, § 394.

33 Ibid.

34 Lehman v. McQuown, 31 Fed. 138; Davis v. Duncan, 19 Fed. 477 *Infra*, § 324.

§ 314. 1 Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Central Tr. Co. of New York v. Wheeling & L. E. R. Co., 189 Fed. 82. A judgment against a receiver in an action which could not properly be instituted without permission, is not void because no such permission was obtained. Ridge v. Manker, C. C. A., 132 Fed. 599. Such an order is revocable and may be conditional. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 74; Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707. "The leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer." Davis v. Duncan, 19 Fed. 477, 483. See also Jordan v. Wells, 3 Woods, 527. The court might direct that service of process be made upon the resi-

action of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[2] This dispossesses receivers appointed by a Federal court of any right which they might otherwise have to remove suits brought against them from the State to the Federal courts, where no difference of citizenship exists and no Federal question is involved.[3] It has been held that this statute makes the judgment in the State court in such an action conclusive as to the right of the plaintiff therein to recover damages, and as to the amount of the recovery;[4] that the receiver has the right to appeal from the judgment of the State court, and that the Federal court should not, as a condition of such appeal, oblige him to execute a *supersedeas* bond;[5] but that judgment in such a suit cannot be enforced by execu-

dent agent of a non-resident receiver. Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 40 Fed. 426. As to the service of process in the absence of an order upon the subject, see Baltimore & O. R. Co. v. Freeman, C. C. A., 112 Fed. 237. For a case where the order of the State court granting leave to sue a receiver appointed by it, was held not to authorize a suit in a Federal court, see Harper v. Printing-Tel.-News Co., 128 Fed. 979. *Cf.* Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; *supra*, §§ 52, 94. Otherwise when it grants leave to sue him "in any court of competent jurisdiction." James Freeman Brown Co. v. Harris, 139 Fed. 105.

[2] Jud. Code, § 66, re-enacting 25 St. at L., p. 436; 24 St. at L., p. 554. See Croy v. Marshall, 21 Ohio W. L. B. 489; Atkin v. Wabash Ry. Co., 41 Fed. 193, 194; Colonial Trust Co., et al. v. Pacific Packing & Navigation Co., 142 Fed. 298; Nashville Ry. & Light Co. v. Bunn, C. C. A., 168 Fed. 862. This applies to receivers in bankruptcy. Re Gutman, 114 Fed. 1009; Re Kanter & Cohen, 121 Fed. 984.

[3] Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335, 45 L. ed. 220. See *supra*, §§ 5, 37, 51.

[4] Dillingham v. Hawk, C. C. A., 23 L.R.A. 517, 60 Fed. 494; St. Louis S. W. Ry. Co. v. Holbrook, C. C. A., 73 Fed. 112; Bound v. South Carolina Ry. Co., 174 Fed. 729; Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731; Willcox v. Jones, C. C. A., 177 Fed. 870, holding that the judgment bears interest in accordance with the State statute; Manhattan Tr. Co. v. Chicago El. Traction Co., 188 Fed. 1006. *Contra*, Guaranty Tr. Co. v. Chicago Union Traction Co., 175 Fed. 284. But see Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 311, 314.

[5] Central Tr. Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551, 555, 556.

tion against the property:[6] that the time and manner of payment must be determined by the court that appointed the receiver;[7] that the statute does not authorize the interference by the State court with property in the possession of the receiver[8] by an action of unlawful detainer,[9] a suit to recover title or possession to property,[10] or garnishment,[11] or, condemnation proceedings,[12] or proceedings to condemn a grade crossing.[13] The refusal of the receiver to agree with the petitioner upon the point and manner of crossing does not constitute "an act or transaction" by him within the meaning of the statute.[14] The

6 Ibid. Dillingham v. Hawk, C. C. A., 23 L.R.A. 517, 60 Fed. 494; St. Louis S. W. Ry. Co. v. Holbrook, C. C. A., 75 Fed. 112; Mo. Pac. R. Co. v. Texas Pac. R. Co., 41 Fed. 311; Gableman v. Peoria, D. & E. Ry. Co., 179 U. S. 335, 339, 45 L. ed. 220, 222.

7 Ibid. Meyer Rubber Co. v. Georgetown & W. R. Co., 174 Fed. 731.

8 Comer v. Felton, C. C. A., 61 Fed. 731; Stateler v. Cal. Nat. Bank, 77 Fed. 43; J. I. C. Plow Works v. Finks, C. C. A., 81 Fed. 524, 529. For a remarkable exertion of Federal power, see Louisville Tr. Co. v. Cincinnati I. P. Ry. Co., 78 Fed. 307.

9 Comer v. Felton, C. C. A., 61 Fed. 731.

10 J. I. C. Plow Works v. Finks, 81 Fed. 529; Love v. Louisville & E. R. Co., 178 Fed. 507. So held of a suit to foreclose a lien when the receiver was a defendant. Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. 917. *Cf.* Grand Trunk Ry. Co. v. C. Vt. R. Co., 88 Fed. 622. So a Federal court refused to entertain a suit to foreclose a lien, Am. L. & Tr. Co. v. Central Vt. R. Co., 84 Fed. 917; or ejectment. Waters v. Shinn, 178 Fed. 345; or to set aside a fraudulent conveyance of property in the hands of a State receiver. Werner v. Murphy, 60 Fed. 769. *Cf. supra*, §§ 52, 55. For a case where the Federal court appointed a trustee to protect the rights of lienors, see Risk v. Kansas Tr. Co., 58 Fed. 45. The same rule applies to trustees and receivers in Bankruptcy. Re Russell & Birkett, C. C. A., 101 Fed. 248. They may, however, be sued in trover without leave of the court of bankruptcy. Re Kanter v. Cohen, C. C. A., 121 Fed. 984; Re Spitzer, C. C. A., 130 Fed. 879.

11 Central Tr. Co. v. East Tenn. V. & G. Ry. Co., 59 Fed. 523; Central Tr. Co. of New York v. Wheeling & L. E. R. Co., 189 Fed. 82. For the practice by the receiver in such a case, see In re Barnard, 61 Fed. 531. For the remedy by a State receiver when property is attached by a United States marshal, see Remington P. Co. v. Louisiana P. & Pub. Co., 56 Fed. 287.

12 Hayes v. Columbus, L. & M. Ry. Co., 67 Fed. 630.

13 Coster v. Parkersburg B. R. Co., 131 Fed. 115; Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707.

14 Buckhannon & N. R. Co. v. Davis, C. C. A., 135 Fed. 707

law does not authorize a mandamus against a receiver.[15] The proper remedy in all such cases is usually a petition of intervention *pro interesse suo*.[16] It has been held that the statute does not prevent an injunction against the interference by the creditors with the assets in the hands of a receiver of a national bank;[17] nor authorize a stockholder of a corporation to enforce a corporate cause of action by a suit against a debtor to the corporation, when the receiver refuses to sue,[18]—in the latter case, the proper remedy is an application to the court to direct the receivers to sue;[19]—nor authorize the joinder of the receiver in his official capacity in an action against different companies for making in concert with him discriminating rates;[20] and that upon his accounting the receiver can set off against a claim upon the fund debts owed by the claimant to his successor in interest. A petition to the Federal court for the payment of a claim should show that the receiver holds assets properly applicable thereto.[22] The holder of a common-law claim who intervenes in the Federal court in the first instance waives his right to a trial by jury; and if the court submits to a jury the issues that arise thereupon, the verdict is merely advisory.[23] It has been held that the statute applies to receivers appointed before its enactment;[24] that it applies to suits against

15 Royal Tr. Co. v. Washburn B. & I. Ry. Co., 113 Fed. 531; *infra*, § 428.

16 Winchester v. Davis Pyrites Co., C. C. A., 67 Fed. 45; Minot v. Mastin, C. C. A., 95 Fed. 734; Strain v. Palmer, C. C. A., 159 Fed. 624; *supra*, § 258.

17 Stateler v. Cal. Nat. Bank, 77 Fed. 43. As to suits in a State court for an injunction against a Federal receiver, see Royal Tr. Co. v. Washburn B. & I. R. Co., C. C. A., 139 Fed. 865.

18 Swope v. Villard, 61 Fed. 417. *Cf.* Werner v. Murphy, 60 Fed. 769.

19 Land Title & Trust Co. v. Asphalt Co., 120 Fed. 996, 999. See Werner v. Murphy, 60 Fed. 769; Swope v. Villard, 61 Fed. 417.

20 Western N. Y. & P. R. Co. v. Penn Refining Co., C. C. A., 137 Fed. 343.

21 Central R. & B'g Co. v. Farmer's L. & Tr. Co., 113 Fed. 405.

22 Empire Distilling Co. v. McNulta, C. C. A., 77 Fed. 700. But see Veatch v. Am. L. & Tr. Co., C. C. A., 84 Fed. 274. For a case where the claimant did not lose any rights by delay till after a dividend had been paid, and the State rule requiring a surrender of collateral was not followed, see London & S. F. Ry. Co. v. Willamette S. M. L. & Md. S. Co., 80 Fed. 226.

23 Flippin v. Kimball, C. C. A., 87 Fed. 258. *Cf.* Atkin v. Wabash Ry. Co., 41 Fed. 193.

24 Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

a receiver for liabilities incurred by his predecessor in office;[25] that is applies to receivers appointed by the courts of the Territories over the property of corporations created by acts of Congress;[26] that non-resident receivers may be served in the same manner as the corporations over which they were appointed;[27] that a judgment in a suit thus prosecuted can only be collected out of the property in the hands of the receiver in his official capacity;[28] that it does not authorize suits against a receiver upon claims against the corporation, over whose property he has been appointed;[29] that after the property has been sold, free and clear from all incumbrances except certain claims, which the decree directs shall be presented within a limited time, and after such time has expired, a receiver cannot, without leave of the court that appointed him, be sued for acts committed in his management of the property;[30] but that a suit pending against a receiver at the time of his discharge may be prosecuted to final judgment where the property has been sold subject to claims against him;[31] and that an order of a Federal court which discharged a railroad receiver, restored the property to the defendant company and required that all claims

25 McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796; State v. Port Royal & A. Ry. Co., 84 Fed. 67. But see Jones v. Schlapbeck, 81 Fed. 274.

26 Wheeler v. Smith, 81 Fed. 319.

27 Eddy v. Lafayette, 163 U. S. 456, 464, 41 L. ed. 225, 228. It was *held* that process might be served upon any local agent of the receivers. *Re* Seaboard Air Line Ry., 166 Fed. 376.

28 Farmers' L. & Tr. Co. v. Central R. Co. of Iowa, 2 McCrary, 181; s. c., 7 Fed. 537; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Mo. Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 310. *Re* Seaboard Air Line Ry., 166 Fed. 376; Hanlon v. Smith, 175 Fed. 192.

29 Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 118 Fed. 204.

30 Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 118 Fed. 204.

31 Baer v. McCullough, 176 N. Y. 97, 103 Parker, C. J.: "Clearly the statute indicates that it was a part of the Congressional scheme that the appointment of receivers of great corporations—in the case of railroads, covering hundreds and sometimes thousands of miles, with property extending through many different counties and States—should not operate to prevent parties having claims against such corporations, or against the receivers thereof, from proceeding in the courts of the neighborhood precisely as they could have done when the corporation was managing the property. And to save the citizen unnecessary expense, and the more surely to protect him in his rights,

against the receiver be presented by intervention to that court before a given date, did not prevent the subsequent recovery in a State court of a judgment against the company for damages on account of personal injuries caused by the negligent operation of the railroad by the employees of the receiver before his discharge.[32] A Court of the United States will rarely, if

it provided, in effect, that the right to bring the action should not depend upon the will of the court appointing the receivers, and so could be brought without the consent of such court. But while Congress intended to permit the establishment of claims against the fund in the hands of the receivers to take place through the ordinary local judicial machinery, it could not, of course, tolerate an attempt on the part of such courts to take possession of so much of the fund or property in the hands of the receivers as would be necessary to the satisfaction of the claims. Only one court could be permitted to operate the property, marshal the assets, decree a sale and provide for the distribution of the assets among those entitled thereto, and hence it was deemed necessary to establish the boundary line beyond which State courts could not go. Such a construction is in harmony with the decree made by the Federal court in this case. True, it provided for a method by which claims against the fund could be ascertained, but it did not provide that such method was exclusive, nor do we think it could have so provided in view of the language of the statute authorizing the commencement of suits without its consent, for if it could take to itself exclusive jurisdiction to establish claims against the fund by decree made at the close of the litigation, it could also do it at the outset of the litigation, and in such case the authority conferred by statute upon other courts to take jurisdiction of actions brought against the receivers would be without effect, and, of course, the statute cannot thus be brushed aside.

"The decree of the Federal court in this case was made on broader lines—lines more convenient for the litigant and in harmony with the statute. It assured the creditor that his claim, whether established or not at the time of the sale of the property, shall be paid, and it does not attempt to take from him the right, plainly given him by the statute, to select the court most convenient to him, and it reserved to the Federal court, in the interest of all the creditors, the right to proceed at the foot of the decree to make such further order as might be necessary to carve out of the property or take from the fund such sum as should be necessary to satisfy all claims established through the proper legal machinery provided either by the State or the Federal government in the event that the purchaser of the property, the Erie Railroad Company, should fail to pay such claims."

[32] Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81. Where the receivers remained in possession a few days after the delivery of the deed to the purchaser, a cause of action for negligence then arising is a liability of the

ever, enjoin a proceeding in admiralty in a Federal District Court against property in the hands of one of its receivers.[33] It has been held that the statute does not apply to a receiver in bankruptcy who is not carrying on the business of the bankrupt, except in so far as the cause of action arises out of his acts in the care and preservation of the property of the estate.[34] A receiver appointed under a creditor's bill is not a proper party to an ancillary foreclosure suit.[35] An independent suit to recover a simple contract debt incurred by him cannot be maintained in equity.[36] The creditor must sue at law or bring a petition of intervention in the original suit.[37] A suit begun before the appointment of a receiver may subsequently be prosecuted to judgment, and the judgment so obtained establishes, as against the receiver, the rightful amount of the demand.[38] A party who, pending such a suit, files his claim against the receiver in the suit in which the receiver was appointed, does not thereby make an election of remedies and lose his right to prosecute the suit.[39] In such a case it was held that the claimant thereby lost his right to costs in the original action.[40] It has been held that leave from a State court need not be obtained before suing a receiver appointed by it for the infringement of a patent.[41] It has been held that an action will not lie against a receiver for a personal injury sustained before his appointment.[42]

§ 315. Manner of applying for the appointment of a receiver. It has been held that a court has no jurisdiction to appoint a receiver, unless a cause is pending;[1] and that, there-

receivership enforceable under such a clause of the decree. Fidelity I., Tr. & S. D. Co. v. Norfolk & W. R. Co., 88 Fed. 815.

33 Paxson v. Cunningham, 63 Fed. 132. *Cf.* The St. Nicholas, 49 Fed. 671.

34 *Re* Kalb & Berger Mfg. Co., C. C. A., 165 Fed. 895.

35 Continental Tr. Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642.

36 Nash v. Ingalls, 79 Fed. 510.

37 Ibid.

38 Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. 853.

39 Ibid. See Zacher v. Fidelity Tr. & S. D. Co., C. C. A., 106 Fed. 593.

40 Ibid.

41 Hupfeld v. Automatic Piano Co., 66 Fed. 788. *Cf.* Curran v. Craig, 22 Fed. 101.

42 Finance Co. of Pa. v. Charleston C. & C. R. Co., 46 Fed. 508

§ 315. 1 In re Brant, 96 Fed. 257, Anon., 1 Atk. 578. See § 324.

fore, will never be appointed upon petition[2] when no suit has been begun, except in the case of lunatics.[3] The grounds of the exception and the reasons why it does not extend to infants are not very clear.[4] After a suit has been begun, however, a receiver may be appointed at any stage of it when a necessity is shown,—before appearance,[5] between appearance and answer,[6] between answer and decree,[7] at the decree,[8] or afterwards, if the cause is still open[9] and the complainant is not in default.[10] But a case of pressing necessity must exist to justify the appointment of a receiver before answer.[11] An objection to the bill on account of multifariousness or a misjoinder of parties will not prevent the appointment of a receiver; nor will the pendency of a motion for leave to amend the bill,[12] unless indeed the proposed amendment would change materially the allegations showing the necessity for a receiver. The bill should lay the foundation for the appointment by stating the facts which show its necessity and propriety,[13] and should contain a prayer for a receiver.[14] If, however, a state of facts subsequently arise making the appointment necessary, it may probably be made without an amendment of the original or the filing of a supplemental bill.[15] The application for a receiver should be supported by evidence showing that the appointment is nec-

2 In re Brant, 96 Fed. 257; Anon., 1 Atk. 578; Ex parte Whitfield, 2 Atk. 315; Merchants' & M. Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

3 Ex parte Radcliffe, 1 J. & W. 639; Anon., 1 Atk. 578; Ex parte Warren, 10 Ves. 622.

4 Ex parte Whitfield, 2 Atk. 315.

5 Tanfield v. Irvine, 2 Russ. 149.

6 Vann v. Barnett, 2 Brown Ch. C. 158; Metcalfe v. Pulvertoft, 1 V. & B. 180.

7 Kershaw v. Mathews, 1 Russ. 361.

8 Osborne v. Harvey, 1 Y. & C. N. R. 116.

9 Cooke v. Gwyn, 3 Atk. 689; Atty. Gen. v. Mayor of Galway, 1 Molloy, 95; Bowman v. Bell, 14 Sim. 392.

10 Harrington v. Union Oil Co., 144 Fed. 235.

11 Latham v. Chaffee, 7 Fed. 525. See Union Mut. Life Ins. Co. v. Union Mills P. Co., 3 L.R.A. 90, 37 Fed. 287.

12 Barnard v. Darling, 1 Barb. Ch. (N. Y.) 76.

13 Tomlinson v. Ward, 2 Conn. 396; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.), 438. But see Hottenstein v. Conrad, 9 Kan. 435.

14 Eq. Rule 25. But see Osborne v. Harvey, 1 Y. & C. N. R. 116.

15 Malcolm v. Montgomery, 2 Molloy, 500; Hottenstein v. Conrad, 9 Kan. 435.

essary.[16] If the application is made before decree, the affidavits should be founded upon the allegations in the bill.[17] If statements not founded on allegations in the bill and alleging facts which existed and were known before the bill was filed, are introduced into the affidavits, it seems that the court will not consider them,[18] and even if, where the case made by the bill fails, sufficient ground for a receiver is confessed in the answer, it seems that a receiver should be denied the plaintiff, at least until he had amended his bill.[19] Where the application is made *ex parte*, it is the complainant's duty to make a full, frank, and complete statement of all facts which might affect the action of the court.[20] After an application for a receiver has been once denied, a second application supported by the same papers will rarely be granted.[21] The former rule was that, after answer, a plaintiff when moving for a receiver could only rely upon the admissions in the answer;[22] but now a sworn answer is given upon such a motion little more effect than an ordinary affidavit, and may be contradicted by affidavits in support of the bill.[23] The appointment is usually only made upon notice and is very rarely granted *ex parte*.[24] Less than one day's notice has been held to be insufficient.[25] A receiver may, however, be appointed *ex parte*, if that is the only way to preserve the property from destruction or serious injury, or remov-

16 Middleton v. Dodswell, 13 Ves. 266; Kerr on Receivers (2d Am. ed.), 154. It was held in a State court that a bill praying for a receiver, sworn to "as being true to the best of affiant's knowledge and belief," is not sufficiently verified. Smith-Dimmick Lumber Co. v. Teague, 24 South. 4.

17 Dawson v. Yates, 1 Beav. 301, 306; Cremen v. Hawkes, 2 Jones & La. T. 674; Kerr on Receivers (2d Am. ed.), 154.

18 Dawson v. Yates, 1 Beav. 301, 306; Kerr on Receivers (2d Am. ed.), 154.

19 Cremen v. Hawkes, 2 Jones & La. T. 674; Kerr on Receivers (2d Am. ed.), 154.

20 Burroughs v. Toxaway Co., 182 Fed. 129.

21 Fenton v. Lumberman's Bank, Clarke Ch. (N. Y.) 360.

22 Daniell's Ch. Pr. (2d Am. ed.) 1976. See Goodman v. Whitcomb, 1 J. & W. 589; Kershaw v. Mathews, 1 Russ. 361.

23 Allen v. Dallas & W. R. Co., 3 Woods, 316, 332.

24 Blondheim v. Moore, 11 Md. 365; People v. Norton, 1 Paige (N. Y.), 17; Sandford v. Sinclair, 8 Paige (N. Y.), 373; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117.

25 St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. 691.

al beyond the jurisdiction of the court.[26] It has been said that a receiver of the assets of a railroad company will rarely be appointed in a suit to which no stockholders or bondholders are actually parties.[27] Where the officer of a corporation who had been served with notice of a motion for the appointment of a receiver fraudulently concealed that fact from his associates, and did not oppose the motion, although no collusion with the plaintiff was shown, a motion to vacate the appointment was entertained.[28] A delay of one month after knowledge of the appointment of a receiver, who had expended in the improvement of the property money furnished him by others, was held such acquiescence as to estop a party from moving to vacate the order of appointment for irregularity because granted without notice to him.[29] Except in an extraordinary case, a receiver

26 Phelps v. Mutual Reserve, etc., Ass'n, C. C. A., 61 L.R.A. 717, 112 Fed. 453; Worth Mfg. Co. v. Bingham, C. C. A., 116 Fed. 785; Re Francis, 136 Fed. 912; holding that such an appointment, without notice to a defendant who is not present, was not unconstitutional as a taking of his property without due process of law. In Buchanan v. Bay State Gas Co., U. S. C. C. D., Del. Oct. 15, 1896, Judge Wales appointed a receiver *ex parte* upon documentary evidence. In a later case Judge Kirkpatrick in U. S. C. C. D., N. J., appointed a receiver *ex parte*. Brady v. Bay State Gas Co., 106 Fed. 584. Latimer v. McNeal, C. C. A., 142 Fed. 451; Mann v. Gaddie, C. C. A., 158 Fed. 42; Taylor v. Easton, C. C. A., 180 Fed. 363. In Weiss v. Haight & Freese Co., May, 1906, Judge Lowell made such an appointment. The case was affirmed on the ground of waiver in Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328; *certiorari* denied 207 U. S. 594, 52 L. ed. 356; Gibson v. Martin, 8 Paige (N. Y.), 481; Johns v. Johns, 23 Ga. 31; Triebert v. Burgess, 11 Md. 452; Gibbons v. Mainwaring, 9 Sim. 77; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Barley v. Gittings, 15 App. D. C. 421, 437; Hendrix v. Am. Freehold, etc., Co., 95 Ala. 313. See Harv. Law Rev., xv, 849; *supra*, § 304.

27 Overton v. Memphis & L. R. Co., 10 Fed. 866. But see Central T. Co. v. Texas & St. L. Ry. Co., 24 Fed. 153. The absence of the defendant from the jurisdiction or inability to find and serve him or some urgent emergency, making the interference of the court necessary to prevent loss of the property, are sufficient grounds for an appointment without notice. Mann v. Gaddie, C. C. A., 158 Fed. 42; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; People v. Albany & Susquehanna R. R. Co., 38 How. Pr. (N. Y.) 228, 252.

28 Allen v. Dallas & W. R. Co., 3 Woods, 316.

29 Ibid.

will not be appointed over property in the possession of a stranger to the suit.[30]

§ 316. Who may apply for the appointment of a receiver. A receiver is usually appointed upon the application of the plaintiff. Before a decree it seems that one defendant cannot move for a receiver,[1] unless he has filed a cross-bill or counterclaim praying for one.[2] After a decree, however, he may, in a proper case, obtain a receiver of the property of a co-defendant upon petition,[3] but not usually over the property of the plaintiff without a cross-bill.[4]

§ 317. Manner of the appointment of a receiver. By the English practice, which was followed in New York before the passage of statutes altering it, when an application for the appointment of a receiver was granted, the selection of the receiver was referred to a master in chancery, whose action was subject to the confirmation of the court.[1] The same master usually exercised supervision over contracts made by the receivers and the adjustment of his compensation.2 In the Federal courts, however, it is the customary practice for the judge to appoint and often to supervise a receiver himself, without the aid of a master, except when the accounts are passed.[3] The order is not void because the bill is demurrable for want of equity, or because the bill is not verified.[4] The denomination

[30] Searles v. Jacksonville, P. & M. R. Co., 2 Woods, 621. See also Davis v. Gray, 16 Wall. 203, 218, 21 L. ed. 447, 452.

§ 316. [1] Robinson v. Hadley, 11 Beav. 614; Leddel's Ex'r v. Starr, 19 N. J. Eq. (4 C. E. Green) 159. But see Sargant v. Read, L. R. 1 Ch. D. 600; Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[2] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.), 153, 154.

[3] Barlow v. Gains, 8 Beav. 329; Hiles v. Moore, 15 Beav. 175; Kerr on Receivers (2d Am. ed.), 154.

[4] Grote v. Bury, 1 W. R. 92; Robinson v. Hadley, 11 Beav. 614; Kerr on Receivers (2d Am. ed.), 153, 154.

§ 317. [1] Creuze v. Bishop of London, Dick. 687; Thomas v. Dawkin, 1 Ves. Jr. 452; In re Eagle Iron Works, 8 Paige (N. Y.), 385; High on Receivers, § 90; Daniell's Ch. Pr. (2d Am. ed.) 1976.

[2] Thornhill v. Thornhill, 14 Simons, 600.

[3] Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 27 L. ed. 117; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Frank v. Denver & R. G. Ry. Co., 23 Fed. 757. But see Taylor v. Phila. & R. R. Co., 7 Fed. 379; s. c., 9 Fed. 1; Cowdrey v. Railroad Co., 1 Woods, 331, 341.

[4] Clark v. Brown, C. C. A., 119 Fed. 130.

of a person appointed, with authority to bring a suit as a special master instead of as a receiver, will not affect the validity of the order.[5] Where in two suits, to which the same corporation was a defendant, a receiver had been appointed in one, and orders concerning the receivership were entitled in both jointly; it was held that, although no order had been made consolidating the two nor extending the receivership to the second suit, the receivership was in fact extended.[6]

§ 318. Who should be appointed receiver. As a general rule no one should be appointed receiver of property who has any interest therein,[1] or is in any way connected with the litiga-

[5] Royal Ins. Co. v. Miller, 199 U. S. 353, 50 L. ed. 226.

[6] Gila Bend Reservoir & Irrigation Co. v. Gila Water Co., 202 U. S. 270, 50 L. ed. 1023.

§ 318. [1] Wiswell v. Starr, 48 Me. 401. The son or brother of a party to a cause should not be appointed receiver over property which is the subject of the litigation, Williamson v. Wilson, 1 Bland (Md.), 418; Taylor v. Oldham, Jac. 527; but see Shainwald v. Lewis, 8 Fed. 878. Nor should the next friend of an infant, whose duty it is to protect his interest, be appointed receiver over his estate, Stone v. Wishart, 2 Madd. 64; nor an active trustee over the trust estate, Sutton v. Jones, 15 Ves. 584; ——— v. Jolland, 8 Ves. 72; although a mere dry trustee may be thus appointed. Sutton v. Jones, 15 Ves. 584; nor should a master in chancery, whose duty it is to pass receivers' accounts, be appointed a receiver, *Ex parte* Fletcher, 6 Ves. 427. It has also been said in England, "that the receiver-general of taxes for a county cannot be appointed a receiver; for having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property." Daniell's Ch. Pr. (2d Am. ed.) 1973. See Atty. Gen. v. Day, 2 Madd. 246, 254. And Lord Eldon held that a peer could not be a receiver, because, "in many instances, a receiver may be committed." Atty. Gen. v. Gee, 2 V. & B. 208. It was held improper to appoint as assignee in bankruptcy of a corporation one who had been appointed by a State court receiver of its assets. In re Stuyvesant Bank, 5 Ben. 566; s. c., 6 N. B. R. 272. But it was subsequently held eminently proper to appoint as a receiver of the assets of an insolvent corporation one who by the laws of the State that chartered it was the official custodian of its assets in case of its insolvency even though that State was in another Circuit from the one in which the suit for a receiver was brought, and the officer did not reside within the jurisdiction of the court. In this case it was made a condition of the appointment that the receiver should pay into the registry of the court the proceeds of all assets collected within its jurisdiction, but he was allowed to give sureties who were residents of the State where he

tion in the course of which the appointment is made,[2] or is nearly related to,[3] or is in the employ of, any of the parties thereto,[4] or who, if he should receive the appointment, would occupy two inconsistent positions;[5] nor a person who is not familiar with the management of similar property,[6] and able to give sufficient attention to the management of his trust.[7] The court may, however, under special circumstances appoint as receiver a trustee,[8] a person interested in the subject of the suit,[9] or even a party to the suit,[10] or his near relation.[11] This, however, should rarely be done unless by consent, or possibly when it clearly appears to be for the interest of all concerned;[12] and in such a case by the English practice the receiver was usually obliged to act without compensation if he accepted the trust.[13]

dwelt. Taylor v. Life Ass'n of Am., 3 Fed. 465.

[2] Baker v. Backus, 32 Ill. 79; Garland v. Garland, 2 Ves. Jr. 137; State Tr. Co. v. Nat. Land & Mfg. Co., 72 Fed. 575; Wood v. Oregon Dev. Co., 55 Fed. 901.

[3] Williamson v. Wilson, 1 Bland (Md.), 418.

[4] Baker v. Backus, 32 Ill. 79; Atty. Gen. v. Bank of Columbia, 1 Paige (N. Y.), 511; Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849.

[5] Stone v. Wishart, 2 Madd. 64; Ex parte Fletcher, 6 Ves. 427.

[6] Lupton v. Stephenson, 11 Ir. Eq. 484. But it was held that a person was not disqualified from appointment as receiver of a railroad because he was not a citizen of the State where the railroad was chartered and situated: nor because he was not a railroad expert and was unacquainted with the mechanical details of the railroad. Farmers' L. & Tr. Co. v. Cape Fear & Y. Val. R. Co., 62 Fed. 675. *Contra*, Wynne v. Lord Newborough, 15 Ves. 283. Nonresidents are often appointed ancillary receivers. Bayne v. Brewer Pottery Co., 82 Fed. 391.

[7] Wynne v. Lord Newborough, 15 Ves. 283; Gibbs v. David, L. R. 20 Eq. 373.

[8] Sykes v. Hastings, 11 Ves. 363; Sutton v. Jones, 15 Ves. 584; Gardner v. Blane, 1 Hare, 381; Powys v. Blagrave, 18 Jur. 463; Ames v. Birkenhead Docks, 20 Beav. 332; Potts v. Warwick & B. C. N. Co., Kay, 143; Kerr on Receivers (2d Am. ed.), 136–139.

[9] Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 462; Kerr on Receivers (2d Am. ed.), 136.

[10] Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40; Robinson v. Taylor, 42 Fed. 803, 812.

[11] Shainwald v. Lewis, 8 Fed. 878.

[12] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Kerr on Receivers (2d Am. ed.), 136–139.

[13] Wilson v. Greenwood, 1 Swanst. 471, 483; Blakeney v. Dufaur, 15 Beav. 40; Hoffman v. Duncan, 18 Jur. 69; Powys v. Blagrave, 18 Jur. 463. But see Newport v. Bury, 23 Beav. 30.

A stockholder,[14] officer or director of a corporation should ordinarily not be appointed receiver of the same,[15] especially when he has been connected with or assented to the transactions that lead to its insolvency;[16] but under special circumstances, when it is necessary to obtain the advantage of his knowledge of its affairs and he cannot otherwise be employed, such an officer or director may be appointed;[17] although, in such a case, it is advisable to join a disinterested person with him as a co-receiver.[18] The fact that directors of a corporation, of which a receiver has been appointed, are also directors of the insolvent corporation, may be a sufficient cause for objecting to his appointment.[19] In one case, the court held that the fact that there was a possible claim on the part of the corporation against one of several receivers was no ground for removing him, until the court or his associates had determined to prosecute the claim.[20] When a party to the cause is appointed receiver in it, he does not thereby lose his privilege of acting as party.[21] It has been held in Tennessee, that no one, not even a clerk of the court, can be made a receiver against his will.[22] Recent statutes provide that no clerk or deputy clerk of a Federal court shall be appointed receiver except for special reasons which must be assigned in the order of appointment;[23] and that "no

14 Wiswell v. Starr, 48 Me. 401; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642.

15 Buck v. Piedmont & A. L. Ins. Co., 4 Fed. 849; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161. Finance Co. of Pa. v. Charleston, C. & S. C. R. Co., 45 Fed. 436; Olmstead v. Distilling & C. F. Co., 67 Fed. 24; but see Farness L. & Tr. Co. v. No. Pac. R. Co., 61 Fed. 546; Coy v. Title Guarantee & Tr. Co., 157 Fed. 794; Attorney General v. Bank of Columbia, 1 Paige (N. Y.), 511; Baker v. Backus, 32 Ill. 79. *Cf.* Re Gordon Supply & Mfg. Co., 129 Fed. 622. See High on Receivers, (4th ed.) §§ 63–81a.

16 Coy v. Title Guarantee & Tr. Co., 157 Fed. 794.

17 State Tr. Co. v. Nat. Land Imp. & Mfg. Co., 72 Fed. 575; Bowling Green Trust Co. v. Virginia Passenger & Power Co., 133 Fed. 186; Cole v. Phila. & E. Ry. Co., 140 Fed. 944; but see People v. Illinois B. & L. Ass'n, 56 Ill. App. 642.

18 Cole v. Phila. & E. Ry. Co., 140 Fed. 944.

19 Cole v. Phila. & E. Ry. Co., 140 Fed. 944.

20 Land Title & Trust Co. v. Asphalt Co. of America, 120 Fed. 996.

21 Scott v. Platel, 2 Phil. 229; Cowdrey v. Railroad Co., 1 Woods, 331, 350.

22 Waters v. Carroll, 9 Yerg. (Tenn.) 102.

23 20 St. at L., 415.

person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."[24] A State statute prohibiting the appointment of non-residents as receivers is not binding upon a Federal court.[25] An order may provide for the appointment of a receiver in the alternative to other relief.[26]

§ 319. The receiver's security. As a general rule, the order for the appointment of a receiver provides that he shall give good and sufficient security for the faithful performance of his duties.[1] This, by the English practice, was usually a recognizance entered into by the receiver and two or more sureties, whereby they, the cognizors, acknowledged "themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels."[2] The recognizance, however, was subject to a condition making it void if the receiver should duly account for the rents and profits of the estate over which he was appointed.[3] In the Federal courts no fixed rule prevails, the security required from a receiver being whatever the judge who orders his appointment thinks proper.[4] When a receiver is appointed by consent, the court may appoint him without requiring security, or upon his own recognizance only.[5] The sureties, when individuals, should usually be residents of the district; but under peculiar circum-

[24] 25 St. at L., 554.

[25] City of Defiance v. McGonigale, C. C. A., 150 Fed. 689.

[26] Curling v. Townshend, 19 Ves. 628.

§ 319. [1] Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

[2] Daniell's Ch. Pr. (2d Am. ed.) 1977; Mead v. Lord Orrery, 3 Atk. 235; Tomlinson v. Ward, 2 Conn. 396.

[3] Daniell's Ch. Pr. (2d Am. ed.) 1999.

[4] Taylor v. Life Ass'n of Am., 3 Fed. 465.

[5] Hibbert v. Hibbert, 3 Meriv. 681; Countess of Carlisle v. Lord Berkley, Amb. 599; Ridout v. Earl of Plymouth, 1 Dickens, 68.

stances sureties residing elsewhere have been accepted.[6] The sureties of a receiver cannot be discharged at their own request,[7] except under special circumstances, "as where underhand practice is proved, and the person secured shown to be connected with such practice."[8] "For if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it."[9] If a surety should procure his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance.[10] In law, a surety is liable to the full amount of the penalty of the recognizance, bond, or undertaking by which he is bound.[11] In equity, however, he is only liable to the full amount, including interest as well as principal which the receiver is liable in equity to pay,[12] unless that exceeds the amount of the penalty, which fixes the extreme limit of his liability.[13] It has been held in England that a surety who has undertaken to be responsible for whatever a receiver "should receive or become liable to pay" as such receiver, is liable for funds received by the receiver before the security was given.[14] Where the parties interested have been guilty of gross delay in compelling the receiver to pass his accounts, the court may excuse the surety from the payment of the whole or part of the interest.[15] According to Daniell, "When an action is brought against a receiver's surety upon the recognizance, the proper course for him to pursue appears to be to apply to the court by motion to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, so as the same does not exceed the amount of the recognizance, into court; and upon such motion, the order will be made, upon the surety's paying the cost of the application, and of the proceedings consequent upon it. When the receiver's account has not been taken, the motion should also pray a ref-

6 Taylor v. Life Ass'n of Am., 3 Fed. 465.

7 Griffith v. Griffith, 2 Ves. Sen. 400; Gordon v. Calvert, 2 Sim. 253.

8 Hamilton v. Brewster, 2 Molloy, 407.

9 Lord Hardwicke in Griffith v. Griffith, 2 Ves. Sen. 400.

10 Vaughan v. Vaughan, 1 Dick. 90; Blois v. Betts, 1 Dick. 336.

11 Dawson v. Raynes, 2 Russ. 466, 468.

12 Dawson v. Raynes, 2 Russ. 466.

13 Walker v. Wild, 1 Madd. 528.

14 Smart v. Flood, 49 L. T. 467.

15 Dawson v. Raynes, 2 Russ. 466.

erence to the master to see what is due from the receiver; and it seems that upon such application the court will indulge the surety by allowing him to pay the balance by instalments."[16] When the surety has been obliged to pay on account of the receiver, he will be entitled to a lien for his reimbursement upon whatever may subsequently be due to the receiver from the suit.[17] The sureties may be liable for the malfeasance of the receiver, although the bill under which the appointment was made has been dismissed for want of jurisdiction.[18] In the absence of a rule of court, or of a stipulation in the bond, the liability of the surety should be enforced in an independent action.[19] In the absence of special circumstances no action can be brought until there has been an accounting by the receiver.[20] It has been held that an order made upon notice to the receiver, directing him to pay the amount of a judgment against him in his official capacity, will not support a judgment for the same against his sureties, when there has been no accounting.[21]

§ 320. Proof of claims against receivers. Claims against receivers are generally presented and proved before Masters in Chancery, to whom the matter has been referred.[1] The court often limits the time within which proof must be made;[2] and in cases of preferred claims, the time within which the preference must be asserted may also be limited;[3] but, in the absence of such an order, a party filing a claim is not required to give notice of the particular class to which the same belongs or whether a preference is claimed.[4] A note given by the insolvent is *prima facie* valid.[5] Claims may be past due, immature or con-

16 Daniell's Ch. Pr. (2d Am. ed.) 2005, 2006, citing Walker v. Wild, 1 Madd. 528.

17 Glossop v. Harrison, Cooper, 61; s. c., 3 V. & B. 134.

18 Baltimore B. & L. Ass'n v. Alderson, C. C. A., 99 Fed. 489.

19 Kirker v. Owings, C. C. A., 98 Fed. 499.

20 Coe v. Patterson, 122 App. Div. (N. Y.) 76. But see Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

21 Ibid.

§ 320. 1 Union Tr. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., 179 Fed. 981.

2 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

3 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721.

4 Pennsylvania Steel Co. v. New York City Ry. Co. 187 Fed. 287.

5 Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., C. C. A., 180 Fed. 648.

tingent.[6] In respect to the question of provability, they may be divided into two classes: "(1) Claims of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the case; (2) Claims which are so uncertain that their worth cannot be so ascertained."[7] The first class of claims can be proved and share in the dividends, whether they are overdue accounts, immature notes, or claims for damages for breach of contract, coinciding with or following the receivership. It has been held that the second class of claims cannot be proved, no matter how highly meritorious they may be.[9] Accordingly, it has been held under a railroad lease, that a lessor railway company may prove a claim for damages caused by a breach of covenant to pay franchise taxes, so far as the same had been assessed, but not as regards future taxes;[10] that claims for rental can be proved up to the date fixed by the court for filing claims against the receivers, but not subsequently;[11] that where the receivers are

6 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 739.

7 Ibid. See Pusey & Jones v. Pennsylvania Paper Mills, 173 Fed. 629.

8 Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 721, 740; New York Security & Trust Co. v. Lombard Inv. Co., 73 Fed. 537; Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 28 E. L. 378.

9 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721, 740; People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412. See § 645, *infra*.

10 Pennsylvania Steel Co. v. New York City Ry. Co., C. C. A., 198 Fed. 721.

11 Ibid. In s. c., 190 Fed. 609, held that expenditures made for the operation, maintenance and improvement of the railroad, after the receivership was extended to the lessor, were not chargeable to the estate of the lessee, since it derived no benefit from the same, and that its receiver was entitled in equity to recover from the receivers of the lessor, in preference to the claims of the mortgagees of the latter, so much of the former's funds as were used for such purposes. In Lockport Felt Co. v. United Box Board & Paper Co., 182 Fed. 328, held that a claim for water rent when the water had not been used by the receivers, could not be considered as an expense of the receivership. For a case determining the apportionment between the lessor and the lessee, of damages collected from directors in interest, see Pennsylvania Steel Co. v. N. Y. City Ry. Co., C. C. A., 198 Fed. 778; s. c., 201 Fed. 418. This case held, amongst other things, that the mortgagee had no right to these proceeds. Citing Farmers' Loan & Tr. Co. v. Waterbury, C. C. A., 193 Fed. 44.

operating the road experimentally, to determine whether or not they will adopt the lease, the court should extend the time within which the claim may be filed until after the experimental period has terminated;[12] that a claim upon a guarantee of payment of the principal and interest of certain railroad bonds can only be proved for interest past due at the time it is filed and not for principal and future interest, since, until the termination of a foreclosure, the amount of damages is too uncertain;[13] and that an agreement with the mortgagor to pay such bonds, cannot be proved for the same reason.[14] It was also held under the same lease, that where the lessee had assumed the contract giving an express company the right to deliver parcels by express over its line for a term of twenty years, in return for a percentage of the gross receipts, and the express company had assigned the contract to another solvent company, in consideration of an agreement to pay it a specified yearly rental during the remainder of the term, that the claimant could prove that the damages were not too uncertain and that the whole amount up to the end of the term could be proved against the funds in the possession of the receiver.[15] Although the receiver has a reasonable time within which to accept or reject a contract, when he does so his relation relates back to the beginning of the receivership and the breach takes place as of that time.[16] Where a creditor holds, as collateral, mortgage bonds issued by his debtor, he is not entitled to receive from the assets not subject to the mortgage, dividends calculated on the basis of the amount due him plus that of the amount due upon such bonds.[17] It has been held that a claim against the insolvent cannot be set off against a claim of the receivers for services or money received during

[12] Ibid. Receivers for the lessee of a street railroad system comprising lines owned by different corporations, are entitled to use the income from the entire system for the purpose of operating and maintaining the same as a unit, notwithstanding the provisions of mortgages on different parts of the property. Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., C. C. A., 180 Fed. 648.

[13] Ibid. Tredegar Co. v. Seaboard Air Line Ry., C. C. A., 183 Fed. 289. In Hitner v. Diamond State Steel Co., 176 Fed. 384, held that interest should be allowed to the time of the adjudication of insolvency.

[14] Ibid.

[15] Ibid.

[16] Ibid. 198 Fed. 721, 744.

[17] Hitner v. Diamond State Steel Co., 176 Fed. 384.

the receivership,[18] and that a receiver appointed in a suit by general creditors should not recognize a secret lien upon the property which is purely equitable.[19] It has been said to be the better practice for the court to fix a time before the accounts are made up for distribution and to allow all claims that are matured and certain before such date.[20] Bankruptcy acts and state statutes regulating the provability of claims against insolvent or dissolved corporations are only entitled to consideration in so far as the rules they lay down appeal to the conscience of the chancellor. So, the decisions of the courts construing and applying such acts and statutes are only of weight when they discuss principles of general application.[21]

§ 321. Receiver's accounts. A receiver should account annually to the court unless accounts at shorter intervals are required of him.[1] His accounts are filed and passed in the office of the master to whom matters pertaining to the receivership are referred.[2] A receiver's account should describe the situation of the estate at the time when he received it, and any changes that have since taken place. He should then state his receipts and disbursements, which should be set forth in schedules as specifically as possible.[3] It is the better practice for him

18 Barber A. P. Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co., 175 Fed. 154.

19 H. K. Porter Co. v. Boyd, C. C. A., 171 Fed. 305.

20 Ibid. In N. Y. Security & Trust Co. v. Lombard Inv. Co., 73 Fed. 537, it was held that all claims could be allowed which had matured before an order of distribution. In Pennsylvania Steel Co. v. N. Y. City Ry. Co., 182 Fed. 155, held that an application for the payment, in full, of certain claims, as preferred, should be denied until the final determination of the status of all classes of claims which might be entitled to a preference.

§ 321. 1 Potts v. Leighton, 15 Ves. 273; General Order, 15 Ves. 278; Lowe v. Lowe, 1 Tenn. Ch. 515.

2 Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997.

3 Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997. But see Lafayette Co. v. Neely, 21 Fed. 738. He has a lien upon the estate for the repayment of his individual funds advanced to execute orders of the court. Union Tr. Co. v. Illinois Midland Ry. Co., 117 U. S. 434, For a case where the receiver's expenses on a journey to Europe were allowed: N. Ala. Ry. Co. v. Hopkins, C. C. A., 87 Fed. 805. For the disallowance of New York hotel bills paid by the receiver of a Kansas railroad, see Braman v. Farmers' L. & T. Co., C. C. A., 114 Fed. 18, 21.

to charge himself with the inventory and to take credit as it is disposed of; to separate expenditures not on improvement account from those for operating expenses;[4] to file vouchers for all sums of money, in excess of twenty dollars, which he has paid.[5] He should also state such indebtedness as he has incurred; and, in general, give as full a description of the estate in his hands, and of his actions concerning the same, as is practicable.[6] Receivers will be charged with personal liability for such indebtedness incurred by them as might have been prevented had they kept proper accounts,[7] and with preferential payments made by them, which should have been ratably applied among all the creditors.[8] When a receiver withholds from a stranger to the suit, money to which the latter is entitled, he is liable for interest upon the same from the time of its receipt until he pays it into court and asks for directions as to its distribution.[9] The burden rests upon him to justify and prove his accounts, so far as they are questioned by exceptions.[10] An *ex parte* order authorizing a payment, which is obtained from the court under a misapprehension due to fraud or negligence by the receiver, will not protect him.[11] If a person has not been paid for services rendered to the estate, but has agreed with the receiver to be content with what the court allows him, that fact should be stated in the account together with a description of the services thus performed.[12] A receiver is entitled to credit

[4] Ibid.; Ely v. Van Kannel Revolving Door Co., 184 Fed. 459.

[5] Remsen v. Remsen, 2 J. Ch. (N. Y.) 495, 501. See also Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

[6] Daniell's Ch. Pr. (2d Am. ed.) 1096, 1097; Hooper v. Winston, 24 Ill. 353; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Atty. Gen. v. N. A. L. I. Co., 89 N. Y. 94, 107; Bourne v. Maybin, 3 Woods, 724, 741; Equity Rule 79.

[7] Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

[8] Gutterson & Goulld v. Lebanon Iron & Steel Co., 151 Fed. 72.

[9] Rosenthal v. McGraw, C. C. A., 138 Fed. 721.

[10] Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72. Specific items for counsel fees were considered in Drey v. Watson, C. C. A., 138 Fed. 792, 796. See also *infra*, § 422.

[11] Gutterson & Gould v. Lebanon Iron & Steel Co., 151 Fed. 72.

[12] Adams v. Woods, 8 Cal. 306. Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 675; Bound v. S. Carolina Ry. Co., 43 Fed. 404; Maxwell v. Wilmington Mfg. Co., 82 Fed. 214; Central Tr. Co. v. Wabash, St. L. & P. Ry. Co., 23 Fed. 675; Boston S. D. & Tr. Co. v. Chamberlain, C. C. A., 66 Fed. 847. *Cf.* Sowles v. Nat. Union Bank, 82 Fed. 139; Am. Loan &

for reasonable counsel fees which he has paid or incurred;[13] but not, it has been said, for services in opposing a motion to vacate his appointment;[14] unless when he is also trustee under the mortgage, when such counsel fees may be allowed.[15] He cannot receive credit for counsel fees he contracted to pay for instituting suits which were unnecessary and not warranted under the circumstances.[16] Allowances for counsel fees will usually be small, until the final accounting of the receiver, when the full amount earned will be ordered paid.[17] In New York it has been held, that such allowances are the property of the receiver, not of his counsel;[18] but payment directly to the attorney is often directed. The employment by the receiver of his law partner, as counsel, is a transaction which is indelicate, and is not to be commended.[19] When, however, it clearly appears that the receiver is not to share in the compensation, his partner may be paid for legal services rendered to

Tr. Co. v. S. Atl. & O. R. Co., 81 Fed. 62; Kernochan v. Ballance, 56 N. Y. Supp. 132; s. c., 26 N. Y. Misc. 435.

[13] Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. Where the counsel for a receiver lived in one State and rendered services in two States, it was *held* that the compensation for his different services should be adjusted at the amount usually paid to lawyers in the States where each were performed. Bibber-White Co. v. White River Valley El. R. Co., 175 Fed. 470. Where the judge wrote the receivers stating that certain persons therein named were their only standing counsel and that others should be employed only after consultation with the court, it was *held* that that was a sufficient discharge of any that might have been previously employed. Guaranty Tr. Co. of New York v. Chicago Rys. Co., C. C. A., 185 Fed. 411. It has been held that $500 is proper compensation to an attorney for filing the receivers' bond and for the preparation, service, and filling of a summons and complaint to compel the payment of $10,000. People, &c. v. Przestrzelski, (Gerard, J., N. Y. Sup. Ct., Sp. Tm.) N. Y. L. J. May 24, 1912. Where the attorneys for an insolvent bank consented to allowances to attorneys for a receiver, in order to enable the bank to resume business, it was *held* that the consent was given under duress and that the receiver might appeal from the order making the allowance. People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750.

[14] Burroughs v. Toxaway Co., 182 Fed. 129; modified S. C., C. C. A., 185 Fed. 435.

[15] Burroughs v. Toxaway Co. C. C. A., 185 Fed. 435.

[16] Burroughs v. Toxaway Co., 182 Fed. 129.

[17] Matter of Simpson, 36 App. Div. 562, 564.

[18] Ibid.

[19] Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568.

the estate.[20] Where before his appointment a receiver had received rent paid to him in his individual capacity in advance, he was obliged to apportion the rent, and to account for so much of it as was paid for the time during which he acted as receiver of the property, for the use of which the rent was paid.[21] Exceptions should not be taken after a master's report upon a receiver's accounting has been filed, the master acting in the place of the court in a judicial and not in a ministerial capacity.[22] Should the receiver or any other party to the accounting feel aggrieved at a ruling of the master, he should take exception at the time,[23] and subsequently petition the court to refer the mattter back to the master for correction.[24] The court's duty upon such a petition consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail or the evidence upon which those items are severally founded; the latter duty belonging more especially to the province of the master acting in his judicial capacity, analogous to the province and duty of a jury on questions of fact.[25] Where the receiver claimed in his accounts a balance as due him, and it was found that he was indebted to the estate, he was charged personally with the costs of the accounting.[26] In a proper case, the receiver, as well as any other party interested, may appeal from the final decree entered after his accounting.[27]

§ 322. **Compensation of receivers.** The compensation of a receiver is usually fixed in the first instance by the master,[1] with whose determination the court will not ordinarily interfere.[2] The compensation will rarely, if ever, be increased upon ap-

20 In re Allin, 8 Fed. 753.

21 Cowdrey v. Railroad Co., 1 Woods, 331, 334.

22 Ibid.

23 Ibid.

24 Ibid.

25 Gunn v. Ewan, 93 Fed. 80.

26 Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447; Petersburg S. & I. Co. v. Dellatorre, C. C. A., 70 Fed. 643.

27 Hinckley v. Gilman C. & S. R. Co., 94 U. S. 467, 24 L. ed. 166; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888.

§ 322. 1 Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187.

2 Cowdrey v. Railroad Co., 1 Woods, 331, 341; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187.

peal.[3] Where the court has fixed a receiver's compensation in advance, it has the power to award him an additional sum for extraordinary labors.[4] In cases of moderate amount of commission of five per cent. upon the receipts and disbursements is not unusual.[5] Commissions were, however, not allowed upon securities which came into the hands of the receiver, but were not collected by him.[6] Where the amounts received and disbursed are large, it is customary to pay the receiver a salary or a lump sum graduated according to the amount of his time employed, the value of the property, the difficulty of his task, and the success of his administration.[7] It has been said that the peculiar duties and responsibilities and accountability of a receiver of a railroad entitle him to a larger amount than would be demand-

3 Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Stuart v. Boulware, 133 U. S. 78, 33 L. ed. 568; Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

4 Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60.

5 Cowdrey v. Railroad Co., 1 Woods, 331, 346; Day v. Croft, 2 Beav. 488; Girard Tr. Co. v. McKinley-Lanning L. & Tr. Co., 143 Fed. 355; Calhoun v. Dragon Motor Co., 166 Fed. 980. $12,000 each was held to be ample compensation for two receivers who had been occupied six months in the administration of trust funds amounting to $2,000,000. People v. Brooklyn Bank, 140 App. Div. (N. Y.) 750. Ten per cent. upon the receipts from a business conducted by him, and five per cent. upon his receipts from other sources and his disbursements was allowed in Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447. Where a receiver collected earnings of the property, to a part of which a third person was entitled under a contract with the defendant, it was held that neither he nor the insolvent estate could charge for the services rendered in collecting the part payable to the stranger. Rosenthal v. McGraw, C. C. A., 138 Fed. 721.

6 Girard Tr. Co. v. McKinley-Lanning L. & Tr. Co., 143 Fed. 355.

7 Cowdrey v. Railroad Co., 1 Woods, 331, 346; Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187. See Burroughs v. Toxaway Co., C. C. A., 185 Fed. 435. Where the majority of the creditors had given their assent to the appointment of receivers of a partnership, upon a bill alleging insolvency and that the completion of a contract would be for the benefit of creditors; it was held that the affidavit of the attorney for a single judgment creditor stating his belief that the firm was solvent and that the receivership was obtained for the benefit of the partners, in order to hinder and delay creditors, was insufficient to justify the vacation of the receivership or to authorize its creditors to issue an execution against property in the hands of the receivers. Patterson v. Patterson, 184 Fed. 547.

ed by the head officer of a railroad, of the same size and business.[8] The receiver's right to compensation passes to his personal representatives upon his death,[9] and has precedence of the claims of holders of receiver's certificates.[10] Whether a receiver can assign his commissions before they are earned is doubtful.[11] An agreement by a receiver that he would not enforce any claim for his commissions, "to the detriment of" the claim of an intervenor, was held not to entitle the latter to be paid out of commissions allowed the receiver from funds that

[8] Bradley, J., in Cowdrey v. Railroad Co., 1 Woods, 331, 347. Approved by Brewer, J., in Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187, 188. See also Williams v. Morgan, 111 U. S. 684, 28 L. ed. 559. Receivers of railroads have been frequently allowed as much as $10,000 a year. Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; Cowdrey v. Railroad Co., 1 Woods, 331, 347. But see Farmers' L. & Tr. Co. v. Central R. R. of Iowa, 8 Fed. 60. In one reported case two receivers were each allowed $70,000 for three and a half years' work. Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 Fed. 187. In a few cases not reported larger fees have been allowed. In other cases annual salaries of $6,000, Boston S. D. & Tr. Co. v. Am. R. Tel. Co, 67 Fed. 165, 168; Braman v. Farmers' L. & Tr. Co. C. C. A., 114 Fed. 18; Boston S. D. & Tr. Co. v. Chamberlain, C. C. A., 66 Fed. 847, where, for winding up the estate after the railroad was sold, only $1,750 was allowed for seven months; $4,500, Easton v. H. & T. C. Ry. Co., 40 Fed. 189; and $2,500, Central Tr. Co. v. Cincinnati, J. & N. Ry. Co., 58 Fed. 500, 512. In street-railroad cases much less is allowed. Montgomery v. Petersbury S. & I. Co., C. C. A., 70 Fed. 746. $15,000 was held to be sufficient for twenty-nine months of service in the administration of oil properties in four different States, which sold for $271,000, when the receiver had also been allowed $15 a day for his expenses during 125 days spent in different cities; and an allowance of $24,022.84 was reduced to that amount. In the same case, it was held that an allowance to an assignee, under an insolvent assignment, of five per cent. upon the money handled by him, was sufficient. Drey v. Watson, C. C. A., 138 Fed. 792. For a case where the Federal court refused to allow its receiver to set off the amount of compensation awarded him by a State court, for compensation for services as a receiver of the same property in another suit, against the sum he was directed to pay by a decree of the Federal court, see Hinckley v. Railroad Co., 100 U. S. 153, 25 L. ed. 591; In re Hinckley, 3 Fed. 556. For a case of estoppel against objecting to the amount of compensation, see Dillingham v. Moran, C. C. A., 81 Fed. 759.

[9] Cake v. Mohun, 164 U. S. 311, 41 L. ed. 447.

[10] Petersburg S. & I. Co. v. Deletorre, C. C. A., 70 Fed. 643.

[11] Bloomfield v. Roy, C. C. A., 120 Fed. 502, 503.

would otherwise have been applied in payment of preferred claims.[12] Misconduct of the receiver, such as the unnecessary prolongation of the receivership[13] or his failure to keep proper books of account,[14] may be a reason for denying him any compensation. Where a receiver, with the consent of the court, authorized certain creditors to advance the necessary expenses to collect certain claims of the estate, under an agreement that they should have a preference for the payment of their expenses and their claims out of the proceeds; it was held that he should receive no compensation from that fund, except from the surplus after they had been paid in full.[15] When the account has been adjusted, the receiver should be ordered to pay the balance into court, and his surety is liable for his default.[16] After such an order, his liability is not measured by the funds or property of the estate, although such funds can be used to comply with the order.[17] An order allowing compensation to a receiver should be made only after notice and a hearing, at which the parties interested have an opportunity of contesting the same.[18] Such an order is appealable and may be reversed for want of proper notice of the application for the same.[19] Ordinarily, motions to fix the compensation of a receiver's counsel should not be heard *ex parte,* but notice thereof should be given to all parties in interest.[20]

§ 323. Removal of receivers. A receiver may be removed for misconduct in office,[1] or because his original appointment

12 Bloomfield v. Roy, C. C. A., 120 Fed. 502.

13 Newell v. International Tr. Co., C. C. A., 169 Fed. 497.

14 Braman v. Farmers' L. & Tr. Co., C. C. A., 114 Fed. 18.

15 Cornell v. Nichols & Langworthy Mach. Co., 189 Fed. 556; aff'd., C. C. A., 201 Fed. 320. See McEwen v. Harriman Land Co., C. C. A., 138 Fed. 797, 898, 71 C. C. A. 163.

16 *Re* Reliable Bottle Box Co., 199 Fed. 670.

17 Ibid.

18 Ruggles v. Patton, C. C. A., 143 Fed. 312; Merchants' Bank v. Crysler, 67 Fed. 388; s. c., 14 C. C. A. 449.

19 Ibid.

20 Merchants' Bank v. Crysler, C. C. A., 67 Fed. 388, 14 C. C. A. 449.

§ 323. 1 Handy v. Cleveland & Marietta R. Co., 31 Fed. 689; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Clarke v. Central R. R. & B. Co., 66 Fed. 16. Instances of such misconduct as will be a cause for the removal of a receiver are: unlawful discrimination in charges between different shippers upon a railroad; Handy v. Cleveland & M. R. Co., 31 Fed. 689; At-

was obtained by collusion or fraud,[2] or was improper on account of his interest in the subject of the receivership or connection with the parties in interest,[3] or because subsequent developments make his continuance in the office likely to be detrimental to the estate.[4] Unreasonable delay in the administration of the estate is a cause for the removal of a receiver.[5] The fact that the estate has a claim against him is a proper cause for his removal.[6] A receiver will not be removed or discharged at his own request except for good cause shown, nor ordinarily for a reason which he knew or had ground to anticipate when he accepted the receivership.[7] Ordinarily, a receiver can only be removed by the court which appointed him,[8] upon an ap-

kins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; but see Central Tr. Co. v. Ohio Cent. R. Co., 23 Fed. 306; the purchase of supplies for the purpose of the receivership from a firm or corporation in which he is largely interested. Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161. In the Eastern District of Georgia, the court refused to remove a receiver, who had continued in good faith reports of the condition of the property similar to those issued by the corporation before his appointment, who had aided in a scheme for organizing the property, who had in good faith allowed a special rate to a shipper, and whose agents had been guilty of fraud. Clarke v. Central R. R. & B. Co., 66 Fed. 16. But in the Second Circuit a receiver very properly is not allowed to become a member of a reorganization committee. Chable v. Nicaragua, C. C. A., 59 Fed. 846.

[2] O'Mahoney v. Belmont, 62 N. Y. 133; s. c., 37 N. Y. Super. Ct. 223.

[3] Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161.

[4] Meier v. Kansas Pac. R. Co., 5 Dillon, 476; where two receivers were unable to act in harmony. but see Conner v. Belden, 8 Daly. (N. Y. C. P.), 257; Land Title & trust Co. v. Asphalt Co., 120 Fed 996.

[5] *Re* Angel, 131 Mich. 345, 91 N. W. 611.

[6] Land Title & Tr. Co. v. Asphalt Co., 120 Fed. 996.

[7] Richardson v. Ward, 6 Madd. 266; *Re* Lytle, 3 Paige Ch. (N. Y.) 251; Smith v. Vaughan, Ridg. *temp.* Hardw. 251; Beach on Receivers, § 782. Thus the court refused to remove, at his own request, a receiver upon the sole ground that the duties of his office interfere with his private business. Beers v. Chelsea Bank, 4 Edw. Ch. (N. Y.) 277. But see Purdy v. Rapalye (N. Y. Ch. 1835); Edwards on Receivers, 661. A receiver may be removed at his own request when by reason of blindness he has become physically incapable of performing the duties of his receivership. Richardson v. Ward, 6 Madd. 266.

[8] Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama & C. R. Co. v. Jones, 7 N. B. R. 145, 169; Beach on Receivers, §§ 777, 778.

plication made in the suit in which his appointment was made.[9] A Federal court may, however, after the removal of a suit, remove a receiver therein appointed by a State court.[10] And it was held that when a Circuit Court of the United States had appointed a receiver of a line of railroad running through another circuit, as well as through that wherein the appointment is made, his authority in the other circuit was recognized merely by judicial comity, and he might be removed from all control over property therein by the Federal court there held, upon a bill there filed.[11] A delay of ten months after knowledge of the facts upon which the motion is founded, in moving for the discharge of a receivership and the removal of a receiver, has been held a sufficient reason for denying the application.[12] Upon an application for the removal of a receiver of a mine, the court ordered that the agent of the applicant be permitted to inspect the mine.[13] When a receiver is removed, the court may appoint another in his place. The successor to a receiver can usually enforce, at least in equity, contracts made with his predecessor in his official capacity and is usually responsible in his official capacity[14] for liabilities incurred by his predecessor in the same manner as if he were a corporation sole.[15] It has been said that a receiver cannot appeal from an order discharging or removing him.[16]

9 Davis v. Michelbacher (S. C. Wis.), 31 N. W. R. 168; Beach on Receivers, §§ 777, 778.

10 Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275. See *infra*, § 555.

11 Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. 161; Farmers' L. & Tr. Co. v. No. Pac. R. Co., 69 Fed. 871. But see Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. 618; Muller v. Dows, 94 U. S. 444; Young v. Montgomery & E. R. Co., 2 Woods, 606, 618; Alabama & C. R. Co. v. Jones, 7 Nat. B. Reg. 145, 169; *supra*, § 304.

12 Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021.

13 Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. 178.

14 Thompson v. Phenix Ins. Co., 136 U. S. 287, 34 L. ed. 408.

15 McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796.

16 Bosworth v. St. Louis Terminal R. R. Ass'n., 174 U. S. 182, 189, 19 Sup. Ct. 625, 43 L. ed. 941, modifying and affirming S. C., 26 C. C. A. 279; 80 Fed. 969, 53 U. S. App. 302; *Re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; Young v. Irish, 104 Minn. 367, 116 N. W. 656; State v. Superior Court, 36 Wash. 81, 78 Pac. 202; High on Receivers, (4th ed.) § 825. But see Conner v. Belden, 8 Daly (N. Y. C. J.) 257; Wilson v. Barney, 5 Hun (N. Y.), 257; Connolly v. Kretz, 78 N. Y. 620.

§ 324. Discharge of a receiver. The discharge of a receiver is a termination of the receivership, and no successor to him is then appointed.[1] It will be ordered when the court is satisfied either that no occasion for a receivership existed when the appointment was made,[2] or that in the course of subsequent events the necessity for the receivership has ceased.[3] Ordinarily, a receiver can be discharged only by the court that appointed him.[4] After the removal of a case from a State to a Federal court, the Federal court may discharge a receiver therein appointed.[5] Any person injured by the appointment of a receiver can move for his discharge although not a party to the suit in which he was appointed.[6] The motion should be made on notice to all parties interested.[7] A motion for the discharge of a receiver may be denied on account of the laches of the moving party.[8] Ordinarily a receiver of the estate of an infant should not be discharged until a year after the infant's majority, unless the ward after majority consents to his discharge.[9] A receiver will not be discharged, as of course, at the motion of the party who procured

§ 324. [1] Beach on Receivers, § 791. See High on Receivers, §§ 832–848a. Where a decree provided that when the receiver made a report, if no exceptions were filed thereto, he should be discharged, but no report was filed; it was *held* that the court was not ousted of jurisdiction. Bray v. Staples, C. C. A., 180 Fed. 321.

[2] Lavender v. Lavender, Irish R. 9 Eq. 593; Furlong v. Edwards, 3 Md. 99; Sage v. Memphis & L. R. Co., 18 Fed. 571; s. c., 125 U. S. 361, 31 L. ed. 694.

[3] Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigge v. Blair, 3 Beav. 421; Tolman v. Ubero Plantation Co., 142 Fed. 270.

[4] Young v. Montgomery & E. R. Co., 2 Woods, 606; Beach on Receivers, § 791.

[5] Texas & St. L. Ry. Co. v. Rust, 17 Fed. 275; Mahoney Mining Co. v. Bennett, 4 Shaw, 287. As to the disposition of the money in the hands of a receiver thus discharged, see Mack v. Jones, 31 Fed. 189, 196.

[6] Thomas v. Brigstocke, 4 Russ. 64; Grenfell v. Dean of Windsor, 2 Beav. 544; Milwaukee & M. R. Co. v. Soutter, 2 Wall. 510, 17 L. ed. 900.

[7] Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigge v. Blair, 3 Beav. 421, 423.

[8] Allen v. Dallas & W. R. Co., 3 Woods, 316, 331; National M. B. Ass'n v. Mariposa Co., 60 Barb. (N. Y.) 423; Hazard v. Credit Mobilier of America, 38 Fed. 195; Brown v. Lake Superior Iron Co., 134 U. S. 530, 33 L. ed. 1021.

[9] Matter of Van Horne, 7 Paige Ch. (N. Y.) 346; Wildridge v. McKane, 2 Molloy, 545. See also Bainbrigge v. Blair, 3 Beav. 421.

his appointment, if other parties who have acquired an interest in the receivership object.[10] The entry of a final decree which does not provide for the continuance of a receivership supersedes the appointment of a receiver.[11] Where a receivership had been extended so as to cover the property of a corporation not a party to the bill, an order directing the receiver to return its property to such corporation was held to be equivalent to a revocation of the receivership as to that company.[12] A receiver may be discharged from the control of real estate, and the rents and profits which he has collected be continued in his control until the termination of the litigation.[13] It has been held that the discharge of a receiver by a decree cannot be set aside upon a motion entered after the term at which it was made,[14] unless the decree reserved the jurisdiction of the court for the enforcement of claims, when the court may appoint a special receiver, against whom pending actions may be revived, with authority to retake possession of sufficient property to satisfy any judgments that may be recovered.[15] The discharge of a receiver terminates his liability for acts done in his official capacity,[16] at least to those who had due notice of the proceedings; and until the same is set aside, he cannot be sued as receiver.[17] After a receiver's discharge damages to the estate resulting from his mismanagement cannot be recovered from the sureties upon an injunction bond concurrent with his appointment,[18] but his discharge does not relieve the sureties upon a forthcoming bond, executed to him and his successors, although no other receiver is appointed and the other property is returned

10 Bainbrigge v. Blair, 3 Beav. 421; People v. Globe M. L. Ins. Co., 57 How. Pr. (N. Y.) 481; Fay v. Erie & K. R. R. Bank, Harring. (Mich.) 194. See, however, Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 471.

11 Daniell's Ch. Pr. (2d Am. ed.) 1765.

12 Hook v. Bosworth, 64 Fed. 443.

13 Jones v. Smith, 40 Fed. 314.

14 Davis v. Duncan, 19 Fed. 477. *Contra*, Taylor v. Easton, C. C. A., 180 Fed. 363, where, upon the discovery of assets, a new receiver was appointed at a term long subsequent.)

15 Southern Ry. Co. v. Townsend, C. C. A., 161 Fed. 310.

16 Davis v. Duncan, 19 Fed. 447; White v. Keokuk & D. M. Ry. Co., 52 Iowa, 97; Western N. Y. & P. R. Co. v. Penn Refining Co., C. C. A., 137 Fed. 343.

17 Archambeau v. Platt, 173 Mass. 249; Lilienthal v. Betz, 185 N. Y. 153, 159, 7 Ann. Cas. 41.

18 Lehman v. M'Quown, 31 Fed. 138.

to his corporation, which can then sue upon the bond.[19] Where a decree discharged a receiver upon condition that he should file a release from the person to whom the property was given by the decree, it was held that his omission to file the release did not make him liable to strangers for former injuries by his employees.[20] Upon the discharge of a receiver and the return of the property to the original owner, who did not oppose the receiver's appointment, the owner is liable for all contracts by the receiver entered into by the authority of the court, and also for the damages caused by the negligence or other torts of the receiver's agents which are incidental to the ordinary management of the property.[21] An order discharging a receiver and directing him to deliver the property to a person from whom he had taken it was held not to be an adjudication that the latter was entitled to the same.[22] Where the court acted within its jurisdiction, it has been held that where a receiver is discharged because his appointment was not justified, the expenses of his administration, including his compensation, should be charged against the funds in his hands; that the party who moved for his appointment should not be obliged to pay them[23] where the proceedings were not instituted improvidently without reasonable cause[24] and the prosecution thereof has not been unreasonably delayed;[25] and that he is not liable for interest

19 Am. Surety Co. v. Campbell & Zell Co., C. C. A., 138 Fed. 531.

20 Davis v. Duncan, 18 Fed. 477.

21 Texas & Pac. Ry. Co. v. Huron, 164 U. S. 636, 640, 41 L. ed. 580, 582; Texas & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 89, 38 L. ed. 81, 84. *Cf. supra*, § 313.

22 Marshall v. Otto, 59 Fed. 249, 255.

23 Elk Fork O. & G. Co. v. Jennings, 90 Fed. 767; New Birmingham I. & L. Co. v. Blevins (Tex. Civ. App.), 34 S. W. R. 828; Clark v. Brown, C. C. A., 119 Fed. 130; Ephraim v. Pac. Bank, 129 Cal. 589, 592.

24 Industrial & Min. G. Co. v. El. Supply Co., 58 Fed. 732, 734; Ogden City v. Bear L. & W. & Imp. Co., 55 Fed. 385; Farmers' Nat. Bank v. Backus, 77 N. W. R. 142; Northern Ala. Ry. Co. v. Hopkins, 31 C. C. A. 94; s. c., 87 Fed. 505; Gallagher v. Gingrich, 105 Iowa, 237; Cutter v. Pollock, 4 N. D. 205; Cutter v. Pollock, 7 N. D. 631, 634; Richmond v. Irons, 121 U. S. 27; Matter of Lacov, C. C. A., 142 Fed. 960; Beach v. Macon Grocery Co., C. C. A., 125 Fed. 513; 60 C. C. A. 557, 559; Burroughs v. Toxaway Co., 182 Fed. 129; S. C., C. C. A., 185 Fed. 435; Chicago Title & Tr. Co. v. Newman, C. C. A., 187 Fed. 573; *Re* Metals Extraction & Refining Co., C. C. A., 193 Fed. 372.

25 Unreasonable delay in the prosecution of the action may be ground for charging the expense of

upon the funds in the receiver's hands.[26] If the appointment were void for want of jurisdiction, or induced by fraud, the rule might be otherwise.[27] Where the proceeds of the estate are insufficient to pay the expenses of the receivership, they cannot be charged against the party at whose application the appointment was made, unless he was guilty of some misconduct,[28] or he has received some special benefit from the receivership.[29] Where a receivership in a creditors' suit has been beneficial to the mortgaged property, the receiver's compensation may be paid therefrom before the mortgage debt.[30] Otherwise this should not be done.[31] The failure of a trustee to exercise a power of sale vested in him, and the institution of a foreclosure suit instead, is no reason for charging him with the expense of the receivership.[32] The fact that land was sold at foreclosure for enough to pay the amount of the mortgage and costs does not prevent the payment to the receivers of compensation out of other property covered by the mortgage.[33]

§ 325. Appeals from orders appointing receivers. "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal must be taken within thirty days

the receivership to the complainant, when the appointment of the receiver is set aside. Harrington v. Union Oil Co., 144 Fed. 235.

26 Clark v. Brown, C. C. A., 119 Fed. 130.

27 Ephraim v. Pac. Bank, 129 Cal. 589, 592. But see Palmer v. Texas, 212 U. S. 118.

28 Atlantic Tr. Co. v. Chapman, 208 U. S. 360, 52 L. ed. 528.

29 Farmers' Nat. Bank v. Backus, 74 Minn. 264.

30 Provident Life & Tr. Co. v. Camden & T. Ry. Co., C. C. A., 177 Fed. 854. See *supra*, § 305.

31 Spencer v. Taylor Creek Ditch Co., C. C. A., 194 Fed. 635.

32 Atlantic Tr. Co. v. Chapman, 208 U. S. 360, 52 L. ed. 528.

33 Strain v. Palmer, C. C. A., 159 Fed. 628.

from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond."[1] Although the statute authorizes an appeal from an order, continuing, refusing or dissolving, or refusing an application to dissolve, an injunction, there is no such provision concerning orders appointing receiverships. The right to appeal from an order denying an application to appoint a receiver or to dissolve a receivership, or from an order continuing or dissolving a receivership, is not expressly granted. It has been held: that an *ex parte* order appointing a receiver is appealable;[2] and that an order nominally appointing a "conditional receiver," which gave the appointee no greater powers than those of a special master, namely, to keep and require accounts, to require bonds in such amount as he might determine and to report to the court in case of misconduct by the defendants, is not appealable.[3] The court said: "Interlocutory orders, which may be reviewed on appeal under and within the purview of the statute just quoted, are orders in the nature of 'executions before judgment,' and in effect either ousting parties from the possession of property or injuriously controlling the management and disposition of property."[4] A

§ 325. [1] Jud. Code, § 129, 36 St. at L. 1087. Where before the Act authorizing appeals from orders appointing receivers, an order appointed a receiver and contained no other injunction than the usual mandate that the defendant, its officers, agents and employees, deliver to him the property in their hands: it was held that it was not appealable. Bissell C. S. Co. v. Goshen S. Co., C. C. A., 72 Fed. 545; Marden v. Campbell Printing-Press & Mfg. Co., C. C. A., 67 Fed. 809. An order vacating the appointment of a receiver and staying all proceedings in the suit, was held to be an injunction order and appealable. Baker v. Walter Baker & Co., C. C. A., 83 Fed. 3.

[2] Joseph Dry Goods Co. v. Hecht, C. C. A., 120 Fed. 760. See Mann v. Gaddie, C. C. A., 158 Fed. 42, 47. *Contra*, Root v. Mills, C. C. A., 168 Fed. 688. It has been said: "This statute will afford defendants relief, where receivers are improperly appointed, whether with or without notice." Mann v. Gaddie, C. C. A., 158 Fed. 42, 47.

[3] Gulf Refining Co. v. Vincent Oil Co., C. C. A., 185 Fed. 87.

[4] Gulf Refining Co. v. Vincent Oil

stipulation not to object to the continuance of a receivership is a waiver of the right to appeal from the appointment.[5] The other decisions which apply to these appeals are discussed in the previous section upon appeals from injunction orders.[6] Upon an appeal from an order appointing an ancillary receiver, the propriety of the decree in the principal suit cannot be questioned.[7]

Co., C. C. A., 185 Fed. 87, 89, per Pardee, J.

[5] Haight & Freese Co. v. Weiss, C. C. A., 156 Fed. 328.

[6] *Supra*, § 300.

[7] McGraw v. Mott, C. C. A., 179 Fed. 646, where it was said that the jurisdiction of the former court could not be questioned.

CHAPTER XX.

THE WRIT OF NE EXEAT REPUBLICA.

§ 326. Definition of the writ of ne exeat republica, and when it will issue. The writ of *ne exeat republica* is a writ which issues from a Federal court of equity or bankruptcy to restrain a defendant to a suit therein from departing from the United States without the leave of the court.[1] In England it was called *ne exeat regno*, and was considered a writ of high prerogative. It was originally applicable to purposes of state only, but afterwards extended to private transactions.[2] In the United States the writ has hitherto been issued only at the request of a private party. The Judicial Code provides that "writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."[3] It is unsettled whether the writ can now issue from a Federal court held in a State which has abolished imprisonment for debt.[4] It has been held that the intention of the defendant to depart from the judicial district, is not enough to authorize the issue of the writ,[5] except in case of bankruptcy.[6] The claim of the party applying for

§ 326. [1] *Re* Berkowitz, 173 Fed. 1012.

[2] Jackson v. Petrie, 10 Ves. 164; Beames on Ne Exeat. 1–21.

[3] Jud. Code, § 261, 36 St. at L. 1087, re-enacting, U. S. R. S., § 717.

[4] *Cf.* U. S. R. S., § 990; Mallory Mfg. Co. v. Fox, 20 Fed. 409; and *infra*, § 471. See also 24 Am. Law Rev. 535.

[5] Loewenstein v. Biernbaum, 8 W. N. C. (Pa.), 163.

[6] *Re* Berkowitz, 173 Fed. 1012, where upon the petition of creditors, accompanied by a certificate of the referee, the writ was issued against a bankrupt, who was about to leave the district and did not appear upon the adjourned day of his examination.

the writ must be one enforceable by a suit in a court of equity[7] or bankruptcy,[8] except where a decree for permanent alimony has been entered and no appeal therefrom is pending, in which case the English rule was that the writ might issue to compel obedience to the same.[9] The claim must be for the payment of a certain fixed sum of money[10] or for an accounting.[11] A claim for unliquidated damages is insufficient.[12] Thus, the writ cannot issue under a bill to set aside a bill of sale of a vessel, for a return of the vessel or her value, and for an account of her earnings.[13] The debt must be already due.[14] A debt which is contingent,[15] or certain but future,[16] is insufficient. The motives for the defendant's departure, no matter how innocent they may be,—as, for example, that he is about to sail upon a ship of which he is captain,[17] will not prevent the issue of the writ.[18]

§ 327. **Against whom the writ will issue.** The writ was originally confined to subjects of the King of England.[1] It has been extended, however, so as to apply to foreigners as well as subjects of the country from the courts of which the writ issued;[2] and where the court has jurisdiction, the writ may be issues at the suit of one foreigner against another.[3] It seems that the writ may be issued against a married woman in a suit affecting her separate estate.[4] The writ will not issue

7 Pearne v. Lisle, Amb. 75; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

8 *Re* Berkowitz, 173 Fed. 1012.

9 Pearne v. Lisle, Amb. 75; Read v. Read, 1 Ch. Cas. 115; Ex parte Whitmore, 1 Dick. 143; Shaftoe v. Shaftoe, 7 Ves. 171; Street v. Street, 1 T. & R. 322; Daniell's Ch. Pr. (2d Am. ed.) 1926, 1927.

10 Graham v. Stucken, 4 Blatchf. 50; Daniell's Ch. Pr. (2d Am. ed.) 1931.

11 Gooding v. Reid, Murdock & Co., C. C. A., 177 Fed. 684.

12 Graham v. Stucken, 4 Blatchf. 50.

13 Ibid.

14 Whitehouse v. Partridge, 3 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

15 Anon., 1 Atk. 521.

16 Whitehouse v. Partridge, 3 Swanst. 365, 377; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

17 Dick v. Swinton, 1 V. & B. 371.

18 Stewart v. Graham, 19 Ves. 313; Daniell's Ch. Pr. (2d Am. ed.) 1934, 1935.

§ 327. 1 Daniell's Ch. Pr. (2d Am. ed.) 1933; Beames on Ne Exeat, 1–20.

2 Flack v. Holm, 1 J. & W. 405; Daniell's Ch. Pr. (2d Am. ed.) 1933, 1934.

3 De Carriere v. De Calonne, 4 Ves. 577; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669.

4 Moore v. Hudson, Mad. & Geld. 218; Moore v. Meynell, 1 Dick. 30; Daniell's Ch. Pr. (2d Am. ed.) 191.

against a defendant who is under arrest or held to bail in an action at law.[5] The Constitution provides that Senators and Representatives shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.[6] And the Revised Statutes, that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.[7] Whenever any writ or process is sued out in violation of this statute, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, is deemed a violator of the laws of nations and a disturber of the public repose, and is liable to imprisonment for not more than three years, and a fine at the discretion of the court.[8] These regulations do not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor to any case where the person against whom the process issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who is required, upon the receipt thereof, to post the same in some public place in his office.[9] All persons may have access to the list of names so posted in the marshal's office, and may take copies without a fee.[10]

[5] Raynes v. Wyse, 2 Meriv. 472; Daniell's Ch. Pr. (2d Am. ed.) 1930, 1931.

[6] Const. art. I, § 6.

[7] U. S. R. S., § 4063. See Ex parte Cabrera, 1 Wash. C. C. 232; U. S. v. Benner, 1 Baldw. 234; U. S. v. Lafontaine, 4 Cranch, C. C. 173.

[8] U. S. R. S., § 4064.

[9] U. S. R. S., § 4065.

[10] U. S. R. S., § 4066.

§ 328. Practice in obtaining the writ of ne exeat. The application for a writ of *ne exeat republica* may be made *ex parte*, even after the defendant has appeared.[1] The reason for allowing this is, that notice might frustrate the object of the motion by giving the party an opportunity of removing himself out of the jurisdiction.[2] It has been held in England that the writ cannot be obtained until a bill has been filed.[3] It is the safer practice to ask for the writ in the bill, when it is needed "pending the suit."[4] But it has been held that the writ may be granted at or after the decree, although the bill contains no such prayer.[5] And by the English practice, no prayer in the bill was required.[6] The writ must be supported by an affidavit made by the complainant himself, or some person acquainted with the facts.[7] The affidavit must be positive as to the facts, not merely upon information and belief,[8] except in the case of an account, when the plaintiff may swear that, to the best of his belief, the sum named will be due to him on the balance of the account.[9] A writ was discharged when it appeared from the affidavit that the affiant could not have had personal knowledge of the transaction to which he swore positively.[10] The affidavit must be positive as to the intention of the defendant to go abroad, or to his threats or declarations, or those of members of his family or his agents, showing such an intention on his part.[11] An affidavit stating information from a stranger will ordinarily be insufficient.[12] It is prudent to state in the affidavit that the debt will be endangered by the defend-

§ 328. [1] Collinson v. ———, 18 Ves. 353; Elliot v. Sinclair, Jacob. 545.

[2] Elliot v. Sinclair, Jacob. 545.

[3] Ex parte Brunker, 3 P. Wms. 312; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75. But see Lloyd v. Cardy, Prec. in Ch. 171.

[4] See Eq. Rule 25. But see the language of Lord Eldon in Collinson v. ——, 18 Ves. 353.

[5] Lewis v. Shainwald, 7 Saw. 403, 417.

[6] Collinson v. ——, 18 Ves. 353; Lewis v. Shainwald, 7 Saw. 403, 416, 417.

[7] Collinson v. ——, 18 Ves. 353; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

[8] Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164; Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75.

[9] Rico v. Gualtier, 3 Atk. 501; Jackson v. Petrie, 10 Ves. 164.

[10] Roddam v. Hetherington, 5 Ves. 91.

[11] Oldham v. Oldham, 7 Ves. 410; Collinson v. ——, 18 Ves. 353; Knight v. Watts, 2 C. P. Cooper *temp.* Cottenham, 257.

[12] Oldham v. Oldham, 7 Ves. 410.

ant's quitting the country.[13] Deficiencies in the affidavit may be supplied by admissions in the answer.[14] The court may require as a condition for the issue of the writ that the complainant give an undertaking to respond in damages should the writ be afterwards discharged.[15] The writ is directed to the marshal, and is in substantially the following form:—

The President of the United States of America to the Marshal of the Southern District of New York:

Greeting,—whereas it is represented to us in our District Court of the United States for the Southern District of New York in equity, on the part of John Aber, complainant, against Charles Dutton, defendant (among other things), that he, the said defendant, is greatly indebted to the said complainant and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said Charles Dutton personally to appear before you, and give sufficient bail or security in the sum of $1,000 that the said Charles Dutton will not go, or attempt to go, into parts without the United States without leave of our said Court; and in case the said Charles Dutton shall refuse to give such Bail or Security, then you are to commit the said Charles Dutton to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and, when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said District Court of the United States for the Southern District of New York distinctly and plainly under your hand, together with this Writ.

Witness, the Honorable George C. Holt, United States District Judge, at the City of New York, in the County and

[13] Mattocks v. Tremain, 3 J. Ch. (N. Y.) 75, 76; Baker v. Haily, 2 Dick. 632; Daniell's Ch. Pr. (5th Am. ed.) 1708, and cases cited. But see McGehee v. Polk, 24 Ga. 406, 412.

[14] Roddam v. Hetherington, 5 Ves. 91, 95.

[15] Daniell's Ch. Pr. (5th Am. ed.) 1708.

State of New York, the thirteenth of November, one thousand nine hundred and twelve.[16]

The writ should be endorsed with the amount of the sum demanded written out in words at length.[17] When it is issued against a personal representative by a person claiming a share of the residuary estate, it should be endorsed with the whole amount due from the defendant, not only to the plaintiff, but to all persons interested in the estate.[18] When the writ is endorsed for a larger sum than is due, the court will ordinarily refuse to quash it, but will require the defendant to give security only for so much as is really due.[19] The writ, upon its issue, must be delivered to the marshal. It is his duty thereupon to execute it by arresting the defendant named in it, and bringing him before the court.[20] He has no power to break open doors under the writ.[21] The defendant may be released upon giving sufficient security to satisfy the marshal.[22] After executing the writ, the marshal should make a return of what he has done.[23] The defendant may move at any time to discharge the writ, either for irregularity or upon the merits, by disproving the charges in the complainant's affidavits.[24] But it has been said by Lord Eldon, that where the plaintiff has sworn positively to the debt and to the defendant's declarations of his intention to go abroad, the defendant's unsupported affidavit will be insufficient to contradict this.[25] If the writ is discharged another writ may issue upon a new affidavit.[26] Upon payment into court of enough to satisfy the plaintiff's claim, the writ will always be discharged.[27] The writ may be discharged if the defendant gives sufficient security to satisfy the court.[28] The security usually required is

16 Beames on Ne Exeat, 23, 24.

17 Beames on Ne Exeat, 93.

18 Pannell v. Tayler, T. & R. 96, 100.

19 Ibid.

20 Daniell's Ch. Pr. (2d Am. ed.) 1943.

21 Beames on Ne Exeat, 95.

22 Beames on Ne Exeat, 96, Boehm v. Wood, T. & R. 332, 340; Daniell's Ch. Pr. (2d Am. ed.) 1943.

23 Daniell's Ch. Pr. (2d Am. ed.) 1945; Impey on Sheriffs (2d ed.), 532.

24 Gernon v. Boecaline, 2 Wash. 130; Grant v. Grant, 3 Russ. 598, 602.

25 Amsinck v. Barklay, 8 Ves. 594, 597; Jones v. Alephsin, 16 Ves. 470, 471.

26 Gernon v. Boecaline, 2 Wash. 130.

27 Evans v. Evans, 1 Ves. Jr. 96.

28 Roddam v. Hetherington, 5 Ves. 91, 95; Boon v. Collingwood, 1 Dick. 115; Beames v. Ne Exeat, 98, 99.

conditioned that the defendant abide by the process and decree of the court;[29] but security that the defendant abide by and perform the process and decree of the court may be required.[30] The discharging order usually enjoins the defendant from bringing an action of false imprisonment;[31] and the prosecution of such an action may be restrained by a subsequent order.[32] If the court considers the writ improperly issued, it may direct a reference to a master to ascertain the damages sustained by the defendant, and direct the payment to him of the amount found due by the sureties upon the plaintiff's undertaking.[33] An amendment of the bill which does not materially alter the case does not discharge the writ.[34]

[29] Griswold v. Hazard, 141 U. S. 260, 281, 35 L. ed. 678, 687.

[30] For defenses to such a bond, see Ibid.

[31] Quoted with approval by Grosscup, J., in Gooding v. Reid, Murdock & Co., C. C. A., 177 Fed. 684, 688; Darley v. Nicholson, 2 Dr. & War. 86.

[32] Quoted with approval by Grosscup, J., in Gooding v. Reid, Murdock & Co., C. C. A., 177 Fed. 684, 688; Darley v. Nicholson, 2 Dr. & War. 86.

[33] Sichel v. Raphael, 4 L. T. (N. S.) 114.

[34] Grant v. Grant, 5 Russ. 189.

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